

UPDATE

Family Wealth Conversations: The Role of Prenuptials

The beautiful baby you once bounced on your knee is preparing to marry. You're happy and excited – and worried. The bleak statistics gnaw at you: 1/3 to 1/2 of all marriages end in divorce. You want to protect your hard-earned family wealth from the fallout of any future divorce. There's no question that a prenuptial agreement is called for, but few financial negotiations are as fraught with emotion. How do you talk to your child about this sensitive topic without causing friction in your relationship? And, how does your child raise the issue with his or her spouse-to-be without killing the romance?

There are no easy answers, but understanding the fundamentals of prenuptial agreements will help ensure that the agreement is ultimately fair to all parties, achieves the family's objectives, and will withstand any future challenge.

Let Children Know the Family's Expectations

As a parent, your responsibility is to make your children aware of the family's expectations regarding prenuptial agreements and then help them communicate those expectations to prospective spouses. If your children understand even before they begin dating that you expect them to sign prenuptial agreements before marrying – no matter whom they marry or what the financial circumstances – your insistence on a prenup won't be perceived as a personal

affront to their intended. On the other hand, if you raise the issue when your child is already in a serious relationship or even engaged, you risk an emotional reaction and potential resentment from both your child and future son or daughter-in-law.



"You should explain that this is an important aspect of your family's overall legacy and financial planning, a precaution that protects your family's hard-earned wealth," recommends Pitcairn's Director of Fiduciary Services & Estate Planning Lindsay C.F. Johnson. "You may even want to encourage a pact among your children that all siblings will enter into prenups to protect the family wealth for the benefit of all."

If expectations are established early, your child's conversation with a spouse-to-be

becomes a much more natural one, which can (and should) be initiated long before wedding plans get underway. The topic can even be raised before an engagement as the relationship becomes more serious and the couple discusses other financial matters. After all, it's important for any couple to discuss what is "his," "hers," and "theirs."

Allowing Time to Create & Finalize the Agreement

The timing of a prenuptial agreement – when it is signed and when the topic was first brought up for discussion – is important not only for the comfort of all parties, but for the agreement's validity. You certainly don't want to present a fully drafted prenuptial agreement to your child's future spouse on the eve of the wedding. This is a recipe for family conflict and could be grounds to nullify the agreement at a later date. The choice of signing the agreement or facing the public embarrassment of a cancelled wedding could surely constitute undue pressure.

"Ideally, a prenup agreement should be signed well before the wedding invitations are mailed," advises Susan R. Schoenfeld, CEO and founder of Wealth Legacy Advisors LLC. "The closer to the wedding date, the more likely that a matrimonial lawyer could successfully later argue that the agreement was signed under duress."

Crafting a proper prenup takes time. It involves two sets of lawyers negotiating, two sets of accountants analyzing the numbers, and two parties (and possibly more if parents are included) who must come to an agreement. Complicating things further, your CPA may have to establish the worth of hard-to-value assets like a closely-held business. Valuations may be subject to challenge if they're not reasonable, so it's important to follow a careful, and likely time-consuming process. Be sure to initiate prenup discussions as soon as possible or risk postponing the wedding over unresolved issues.

Prenup conversations between parent and child and between the engaged couple should not be "one and done." Open and ongoing dialogue will help flesh out concerns, issues, and objections. It's important to acknowledge the emotional components of the discussions without succumbing to anger or resentment. But even more important is to provide multiple opportunities for calm and reasoned discussions.

Tips

- Maintain an open and ongoing dialogue to address all issues
- Make expectations clear to children before they're ready to commit
- Be sure the prenup is fair to all
- Remind your children that a prenuptial agreement does not prevent them from making lifetime gifts to spouses, creating joint tenancies, or providing more liberally for spouses through an estate plan

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Meeting the Basic Legal Requirements for Prenuptial Agreements

An attorney will prepare the actual prenup document, but it may be helpful to understand the basic legal requirements before embarking on the process. The prenuptial agreement:

- Must be voluntary
- Must not be unconscionable
- Must be made in writing and signed before a notary, and
- Must reflect full disclosure of all important matters

Though there is no absolute legal requirement that both parties be represented by independent counsel for the prenuptial agreement to be valid and enforceable, it is highly recommended in all cases. Every state does require that both parties sign the agreement knowingly, voluntarily, and not under duress. Separate representation by independent attorneys is evidence that both parties knew what they were signing and did so voluntarily.

Of course, lawyers don't earn their fees by encouraging clients to sign away rights without receiving sufficient compensation, so be prepared for some difficult conversations. "No one wants an adversarial situation in the midst of wedding plans, so it may help to hammer out a basic outline first, even before bringing attorneys into the discussion, and then tackle the details," counsels Johnson.

Even though the parties in a prenup seldom have equal bargaining power, the agreement must be fair and cannot be unconscionable. Fairness is evaluated when the agreement is signed and again when it is enforced, so the wealthier party should consider providing more generously for his or her spouse the longer the marriage lasts. Use of separate counsels can also mitigate the fairness concern, especially if there's a record of some negotiation between parties.

Tips

- Make sure both parties are represented by counsel of their own choosing
- Don't recommend a particular lawyer to the intended spouse to avoid even the

Using a Trust Instead of a Prenup

After considering the pros and cons of a prenup, particularly the potential emotional pitfalls, some families elect to protect their assets by creating trusts for their children as an alternative to prenuptial agreements. There are pros and cons to trusts as well. Any assets a child receives from the trust and co-mingles in a joint account with a spouse become marital property and subject to division in a divorce. However, an independent trustee can make distributions to a child for health, education, maintenance, and support, leaving undistributed assets in the trust. This may be effective in some states, but in others, even

beneficial interests in trust may be treated as marital property in divorce proceedings.

Families of wealth may also use other available planning tools. For example, you can protect your family's interests by creating trusts, exercising powers of appointment, and establishing business agreements that limit the ability to transfer closely-held business assets. Whether you are considering a prenup, a trust, or another financial structure, seek legal advice to be sure your family's interests are protected.

appearance of undue influence or other impropriety

- Have both attorneys sign a statement affirming that they have reviewed each provision in the agreement with their clients

Full & Fair Financial Disclosure

For a prenuptial agreement to be enforceable, both parties must make full and fair disclosure of their financial situations at the time the agreement is signed. This often causes discomfort for families not accustomed to sharing personal financial details. Depending on the nature and extent of your engaged child's beneficial share of the family's business interests, your family's balance sheet might be exposed to the fiancé(e), attorneys, accountants, and possibly the future in-laws. For many, that is a sobering thought, but also an unavoidable obligation.

Remember that a prenup could be set aside later if a court finds that adequate and reasonable disclosure was not made, potentially risking your family's wealth or business. Full disclosure of the nature and extent of family holdings is essential. Enlist your family's CPA to prepare an accurate financial statement and to carefully review the financial disclosure provided by the other side.

Some states do allow parties to waive full disclosure, and this is a tempting option, but carefully balance this temptation against the possibility of defending against a subsequent claim of intentional concealment. The safer route is full disclosure of all assets, including bank accounts, securities, collectibles, real estate, business interests, and trust interests. Both parties should also disclose liabilities, including mortgages, credit card debt, and student loans, because either party could have significant undisclosed debt. Also consider sharing recent tax returns and credit reports.



Tips

- Both parties should have their CPAs sign a statement confirming that they have reviewed the financial disclosures with their respective clients

Family Wealth Conversations

In November 2014, at the *Pitcairn Family Wealth & Investment Forum*, Pitcairn had the pleasure of hosting several generations of our client families who participated in a valuable exchange of knowledge and experiences.

One highly successful session focused on Family Wealth Conversations. During the session, speakers and family members talked about how trust and communication are always vital to healthy family relationships, but even more so in times of transition. Whether it be succession planning, marriage, or selling a business, transitions typically involve heightened emotions and may challenge a family's ability to make thoughtful financial decisions.

"When transitions falter," explained Managing Director Rebecca Meyer, "it's often not due to investment performance or poor technical planning. The culprit is more likely unprepared heirs, a breakdown in personal trust, or lack of family communication."

To help families successfully navigate both everyday life and pivotal transitions, Pitcairn has made Family Wealth Conversations a priority and has developed a recipe for successful generational relationships:

- One part planning
- One part education and mentoring
- One part family decision-making

Our Family Wealth Conversations series is designed to help families benefit from constructive communication in situations that nearly every family will someday face. As part of this series, "The Role of Prenuptials" explains the basics of this highly sensitive document and helps families think about pre-marital financial planning in an informed, straightforward, and respectful manner.

Your Pitcairn team is prepared to help you and your family engage in meaningful conversations so that your family can benefit from your wealth for generations to come.

- Parties may enter into confidentiality agreements regarding financial disclosures, particularly with respect to closely-held business interests
- In order to protect a family business, families may draft agreements that restrict the ability to transfer ownership of family held business assets

Ready to Tie the Knot

Prenuptial agreements are a critical component of wealth preservation planning and an important step in pre-marital preparations. Raising this potentially sensitive topic as soon as possible helps minimize resentment, prevent rushed and

incomplete negotiations, and avoid a future challenge to the agreement's enforceability. By helping your children understand up front why prenuptial agreements are a family expectation, you can be sure they are ready to discuss the topic with a spouse-to-be when the time comes. The prenup process may take some time, but as long as both sides are represented by independent counsel, provide full financial disclosure, agree to fair terms, and sign the agreement before a notary, the happy couple will be all set to tie the knot when the wedding day finally arrives. **P**

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About Pitcairn

Pitcairn is one of the world's leading family offices. We are dedicated to helping families sustain and grow their substantial, often complex financial assets and supporting the unique heritage of our clients across multiple generations. Pitcairn works with families and single family offices filling one need or providing comprehensive solutions. Since our founding as a family office in 1923, we have successfully transitioned wealth across generations of families through a combination of effective planning, strong investment results, thoughtful governance, and a commitment to education. Headquartered in Philadelphia, Pitcairn also has offices in New York and Washington, DC as well as a network of resources around the world. You can learn more about our family office services as well as find additional articles, news, and events on our website at www.pitcairn.com.

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