

# MICHIGAN LAWYERS WEEKLY

## **Be sure a prenup can withstand a challenge in court**

*Popularity for option grows among baby boomers, young adults*

By: Lee Dryden in News Stories May 17, 2016



As prenuptial agreements grow in popularity among cautious couples of all ages, attorneys advise that proceeding cautiously will help ensure the documents can withstand challenges.

Stewart C.W. Weiner, a shareholder at Maddin Hauser Roth & Heller PC, represented a husband in a Wayne County case where the wife considered challenging the prenuptial agreement. He was curious to see how the judge would rule, but the wife ultimately dropped the challenge.

"I thought it was very interesting," he said. "Because I had not had my (clients') prenuptial agreements challenged, I wanted to see how

the judge looked at things.”

Some family law practitioners are busy drawing up such agreements as baby boomers are protecting their assets when entering second — or third — marriages. Young couples are getting them as well, often at the insistence of older relatives passing on an inheritance or business interests.

Lawyers say challenges to prenuptial agreements aren’t rare, but they typically pass muster in court if clearly drafted with fairness to both sides in mind.

### **Withstanding a challenge**

In Weiner’s case, he said he successfully conveyed to opposing counsel that the agreement was solid.

“The wife really didn’t understand the prenuptial agreement,” he said. “Eventually, he was able to convince her that what I told him was accurate.”

The decision saved thousands in legal fees and expedited the process, Weiner wrote in an article about the issue on his firm’s website.

“One of the major obstacles that the wife had was that she needed time, and the assistance of counsel, to truly process and understand that the prenuptial agreement that she had signed 10 years ago, was in fact fair and reasonable and that she was going to receive a reasonable settlement,” he wrote. “The initial emotions of the circumstances leading to the decision to divorce initially controlled the situation. Instead of five years, the divorce took four months to complete. The parties were able to cooperate during the divorce process and the acrimony dissipated.”

Weiner highlighted elements of a prenuptial agreement that is likely to be enforced: each side was represented by independent counsel or had the opportunity for representation, the agreement was fair and equitable when executed, the facts and circumstances have not

changed enough to make enforcement unfair, there was no duress or pressure suggesting the agreement was not voluntary, and there was a fair and reasonable disclosure of the assets and liabilities of each party.

"If you do it right, it's less likely to be challenged and you're less likely to be disappointed," he said.

Weiner also called for allowing sufficient time between the prenuptial agreement drafting and the wedding itself. He said a month is optimal, adding that he won't accept a client he's never met who comes in two weeks before the wedding wanting an agreement.

"I think it's a very serious agreement and it requires time and care," he said, adding that the agreements are a form of estate planning as they include plans for divorce and death.

Prenuptial agreements could be challenged based on unforeseeable factors such as abuse or the wife being told to stop working, said Carol F. Breitmeyer of Breitmeyer Cushman PLLC and chair of the State Bar of Michigan's Family Law Section.

"The challenges occur regularly. Usually they come in the form of summary disposition," she said. "It's not rare. Frequently there are challenges and people go about the business of settling the case." Prenuptial agreements can't be an "I get everything" scenario, said Andrea Kahn of DAWN (Divorce Attorneys for Women) in Grand Rapids.

"Most challenges come when there is an inequitable property distribution plan," she said. "But I have also seen prenups that talk about not gaining weight, amounts of acceptable (and expected) plastic surgery, who leaves the house when there is an argument, etc. We generally figure those out before it gets to an actual in-court challenge."

Some prenuptial agreements include a provision that a party who challenges and loses has to pay attorney fees, Weiner said.

Practitioners should help their clients weigh whether a challenge is feasible, Weiner said.

“They owe their client the duty to review the prenuptial agreement and review the elements of prenuptial agreements,” he said.

### **Prenups are popular, tricky**

Prenuptial agreements are more common now than 25 years ago, Weiner said.

He is seeing clients with a significant net worth getting married for the second or third time with a desire to ensure assets are protected for their children.

Also, people in their 30s are seeking to protect ownership of a business interest given by parents or grandparents, Weiner said. Other young adults without assets simply want peace of mind.

“In the event of the divorce, they want to know what they will be entitled to,” he said. “They want to know if the relationship doesn’t work out, it won’t be acrimonious.”

Breitmeyer said remarriages among those in their 50s and 60s and more women in the workplace are among the reasons for a rise in prenuptial agreements.

“The interest in prenuptial agreements reflects a whole bunch of changes in our society,” she said. “The whole point of a prenuptial agreement is to prevent the other person from getting your stuff.” Breitmeyer cited an example of a couple that would benefit from a prenuptial agreement — a second marriage, both in their late 50s with two adult children, relatively equal marital estates yet unequal income, and a desire to look after their spouse and their own children.

“That’s a beautiful use of an effective tool,” she said, adding a full estate plan is still needed.

She added that those providing an inheritance often insist upon the recipient having an agreement for protection.

Reasons to get a prenuptial agreement include "large estates, high asset value, large disparity in income, separate property issues and/or property that has been in the family for generations," Kahn said.

Baby boomers on their second or third marriage "can change the dynamic between the parties, particularly if both bring some money to the table," Kahn said.

Lawyers agree drafting a prenuptial agreement isn't a simple process with so many factors involved.

"These prenuptial agreements get fairly complicated — it depends on the people and the anger and the reason why they are getting divorced," Weiner said.

Breitmeyer added, "It's probably one of the most complex things a family lawyer can do. This is not for the faint of heart and the inexperienced person."