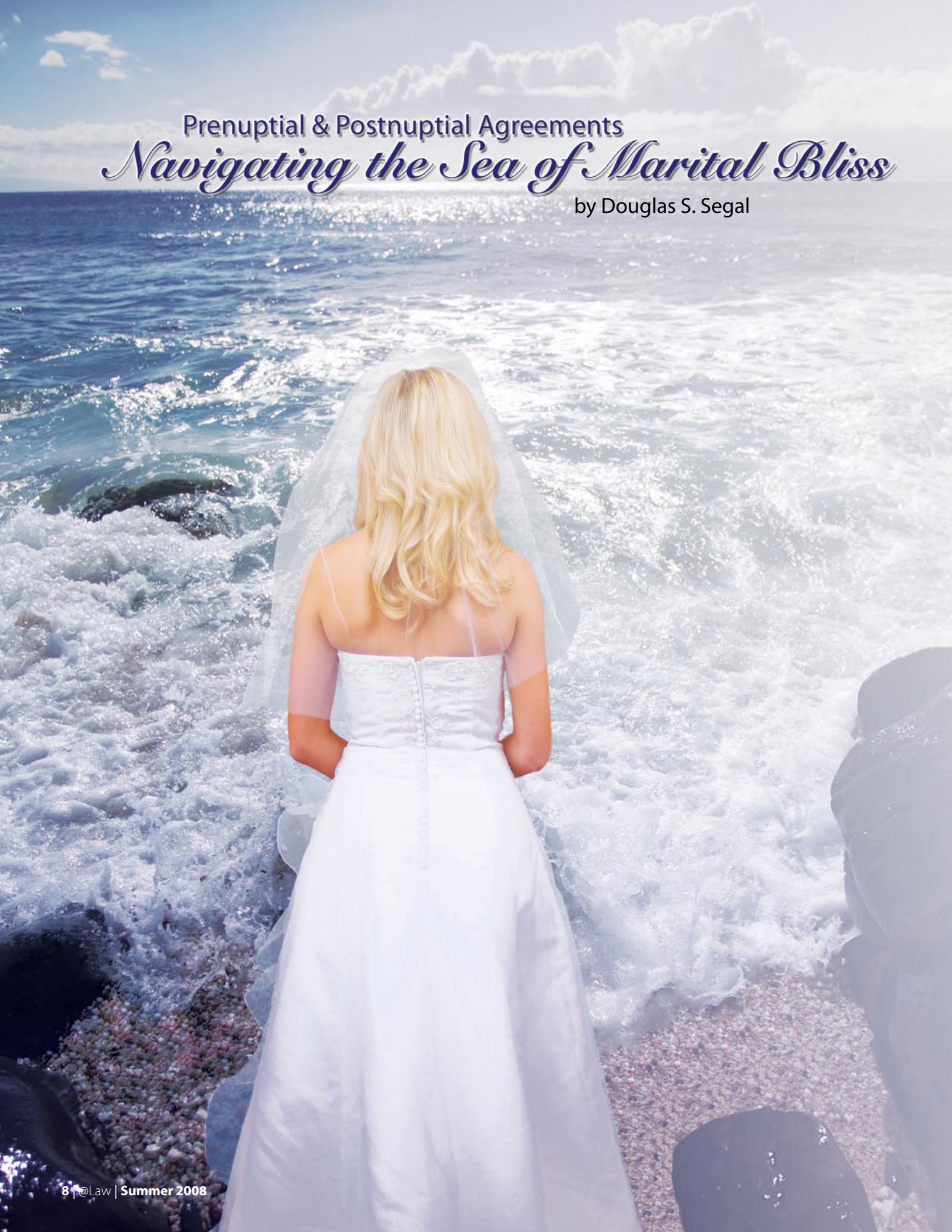

Prenuptial & Postnuptial Agreements

Navigating the Sea of Marital Bliss

by Douglas S. Segal

It is often reported that about 50% of all marriages in the United States end in divorce. Whatever the exact percentage may be, we all know that divorce has become an all-too-common event. Nevertheless, few, if any, couples set sail on the Sea of Marital Bliss (the "Sea") with the expectation that their ship of love will founder. All but the hopelessly naïve, however, begin that voyage knowing full well that the waters of the Sea can be cold and stormy, rife with perilous shoals, riven by treacherous tides, and teeming with divorce lawyers.

Given these realities, it is not surprising that more and more prospective sailors are asking their mates-to-be to enter into prenuptial agreements ("prenups") to minimize the financial and emotional trauma of a possible divorce. And more and more couples who have already set sail on the Sea are entering into postnuptial agreements ("postnups") for that same reason. Married couples, particularly those who have already weathered or are currently weathering marital storms, are increasingly realizing that a postnup can be an effective tool in their efforts to preserve their marriage. Indeed, in a number of states, postnups are referred to as "reconciliation agreements."[1] By resolving the financial aspects of a potential divorce in advance, the couple is able to focus all their energies on the emotional problems affecting their relationship, thereby maximizing the chances of saving their marriage. And should those efforts ultimately prove unsuccessful, the parties are at least spared the emotional and financial toll of divorce litigation.

Prenups and postnups, in essence, are marital settlement agreements drafted in advance of marriage or divorce, rather than in the context of actual divorce proceedings. Divorce insurance is not a product currently offered by the insurance industry, and prenups and postnups are the closest thing available. People insure their homes against theft, fire and floods, even though for most people those events are far less likely than divorce. So while hammering out a prenup or a postnup is far from a romantic endeavor, from a financial perspective it makes a lot of sense.

Every state in the United States permits parties to enter into a prenup that makes provisions for divorce, but postnups are not yet as widely accepted. While California often leads the way in family law matters, Arizona was the first state to recognize the validity of postnups.[2] Of the remaining 48 states and the District of Columbia, 23 states have approved postnups by statute and/or caselaw; 23 states and the District of Columbia either have not determined whether postnups should be approved, or have not addressed the requirements for their enforceability; and 2 states (Ohio and Oklahoma) bar postnups altogether.[3] In *Fogg v. Fogg*, 409 Mass. 531 (1991), the Massachusetts Supreme Judicial Court struck down a postnup on the grounds of fraud, but declined to make a definitive ruling on the validity of postnups in general. The Court stated that if prenups were valid, "they would at least have to meet the same threshold requirements of antenuptial and separation agreements." Thus, under *Fogg*, the issue of the validity of postnups in Massachusetts is still clouded.

In the eleven "community property" states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Oregon, Texas, Utah, Washington and Wisconsin), all premarital property is "separate property" as a matter of law, and the courts have no jurisdiction to divide separate property in the event of divorce; all earnings received after marriage, and all property acquired therewith, are community property as a matter of law and are divided 50-50 upon divorce. Of the non-community property states (known as "equitable division" states[4]), some (*e.g.*, New York[5]) designate pre-marital property as separate property; some (*e.g.* New York[5] and Iowa[6]) designate inherited property as separate property; some (*e.g.*, New Hampshire[7]) give the courts discretion to consider the value of premarital and gifted property in effecting a division; and some (*e.g.*, Massachusetts[8], Connecticut[9] and Kansas[10]) do not recognize the concept of "separate property" at all, and all property, regardless of when or how acquired or how title is held, is deemed "marital property" subject to division upon divorce.[11]

The law of the state in which the parties will reside after marriage, or where they are then living as spouses, will usually be designated in the agreement as the law that governs the issues of the validity and enforceability of the agreement in the event of divorce. Parties can select the law of another state as being controlling only if they then have, or after marriage will have, significant connections with such state. The choice-of-law provision in the prenup or postnup will obviously affect the terminology used in the document (e.g., "community property" vs. "marital property"), and, to some extent, its content as well. Because laws can change, however, it is wise to make sure that the document is drafted in such a way as to insulate its provisions from possible future changes in the law that could undercut or negate the parties' intent.

Once a couple has agreed that a prenup or postnup is a good idea, the next step is to decide what provisions it should contain. Provisions commonly found in such agreements include those that:

- designate all or a portion of all property[12] brought into the marriage by each party ("premarital property"), all property acquired after marriage with premarital property, and all appreciation in value of such property as the "separate property" of its owner, *i.e.*, property which he or she will keep in the event of death or divorce, and which he or she can bequeath to anyone he or she chooses, to the exclusion of his or her spouse;
- designate all property received by inheritance or gift during marriage, all property acquired therewith, and all appreciation in value of such property as the separate property of the recipient;
- designate all post-marital earnings of each party, all property acquired therewith, and all appreciation in value of such property as the separate property of the earning party;
- designate procedures for creating community or marital property (*e.g.*, taking or holding property in joint names), with all other property being the separate property of the owner/acquirer, and specifying how community/marital property is to be divided upon divorce (*e.g.*, 50-50) or death (*e.g.*, survivor takes all);

- designate just one or a few items of premarital and/or community/marital property as separate property (*e.g.*, family heirlooms, artwork or antiques, or one party's interest in a family business, or in his or her own business), with all other property being community/marital property, to be divided 50-50 (or otherwise) upon divorce;
- provide for mutual waivers of alimony, both temporary and permanent; tie the amount and duration of alimony to the length of the marriage; or leave the issue to be determined by agreement of the parties or by the court;
- require one party to provide health insurance coverage for the other during the marriage and/or in the event of divorce; require one or both parties to provide life insurance coverage for the other during the marriage and/or in the event of death or divorce;
- establish procedures for paying expenses during marriage, such as the establishment of a joint checking account for the payment of household expenses, into which each party will deposit an amount (either fixed, or a percentage of earnings/income) each month; or, where there is a great discrepancy in income, a clause specifying that the wealthier party will pay all such expenses. Such provisions can be helpful in clarifying each party's expectations and in establishing "ground rules" for the marriage, but they are not enforceable during marriage. As a noted authority states, "actions under agreements between spouses are generally frowned on as disruptive of marital harmony."[13]
- determine how the equity in any community/marital property and/or marital residence(s), and any secondary residence(s), will be divided in the event of the death of either party or divorce;
- provide for a "sunset" clause that terminates the agreement after a specified number of years (usually between 5 and 10). Such a clause may be used when the wealthier party is only concerned about protecting his/her assets and/or income in the event of a divorce in a shorter-term marriage. Virtually all prenups/postnups, however, contain a provision permitting the parties to modify or terminate the agreement at any time in a writing signed by both parties and notarized, and most parties prefer to take a "wait and see" attitude toward the termination issue, rather than binding themselves to a fixed "sunset" date years in advance;
- require the parties to submit disputes over all, or specified, issues arising under the agreement to either mediation or arbitration, including the method for selection of the mediator/arbitrator, payment of his/her fees, and whether the results will be binding or non-binding; and/or
- determine the future care and custody of any children born of or adopted during the marriage. Child-related provisions in a prenup, however, are not binding on the courts and are unlikely to be enforced absent agreement between the parties at the time of divorce. If at the time of enforcement of a postnup there is a dispute between the parties regarding any of its child-related provisions, the shorter the time period between its execution and its enforcement, the more likely that such provisions, while not binding on the court, will be given weight and taken into consideration. Conversely, if the parties executed a postnup when their children were very young, and at the time of enforcement those children are much older, it is unlikely the court will give much weigh to the agreement's child-related provisions.

The above list is meant to be illustrative rather than exhaustive. Variations in the terms of a prenup/postnup can be endless, and each agreement must be individually tailored to the parties' intentions and goals. Some provisions are more common than others (*e.g.*, "all pre-marital property remains separate property"), but there are no "right" or "wrong" provisions (other than those that violate public policy). The provisions that go into an agreement will be those the parties, aided by their respective attorneys[14], agree are necessary and fair. The greater the extent to which the parties are able to work out the terms between themselves and the less they have to rely on their lawyers in the negotiation process (as opposed to the drafting process), the better are the parties' prospects for creating an agreement that promotes marital harmony. The author would only urge that in negotiating those terms, both parties try to err on the side of generosity and fairness, so that the waters of the Sea of Marital Bliss will be calm when their ship of love sets sail, or is repaired and relaunched, and so that ship will be better able to weather the inevitable storms that lie ahead for every couple navigating those challenging waters.

Bon Voyage!

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Endnotes

1 *See, e.g., Curry v. Curry*, 260 Ga. App. 302 (1990); *Yeich v. Yeich*, 11 Va. App. 509 (1990); *Flansburg v. Flansburg*, 581 N.E. 2d 430 (Ind. App. 1991); and *Gilley v. Gilley*, 778 S.W. 2d 862 (Tenn. App. 1989).

2 *Spector v. Spector*, 531 P. 2d 176 (Ariz. Ct. App. 1975). California did not recognize the validity of postnups until 2002. *In Re Marriage of Friedman* (2002) 100 Cal. App. 4th 65; *see also*, *In Re Marriage of Burkle* (2006) 139 Cal. 4th 712.

3 *See* S. Williams, "Postnuptial Agreements," 2007 Wis. L. Rev. 827, 881. As Williams notes, many states place more restrictions on postnups than on prenups. *Id.* Williams' article provides an up-to-date summary of the legal status of postnups throughout the U.S., and makes a compelling case for the universal acceptance of postnups under less stringent standards of enforceability than are applied to prenups.

4 In "equitable division" states, marital property, rather than automatically being divided 50-50, is divided on an "equitable" basis that requires the trial court to apply a number of factors in making its decision. The Massachusetts statute, M.G.L. c.208, § 34, is illustrative:

"[T]he court may assign to either [party] all or any part of the estate of the other … [I]n fixing the nature and value of the property to be so assigned, the court … shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future

acquisition of capital assets and income … [T]he court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each … as a homemaker to the family unit."

New Hampshire's property division statute provides that "The court shall presume that an equal division is an equitable division of property, unless the court decides that an equal division would not be appropriate or equitable after considering one or more of the following factors [subsections (a) – (o), similar to those set forth in M.G.L. c. 208, § 34] …" N.H.S.A. 458: 16-a II.

5 N.Y.C.L. § 236 B 1.d (1).

6 Iowa Code section 598.21.5.

7 N.H.S.A. 458: 16-a II(m) and (n)

8 *See Rice v. Rice*, 372 Mass. 398 (1977), construing the scope of M.G.L. c. 208 Sec. 34, the statute governing awards of alimony and division of property.

9 CGS § 46b-81.

10 K.S.A. 60-1610 (b).

11 Alaska is unique among the 50 states in offering divorce litigants the choice of either "community property" or "equitable division." If the parties desire to have their assets treated as community property, they can do so by a community property agreement or a community property trust (Alaska Statutes Chapter 34.77 – see AS 34.77.303(a)). Absent such an agreement or trust, the courts in Alaska will divide the marital assets in an "equitable division" manner. *See* AS 25.24.160(a)(4). Tennessee has a hybrid statute, pursuant to which "marital property" and "separate property" are defined by statute, with marital property being divided on an "equitable basis." *See* T.C.A. § 36-4-121 (b)(1) and (b)(2).

12 Property includes all assets of every kind, nature and description held by a party either individually or jointly with another, including vested testamentary interests under a will or trust. In every state, full disclosure of all assets by each party to a prenup or postnup prior to signing is an absolute prerequisite to the agreement's validity and enforceability.

13 Lindey & Parley on *Separation Agreements and Antenuptial Contracts*, § 110.75[2][e] (2nd ed. 2007). "Failure to comply with such a provision could subject the breaching party to a claim for damages for breach of contract in the divorce action, or enable a party either (i) to challenge the validity or enforceability of the agreement on the grounds of failure of consideration or unconscionability, or (ii) to block its enforcement on the basis of the breaching party's 'unclean hands.'"

14 Most states encourage both parties to be represented by counsel in connection with the execution of a prenup/postnup, and it is particularly important that the less wealthy party, against whom enforcement of the agreement will be sought in the event of a divorce, be represented. *See, e.g.,* California Family Code § 1615(c)(1) and (3).