***Divorce and Prenuptial Agreements***

**25th November 2008**

**Conflict Negotiations**

**Professor Robert Yonker**

*Meagan Frances Ayers*

*Chandler Gabbey*

*Andrea Obregon*

*Kim Jesse*

*Divorce and Prenuptial Agreements*

**Introduction**

“Harris Interactive conducted an omnibus study on behalf of Lawyers.com,” and it was brought to our attention that:

* 41% of Americans in their first marriage will get a divorce, 60% of Americans in their second marriage will get a divorce and 73% of Americans will get a divorce in their third marriage.
* However, only 2% of divorced Americans had a prenuptial,
* 25% of divorced men regret not having a prenuptial,
* 9% of divorced women regret not having a prenuptial, and
* 15% of Americans regret not having a prenuptial because their spouses received too much of their assets that they themselves earned.”

Once this information was digested, we could not help but wonder why, when there are so many failed marriages, do people who are contemplating marriage not consider prenuptial agreements?! This essay will dive deep into the issues of what conflicts are brought about by divorce and how a Prenuptial Agreement may resolve these conflicts only to bring about issues itself.

**Divorce**

*Conflicts within a Divorce*

There are many issues/conflicts which may arise when a couple makes the decision to go through a divorce and has to divide their assets, belongings and finances; this becomes even more complicated when there are children of the marriage involved. Many things can go wrong and there, many times, can be hostility and anger towards the other party.

The first problem with negotiating during a divorce is that there is already much conflict; otherwise the two parties would not be getting a divorce in the first place. Many times, divorce is a result of “irreconcilable differences,” which means both parties of the marriage cannot resolve a conflict within their marriage. There are many things which may contribute to the already present conflict within a divorce negotiation, including that the “atmosphere is charged with anger, frustration and resentment, channels of communication are closed or constrained, or one party could see themselves favorably and sees the other party as the enemy” (Professor Yonker – Managing Negotiation Impasse).

Unfortunately, this may lead to impasse within the negotiation and there may be no “quick and easy solution”; this will probably only be amplified due to the fact that there is more than likely a current intensity of anger, resentment and a hunger for revenge. Fortunately, there are ways of trying to deal with these issues; it may not resolve the issue, but it could definitely drive the parties towards a solution.

Child Custody

One conflict involving prenuptial agreements is child custody, which is possibly the most important part of a divorce when children are present.  The most imperative thing for parents to remember is that you must maintain your relationship for the child. Even if the relationship is no longer important to the two parties, it is still important for the children’s sake. This does not mean that you have to remain friends with each other; while this would be an ideal situation, it just simply means that you must remain cordial for the child’s sake.

Child custody refers to determining the residence, protection, care and education of a child (or children) after a divorce. There are several different types of child custody, some of which include:

* Legal custody.  This gives the parents equal rights and responsibilities in making important decisions that affect the child.
* Joint physical custody. This is where the custody of the child or children is shared by both parents so the child is in frequent contact with both parents.
* The most controversial type of custody is alternating custody; also referred to as divided custody.  This type of custody involves the child, or children, spending either weekdays or alternate weekends with the parents.

There is much conflict when these issues arise because it not only disturbs the parents, but it causes disruption in the child’s life as well.  There is chaotic disorder because the child is often being expected to adjust to having two different social environments in their life and they often do not have the time and energy to develop either effectively (Atkinson 361).

One factor that causes much conflict is the Tender Years Doctorine which favors maternal preference; in other words, it favors the birth mother of the child.  “A blanket of judicial finding of fact, a statement by a court that, until proven otherwise by the weight of substantial evidence, mothers are always better suited to care for young children than fathers (Atkinson 221).”

This causes much conflict right away because even if the father feels he is the best suited guardian for the child, the courts tend to show a bias towards the mother since she has been the primary caretaker of the child.  (The primary caretaker of the child is defined as the person who meets the child’s physical and emotional needs on a day-to-day basis).  The mother is considered to be that person in most cases because she is the one who gave birth to the child and provided most of the care throughout the early stages of the child’s life. 

Statistics show that 80% of the time, the mother received custody of the child, or children, in a court hearing (Atkinson 241).  The reason for this is because the universal decision in determining who will receive custody, in most cases, is based on “the best interest of the child” and when determining the custody of the child, it takes a lot of proof and verification that the mother would not be the best choice to have sole custody.

For child custody to work, both parents must have the ability to implement a collaborative strategy while negotiating because they must be able to find commonalities between them. For this type of strategy to work, both parties must work together and there must be a great deal of trust and cooperation shown on both sides (Lewicki 117).   The courts search for flexibility and cooperation from both sides and if it is not demonstrated, then the real “loser” in the negotiation is the child. This is because the child is “tugged” and forced to live two separate lives.  As stated before, when going through a divorce, it is pertinent for the parents to put their interests and anger aside to unselfishly focus on the interests of the child rather than themselves. The objective is to find the best solution for both sides and develop a win-win outcome for the situation.

Personal Belongings

According to prenuptialagreements.org, some items which can be negotiated over in a prenuptial agreement are personal belongs; including property and premarital debts. It can be important for both sides to decide how they are going to divide up their joint property during a divorce. But in order to do this, each party must negotiate what is going to be considered community property and each person’s individual property; this is where it gets tricky.

Some items which might be considered community property are any residences or vehicles purchased while married. Since many times the reason for a divorce is attributed to an incapability to reconcile conflicts within a marriage, the two parties are unlikely to be able to negotiate effectively between themselves. Due to this dilemma, it may be quite difficult to get both parties to agree upon who owns, or receives, what belongings after a divorce is complete; resulting in either party becoming hostile, unmanageable or the possibility of one party attempting to use power over to get what they want out of the negotiation. Usually, the solution to this problem lies with an unbiased third party which is explained below.

*Ways of Resolving Conflict*

The most important part of a negotiation is to strategize and plan prior in order to effectively meet your goals. It is imperative to go into a negotiation knowing what it is that you want and having a plan of how to achieve these goals. One way of strategizing is to know the other party; if you have an idea of what they want, you can strategize what you will trade for what they desire (Professor Yonker – Strategy and Planning).

Once you have strategized and the negotiation is taking place, you may experience difficulties within the negotiation; this can be attributed to a variety of reasons (i.e. The other party has become greedy or they are out to seek revenge and negotiation is made very difficult because they do not care about the issues and needs of either party, but only revenge). The following are a few ways to handle conflict while negotiating during a divorce:

* First things first, tell the other party what you want; you can then offer them something in return for what they desire as a bribe (Professor Yonker – What is Negotiation?).
* If the other party wants something which you desire as well, you can attempt a hardball tactic and make it appear less attractive to the other party (Professor Yonker – Strategy and Tactics of Distributive Bargaining)
* Ensure that you stay calm while negotiating and attempt to befriend them; trust is the most important aspect of a negotiation (Professor Yonker – Strategy and Tactics of Distributive Bargaining), which brings us to the next tactic.
* Do not let the other party feel as if you are trying to “pull one over” on them, the negotiation will become extremely difficult (if not impossible) if the other party feels as if they are being treated unfairly (Professor Yonker – Strategy and Tactics of Integrative Negotiation).
* Attempt to understand the other party’s needs and interests rather than their position. Note: it is not necessary that you agree with the other party, just that you try to understand them (Professor Yonker – Strategy and Tactics of Integrative Negotiation & Communication).
* Emphasize commonalities rather than differences (Professor Yonker – Strategy and Tactics of Integrative Negotiation).
* If the other party is attempting to use coercive power (bullying) in order to get what they want, be sure to address the issue right away and let them know you will not be taken advantage of. Try to collaborate your power (“power with” rather than “power over”) in order to come up with a solution (Professor Yonker – Finding and Using Negotiation Power).
* Communication can be an enormous barrier to a successful and smooth negotiation. Therefore, it is essential to make sure you are truly listening to the other parties concerns; ensure that you are actively listening and giving acknowledgement rather than just passively listening. This may in turn motivate the other party to act in the same manner which will only make it less stressful for both parties involved (Professor Yonker – Communication).
* Once you have completed the negotiation, the key is to make the other party feel as if they have received a good settlement; otherwise, you may end right back up in a negotiation and starting all over again (Professor Yonker – Strategy and Tactics of Distributive Bargaining).
* Search for solutions that meet the goals and objectives of both sides and disregard the mythical idea of a fixed pie. During a negotiation, you must be creative with your solutions and use Integrative Bargaining which creates value and invent options; i.e. If there is a summer house, one may want to own the house but giving rights to use the house periodically may meet both parties needs. (Professor Yonker - Perception, Cognition and Emotion)

Another important thing to consider during this negotiation process is to have a neutral third party to facilitate the movement and tranquility of the negotiation.

**Prenuptial Agreements**

*Why Negotiate*

In order to try and avoid conflict after a marriage has dissolved, it may be highly beneficial to devise a contract prior to marriage which clarifies how assets will be divided in the event of a divorce. This will be helpful due to the fact that the anger, frustration and resentment will not be as prevalent prior to a marriage as it is once it has dissolved.

This will allow for a more amicable negotiation and more clear communication; not to mention that trust is probably higher prior to marriage than during a divorce. This could mean that both parties are more willing to negotiate and a superior outcome may result. The negotiation may also have a better outcome than that of a divorce due to the fact that both parties value the relationship; whereas during a divorce, the relationship has already failed.

*Why Is It a Good Idea*

According to prenuptialagreements.org there are eight reasons why people should get a prenuptial agreement, including:

1. “If one partner is much wealthier than the other,
2. If one partner earns more money than the other,
3. This is not the first marriage,
4. If you have children from a previous marriage, a prenuptial agreement can ensure that your assets are distributed according to you wishes in the event of your death; guaranteeing that your family is not cut off from inheritance,
5. If your partner has a heavy debt sum,
6. If you own a business,
7. To prevent your spouse from overturning your estate plan, and
8. If you plan to quit your job to raise children.

All these reasons to draft a prenuptial agreement can lead to heavy conflict and impasse down the road in the event of a divorce if not taken care of prior to the marriage. Therefore, it may be a good idea to come up with a prenuptial agreement just in case.

*Conflicts within a Prenuptial Agreement*

There are many conflicts which can arise from negotiating a prenuptial agreement. Some might say their spouse doesn’t love them enough, they feel they will not get a divorce (and therefore don’t need one) or it costs too much to negotiate a prenuptial agreement. Even though a prenuptial agreement isn’t wrong, some think it’s just not made for their marriage.

In a study of prenuptial agreements (prenuptialagreements.org), Americans are divided by the idea of negotiating a prenuptial agreement prior to marriage. Some reasons for not negotiating a prenuptial agreement include the fact that many men and women feel uncomfortable bringing up the discussion of a prenuptial agreement, people getting married who have children are less likely to get a prenuptial agreement than those who do not already have children and that people who have already been divorced before feel having a prenuptial is a great idea for them financially; on the other hand first time couples getting married feel that a prenuptial agreement is testing their love for one another.

According to prenuptialagreenments.org, in some cases people may not feel as if prenuptial agreements are law binding documents. Therefore, they don’t trust a prenuptial agreement nor do they want to put the time and effort into devising an agreement. The basis for why some people feel a prenuptial agreement is not law binding could be contributed to the reasons why a prenuptial agreement might be considered invalid. Some of the reasons are of the following: the agreement wasn’t in writing, it was never signed it, one party was pressured into signing it, there was false or incomplete information, or one party wasn’t counseled on the prenuptial agreement; if you want to be sure your agreement is a law binding document, make sure you have a mediator or a lawyer review the document prior to accepting it.

One very important downfall of a prenuptial agreement is that it neglects the biggest concern regarding divorce (as stated previously); the children involved. According to Lawyers.com, you are not able to include who receives custody of the future children, what school the children will go to, what religion they will observe child support or visitation for the children within a prenuptial agreement.

*Resolving Conflict*

There are many legal aspects one should go over while negotiating a prenuptial agreement. The first thing you should think about prior to negotiating is an outline/strategy. This way, you can prepare yourself for what you will negotiate within the prenuptial agreement so you can effectively meet all your goals.

following are a couple of things to think about while preparing for your prenuptial agreement which may help to resolve your conflict in a constructive manner: decide how all of your debts will be handled, make sure you disclose all of your assets, liabilities, sources of income, and any other potential future assets, clearly state what will happen to each specific type of property (either community property or separate property), discuss any type of alimony necessary in the event of a divorce, and determine the status of any gifts given before or after marriage (prenuptialagreements.org).

These are just a handful of items that should be strategized and planned out prior to going into a negotiation for a prenuptial agreement. If you notice, this covers many of the conflicts of interest which may arise when negotiating during a divorce. This type of document, if drafted properly and fairly, may lead to peace of mind when entering a marriage. It would also provide security for a couple should they ever require a divorce; the conflict will already be resolved prior to the divorce when tension is high.

*Why Negotiation Is Important*

Although many people might not believe that negotiation is taking place within a prenuptial agreement, this is far from the truth; there are at least two or more people who have common, or conflicting, interests about what they want to put in a prenuptial agreement.

In order to devise a fair prenuptial agreement, it is imperative to use distributive bargaining. In the event of a divorce, a couple might be in direct conflict of certain items they feel they are entitled to. Without a prenuptial agreement, this can get very complicated; couples may attempt to negotiate who receives what items and who deserves items more than the other.

.

Integrative negotiating can be highly useful when used in the process of creating a prenuptial agreement as well because you can be creative with what each person will receive in the event of a divorce in order to effectively satisfy each parties needs; both husband and wife need to find common ground on what the other party wants included within the prenuptial agreement. The key to this is having good communication between both parties to help achieve the goals and concentrate on the issues and concerns of each party as well as trying to define the problem as a common goal and seeing what both sides want out of the situation. Both parties must also try to get behind the issues and understand the needs, interests, fears and concerns because they will be able to discover multiple ways of resolving the dispute (Lewicki 120).

**Conclusion**

A divorce would not be as prolonged and tedious if you took the time prior to marriage to draft a prenuptial agreement. Whether you have a prenuptial agreement or not, you will still have to take the time to figure out child custody in the event of a divorce. However, when it comes to finances, personal belongings and assets, these can all be predetermined prior to a heated conflict when there is less likelihood of anger, resentment and a need for revenge.

While this seems to be a better alternative, prenuptial agreements can also bring about conflicts within themselves. The important thing to remember is to strategize your goals prior to negotiation (either within a prenuptial agreement or a divorce) and to then use the strategies above to get what you want. Remember, having a prenuptial agreement does not mean that you will get a divorce in the future, it is just there in case; after all, no one can tell what the future holds.

*Sources*

**Books**

Atkinson, Jeff. (1986). *Modern Child Custody Practice Volume 1*. New York, New York: Kluwer Law Book Publisher

Lewicki, Barry, Saunders. (2007). *Negotiation Readings, Exercises and Cases.* New York, New York: McGraw-Hill/Irwin

**Internet**

eHow Legal Editor. (2008). *How to Negotiate a Prenuptial Agreement*. Retrieved October 31, 2008. From Web site: http://www.ehow.com/how\_2063971\_negotiate-prenuptial-agreement.html?ref=fuel&utm\_source=yahoo&utm\_medium=ssp&utm\_campaign=yssp\_art

Dictionary.com. (2008). *Custody.* Retrieved October 30, 2008, from Web site: http://dictionray.reference.com

Lalloway, Jefferey. (2008). *California Divorce and Family Law.* Retrieved October 20, 2008, from Web site: http://oc-divorce.typepad.com/california\_divorce\_and\_fa/2006/02/what\_to\_cover\_i.html

LexisNexis. (2008). *Lawyer.com*. Retrieved November 4,2008, Web Site: http://www.lawyers.com/

Prenuptial Agreements. (2008). *Prenuptial Agreements*. Retrieved November 20, 2008, Website: http://www.prenuptialagreements.org/

**Notes**

Yonker, Robert. Class Notes. *Conflict Management: Mediation and Negotiations: Communication.* The University of Toledo, Toledo, OH. 30 November 2008.

Yonker, Robert. Class Notes. *Conflict Management: Mediation and Negotiations: Finding and Using Negotiation Power.* The University of Toledo, Toledo, OH. 18 November 2008.

Yonker, Robert. Class Notes. *Conflict Management: Mediation and Negotiations: Managing Negotiation Impasse.* The University of Toledo, Toledo, OH. 14 October 2008.

Yonker, Robert. Class Notes. *Conflict Management: Mediation and Negotiations: Perception, Cognition and Emotion.* The University of Toledo, Toledo, OH. 20 November 2008.

Yonker, Robert. Class Notes. *Conflict Management: Mediation and Negotiations: Strategy and Planning.* The University of Toledo, Toledo, OH. 9 September 2008.

Yonker, Robert. Class Notes. *Conflict Management: Mediation and Negotiations: Strategy and Tactics of Distributive Bargaining.* The University of Toledo, Toledo, OH. 18 September 2008.

Yonker, Robert. Class Notes. *Conflict Management: Mediation and Negotiations: Strategy and Tactics of Integrative Negotiation.* The University of Toledo, Toledo, OH. 30 September 2008.

Yonker, Robert. Class Notes. *Conflict Management: Mediation and Negotiations: What is Negotiation.* The University of Toledo, Toledo, OH. 2 September 2008.