

# Marital agreements: awkward but essential

*Why do you need a contract just to get married? Here's why: The most dangerous creditor most doctors ever face is an ex-spouse.*

By David J. Schiller, J.D.

If you're a married doctor, you have roughly a 50 percent chance of getting divorced, and only about a 40 percent chance of being sued for malpractice. Yet, while most physicians have malpractice insurance, few have nuptial agreements—the only divorce “insurance” available. Clearly, doctors would be wise to consider that option more seriously. One who did, a client of mine, gave me a puzzling call one day:

“The wedding’s off,” he said, “but the reception’s going ahead.”

“What do you mean?” I asked.

“Janice refuses to sign—she won’t even talk about it—so I’ve broken our engagement,” he said. He was referring to the prenuptial agreement we’d worked on for months. “But I’ve already paid a fortune in deposits for the ballroom, the dinner, and the band. So I’m going ahead with that—at least for the guests on the groom’s side.”

I was surprised to hear about the party, but not about the canceled marriage. Dr. Jones (I’m not using real names) was a busy internist. His fiancée was divorced, with two high-school-age children; Jones had wanted to make sure he didn’t take on financial obligations relating to her family. And Janice was very con-

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Illustration by John Ceballos



cerned about her own rights. After what seemed like endless back-and-forth diplomacy, we'd arrived at an agreement that even Janice's lawyer agreed was fair.

But now she'd backed out of signing; and I had to agree that Jones was wise not to marry her in the face of that refusal. His lengthy negotiations had made clear to him something too few physicians stop to consider: A marriage is probably the biggest business deal most people ever make. It can involve major assets, earnings during the marriage, and income for years afterwards.

That makes a prenuptial agreement vital. In fact, if you married without one, you should consider working out a post-nuptial version; an adviser might help broach this sensitive subject.

Of course, some doctors do understand the issue's significance, yet put it off anyway, since a marital agreement can be an awkward matter to pursue. But not having one can be disastrous. To see why, let's consider some of the experiences I've had with clients—starting with the internist.

### **The doctor who waltzed out of marital danger**

"I do enough negotiating when I deal with HMOs. Why do I need a contract just to get married?"

That was what Jones had asked when he first consulted me about a prenuptial agreement. Like many clients, he was ambivalent about the concept at first. "I understand that if we divorce, we should each keep what we had before the wedding," he said. "So maybe we should list our assets. But why go beyond that? Once we've tied the knot, marriage ought to be a 50-50 proposition."

He was looking at the bright side; as a lawyer, I knew that was my cue. "That's fine, when a marriage lasts," I said. "But what if you get divorced after a couple of years? You're making \$200,000, and she's making \$60,000, so you'll have been paying most of the expenses. Should she

walk away with half of all you've accumulated during that time from practice earnings and investments—plus rights to your pension when you die? Without a prenuptial contract, that's what a court might award her. Alimony would just be the cherry on top."

Now Jones looked thoughtful; at 45, he was engaged for the first time, and, like many doctors, he knew little about the laws that govern marriage and divorce. You might think only the nine "community property" states (which generally put



**"At least she can't touch my pension in the divorce,"**

**the doctor said. But he was wrong.**

**His wife had waived her pension rights while still a fiancée—so the waiver didn't count.**

assets of husband and wife into one pot) would split assets evenly after a divorce. But many states' divorce laws mandate that assets accumulated during marriage be divided equally—sometimes without regard to who brought in the income or how long the marriage lasted. And federal law says a spouse becomes your retirement-plan beneficiary automatically, as I told Jones (though plans may require that a marriage last a year before that right takes effect.)

Jones asked a good question: "If my fiancée would automatically become a beneficiary when we marry, then wouldn't she automatically stop being one if we divorce?"

"Technically, Yes," I told him. "Still, even an ex-spouse may be able to claim plan assets as you withdraw them—or might be awarded that money by a judge's decision."

Children can complicate the picture. Jones had none—but did want to clarify



that he wouldn't be financially responsible for Janice's teenagers. Besides his income, he had a large house, a vacation ski lodge, and substantial investments outside his pension fund. "If you divorce," I pointed out, "a settlement and alimony might threaten all of those."

True, if you're young, entering a first marriage, and have few assets, maybe you don't need a prenuptial contract—especially if your spouse will have substantial earnings, too, which makes alimony less of a threat. But most doctors have more at stake. Jones did; I guess that's why he decided that, rather than walk to the altar with no prenuptial agreement, he'd head for the dance floor.

### **The doctor who wanted a shield around everything**

"You don't have to tell me about the financial risk of marriage," said pediatrician Pamela Roberts. "I've seen my brother's finances devastated by a divorce. As for myself, I earn a good living, I've saved a lot, and my fiancé is an investment banker who's also interested in protecting himself financially. So how broad can our agreement be?"

Very, I told her. The law provides many rights for a spouse when a marriage ends, but you can shield yourself by specifying that all such rights are waived. Of course, each side must waive them to make the contract enforceable.

"For completeness," I suggested, "you'd use a before, during, and after approach. First, you'd each waive rights to assets the other person brings to the marriage. Of course, the law may not give you rights to those anyway, if

they're kept separate.

"More crucially, you and your spouse can give up any claim to the other's financial gain *during* marriage. That would protect the money you earn and what you buy with it, your individual assets' income and capital appreciation—even inheritances and gifts you receive. You'd specify that none of these become marital property," I explained.

"That 'during' part is where my brother's agreement let him down," Roberts said. "He signed a prenuptial contract, but it protected only what he brought into the marriage. So his ex got half his earnings." I wasn't surprised. Too often, lawyers feel it's reasonable to provide a 50-50 split of what's acquired during a marriage. But I advise against that; in my view, marriage isn't supposed to be an investment opportunity for either side.

"Finally, comes the 'after,' " I

concluded. "You'd also give up rights to alimony. Moreover, state law often entitles spouses to one-third or even one-half of an estate, despite what a will says; so you could also give up such rights to 'take against a will.' "

Roberts seemed surprised. "That really is a clean sweep."

"Exactly. You're agreeing that the marriage doesn't become an economic advantage to either party." Of course, one person usually has more to protect—and when my client's on that side, it's my job to recommend as much protection as possible.

"We'd need his-and-hers accounts to keep things straight," Roberts said. She showed foresight; indeed, prenuptial contracts often specify that, to help the parties fulfill their intentions. "Of course, you can always put some money into joint accounts, if you choose to," I reminded her. In any case, Roberts and her fiancé even-



**"Now do you see why he's such an expensive guide?"**



tually agreed on a strong prenuptial agreement that included most of the points I'd mentioned.

### **The doctor who was eager to share more**

Not every physician wants such a tough arrangement; and a reasonable agreement can have some leeway. After I'd outlined how a middle-aged FP named Williams could keep his finances rigorously separate from those of his fiancée, he said, "It sounds as though I'm asking Barbara to give up a lot."

"That's what her lawyer might say," I answered. "What you're really doing is

costs, for instance," he said. "Still," I answered, "you shouldn't agree to pay for their expenses in general—or even to write checks for such specific costs. If you and Barbara divorce, she might argue that she wouldn't have sent the kids to private school if you hadn't taken on that expense, and that it would harm them to switch back to public school. Then a court could order you to keep paying tuition." To be safe, I recommended he simply give Barbara extra money, which she could use for the children as she wished.

Williams could also share ownership of specific assets, I added. Generally, it's wise to state that all separately-titled property stays separate; but you can also confirm that jointly-titled property will belong to both. "It doesn't have to be an even split, either. You might say that 40 percent of such assets will be yours."

"Why would I do that?" he asked.

"This kind of provision can help make a prenuptial contract acceptable to the other party. And though it favors Barbara, you're still protected. The section would apply only to assets you transfer to joint ownership or buy together." Finally, Williams could also clarify how he'd provide for Barbara if he were to die before her. "For example, you might agree to leave Barbara your house."

Williams decided on several such provisions; and he and his fiancée had no problem signing that agreement.

### **How agreements can avoid specific divorce troubles**

Dr. Schmidt was planning to end a three-year marriage when he asked me to review the marital agreement he'd signed before the wedding. Back then, he said, he'd been very concerned about protecting the \$1.5 million pension he'd built up



## **M**any states' divorce laws split things down the middle—

**without regard to who earned what, or how long a marriage lasted. But with an agreement, you can write your own rules.**

making sure she doesn't take a lot—so you don't come out of the marriage worse off." I knew his fiancée had few assets, and Williams was inclined to be generous; so I wanted to advise caution.

He looked hesitant. "Barbara might be happier with this arrangement if some of it were designed to make her feel comfortable. For example, I think I could clearly state which expenses I'll be responsible for." He had a good point. There's nothing wrong with making reasonable provisions concerning what you do intend to share.

But then Williams told me that he felt close to his fiancée's two children; in fact, he had every intention of supporting them. "That's different," I said. "I advise against taking on a spouse's obligations, especially open-ended ones like those involving children."

"But I *want* to pay their private-school



## Surprise: Estate planning might be the cheerful part

If a marriage doesn't end in divorce, then it ends with a death. When making toasts at weddings and anniversaries, you might ignore that point—but remember it when doing your planning.

Presumably, if you're still wed when you die, you'll have been at least reasonably content in the marriage. So a marital agreement could have a more benevolent estate-planning aspect: You'll want to protect your spouse-to-be, as well as your children. Yet here, too, you'd better be careful about what you promise.

Remember, state laws may allow a spouse one-third or one-half of your estate's worth, regardless of what your will says. If you want to provide less, you can—but only in a nuptial agreement.

My client, Gail Black, a high-earning OBG, pinpointed the key issue. "If I die first, I'd certainly want Bill to have some income from my assets," she explained, "but I also need to look out for the children from my previous marriage."

There were suitable options, I told her. "For example, you can put money into a trust whose income will go to Bill, and whose principal will eventually go to your children." That would prevent Bill from using up the principal, and would also postpone any death taxes on her assets until the end of his life. "But Bill is only 52,"

Black said. "So my children might have to wait 30 years before they see a dime of that trust." In that case, I explained, she might make separate bequests for them.

"Wait a minute," she said. "Isn't all this something my will can take care of?" Not necessarily, I answered. "If there's a conflict between the two documents, the prenuptial agreement governs, because it's a contract—and you can't disavow a contract in your will." So it's best to have the prenuptial document describe the arrangements you'll provide in your will.

Since a prenuptial agreement may govern finances for a lifetime, you should also consider how it might protect children who aren't here yet. Dr. Greene, for instance, lived in a big farmhouse that he anticipated sharing with Martha, his wife-to-be, and the children they planned to have. "If I die," he said, "I'd want Martha to stay in the house, if she wants to. But if we have kids, I'd want them to get the house eventually. Martha has children from her first marriage; I can't be sure how she'd divide her estate."

Again, a trust was the answer. And Greene's prenuptial agreement specified that his fiancée would inherit the house outright only if they didn't have kids. That made the agreement consistent with what he'd say in his will and trust document, to avoid future conflicts.

over 20 years." And at least," he said, handing me the papers, "my wife can't touch that. She waived all rights to it."

After scanning the waiver clause, I looked at the last page, where the signature read "Elaine Miller," not "Elaine Schmidt." "Doctor," I said, "your wife never signed this. Your fiancée did."

He looked puzzled. "Well, sure; it was a prenuptial agreement."

I had to explain that he'd fallen into a trap. A spouse's rights to a qualified retirement plan are strongly protected by the law—so strongly that only a spouse can waive them. That means the waiver must be executed *after* the wedding. In fact, you should use a waiver form provided by your plan, not just your prenuptial agreement or an addendum to it.

Schmidt was stunned. "You mean she's



still the beneficiary, despite that agreement?" "Yes," I said. So he had to negotiate his divorce settlement with that as a given. "I'd like to sue the attorney who prepared that contract," Schmidt told me. In fact, he could have, I replied. That attorney knew family law, not pension rules, so he was negligent in handling the agreement alone. When I prepare agreements, I include a promise that waivers will be executed properly after the wedding—and I warn clients to follow up.

A pension isn't the only asset requiring special treatment. Your share of a medical practice can be at stake, too. A client in the middle of a divorce fight called me late one night, sounding outraged. "She's wearing out calculators, figuring out every penny I'm worth," he said, "and that includes my practice share, too. Now she wants her accountants to come right into my office, to review the receivables. Can they do that? My partners will go berserk."

"Does the buy-sell require a valuation of your practice share if you're bought out?" I asked. It did. "Has she waived rights to the practice and its income in a

prenuptial agreement—or maybe in the buy-sell itself?" She hadn't. So I had to tell him, Yes, her accountants could come in. A judge likely would have said she was entitled to a valuation also, and probably would have issued a court order permitting the visits.

As for alimony, remember that your prenuptial agreement can pre-empt that by including provisions that would apply if you divorce. One doctor client did allow alimony, against my advice; his fiancée insisted. But at least we worked out a reasonable amount. She got about one-third of the difference between their earnings. And the amount was tied to the marriage's length, too.

Child-support obligations are a different story. In most states, you can't avoid those for your natural or adopted children. Prenuptial provisions that limited such obligations would be ignored.

#### **Wrapping things up: what makes an agreement valid**

"This time I'm counting my socks and underwear," Dr. Smith told me, as we planned his prenuptial agreement. He'd

### **What do you do if you're already married?**

"Dear, I've been wondering how we'd divide things up if we ever got divorced." That's not an easy sentence to say. So if it's a concern of yours, how can you raise the topic?

Maybe the best way is to pass the buck. Get an adviser to bring it up at an appropriate time. Suppose you're updating your estate plan—or looking for ways to protect family assets from outside creditors, like malpractice claimants. Then you'll be weighing related questions: Which spouse should own which assets?

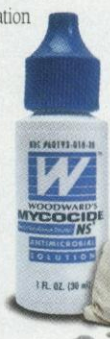
And you'll probably be considering transfers for strategic reasons. So it's reasonable that you might also be wondering about what would happen if the marriage were to end. Your adviser could easily use this occasion to address those potentially awkward questions.

Suppose your spouse won't cooperate? If you're in a second marriage and have kids to worry about, you might simply transfer assets to them (maybe through a trust). That way they'll be protected, at least, no matter what happens to your marriage.



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signed one before an earlier marriage—and to make sure his fiancée didn't ask for much, he hadn't disclosed all of his assets. His foxiness came back to bite him when the marriage ended. His wife's attorney had discovered all the facts, and a court tossed out his prenuptial contract. "The judge hit me with a settlement that took half of what I owned," he said. "Plus alimony that eats heavily into my income to this day."

The second time, he played by the rules. But disclosure is just one crucial factor. For your prenuptial to hold up, you and your intended should also have separate counsel. In fact, many states prohibit an attorney from representing both sides (in some jurisdictions, doing so constitutes legal malpractice). The agreements I write explicitly mention that each side had a different lawyer.

Don't be afraid that a prenuptial agreement won't be enforced simply because it's demanding and provides primarily for one party. True, the agreement can't be unconscionable. One doctor wanted the right to keep *all* the income earned during the marriage, no matter who brought it home—until I told him any judge would use that stick to beat him. Yet you can ask your spouse to waive all rights to your earnings, your pension, and a statutory inheritance share. That may not seem fair, but it's legal; however, you must make all those waivers reciprocal.

Timing is another key factor. Legal fights have erupted over agreements signed within hours of the wedding because they "had to be." Courts have generally honored such documents anyway; they haven't accepted fear of



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**Carcinogenesis, Mutagenesis, Impairment of Fertility:** In a 2-year oral carcinogenicity study in mice, a 4% incidence of splenic hemangiosarcomas and a 6% incidence of leiomyosarcoma-like tumors of the seminal vesicles were observed in males at the highest dose level, 156 mg/kg/day (equivalent to at least 390 times the maximum potential exposure at the recommended human topical dose\*). In a carcinogenicity study in rats at the highest dose level, 69 mg/kg/day (equivalent to at least 173 times the maximum potential exposure at the recommended human topical dose\*), a 6% incidence of both liver tumors and skin lipomas were observed in males. In rats, the formation of liver tumors was associated with peroxisomal proliferation.

A battery of *in vitro* and *in vivo* genotoxicity tests, including Ames assay, mutagenicity evaluation in Chinese hamster ovarian cells, chromosome aberration test, sister chromatid exchanges, and mouse micronucleus test revealed no evidence for a mutagenic or clastogenic potential for the drug. Reproductive studies in rats administered up to 300 mg/kg/day orally (equivalent to at least 750 times the maximum potential exposure at the recommended human topical dose\*) did not reveal any adverse effects on fertility or other reproductive parameters. Intravaginal mucosal application of terbinafine hydrochloride at 150 mg/day in pregnant rabbits did not increase the incidence of abortions or premature deliveries or affect fetal parameters.

**Pregnancy: Pregnancy Category B:** Oral doses of terbinafine hydrochloride, up to 300 mg/kg/day (equivalent to at least 750 times the maximum potential exposure at the recommended human topical dose\*), during organogenesis in rats and rabbits were not teratogenic. Similarly, a subcutaneous study in rats at doses up to 100 mg/kg/day (equivalent to at least 250 times the maximum potential exposure at the recommended human topical dose\*) and a percutaneous study in rabbits, including doses up to 150 mg/kg/day (equivalent to at least 350 times the maximum potential exposure at the recommended human topical dose\*) did not reveal any teratogenic potential.

There are, however, no adequate and well-controlled studies in pregnant women. Because animal reproduction studies are not always predictive of human response, this drug should be used only if clearly indicated during pregnancy.

\* The above comparisons between oral animal doses and maximum potential exposure at the recommended human topical doses are based upon the application to human skin of 0.1 mg of terbinafine/cm<sup>2</sup>, the assumption of average human cutaneous exposure of 100 cm<sup>2</sup> (assuming the use of 1 gram of Lamisil® Cream, 1% (terbinafine hydrochloride cream) per dose), and the theoretical worst case scenario of 100% human cutaneous absorption. At present, comparative animal and human systemic exposure pharmacokinetic data are not available.

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embarrassment as the kind of duress that would invalidate a contract.

But you'd better not count on that. It's much safer—not to mention saner—to get a prenuptial agreement settled well ahead of the wedding day. That will also forestall an argument that one spouse didn't have time to consult fully with a lawyer.

And don't ever let anyone tell you, "Just get it signed *after* the wedding." That's required for the waiver of pension rights, but disastrous for a prenuptial agreement. Once you're a legal couple, what reason does the other person have to sign? Moreover, a spouse who does that just because you ask would be giving up legal rights that have now "vested"—without getting anything in return. And that would make an agreement unenforceable.

Finally, once you've got your

prenuptial document signed and notarized, make sure you follow up where you need to. If the agreement describes trusts intended to ensure that your property eventually goes to your children, remember to prepare the will that actually sets up those trusts.

Be aware, too, that you could inadvertently destroy your agreement's protection by making other financial choices that negate its provisions. For example: Couples often own property together (as "joint tenants"), and, if so, the survivor inherits automatically. That doesn't depend on a will, and it also can't be defeated by your prenuptial agreement. So before you buy a home together or switch assets into a joint account, review your original contract. If what you're doing isn't in accord with what you planned before you married, you probably want to think twice about it. ■



"Well, it looks like progress has finally caught up with us!"