



Lowenstein Sandler's Trusts & Estates Podcast: Splitting Heirs

Episode 2 - The \$6 Million Wedding

By [Warren Racusin](#), [Eric Weinstock](#), Jonathan Wolfe
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Kevin Iredell: Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts. Or find us on iTunes, Spotify, Pandora, Google podcast, and SoundCloud. Now let's take a listen.

Eric Weinstock: So I'm doing a prenuptial agreement for the son of a really wealthy client. And the really wealthy client is pushing the prenup because she thinks she has to protect her child from her fiancé, who, of course, is just trying to get his hands on my client's money. In the middle of the discussions, the very wealthy client tells me, "Oh, by the way, we have to get this done quickly. The wedding's getting close and we're spending \$6 million on it." After I start breathing again, I ask the client, "Have you spent it all yet?" She says, "No. We still owe \$1.5 million." And I say, "Well, maybe you shouldn't write that check quite yet until we get the damn prenup signed."

Warren Racusin: From the law firm, Lowenstein Sandler, this is splitting heirs. I'm Warren Racusin. So why would the first episode of a series of podcast about estate planning deal with prenuptial agreements, and not with wills or trusts or any of that stuff? Well, for one, you're going to see that the most important part of estate planning is that it really deals with people's lives, your family, your loved ones, the things that are most important to you. You're also going to see that estate planning deals with all parts of your life, not just what happens at the end of it. Which is why you need to talk to your estate planning advisors before any major changes in your life.

And you're going to learn that estate planning brings out the best and sometimes the worst in people, which makes it fascinating to think about and sometimes kind of funny. Our tour guides through the wonderful world of prenups are my colleague, Eric Weinstock here at Lowenstein, a trust and estate's lawyer who counsels clients on prenuptial agreements on a regular basis, and our good friend, Jonathan Wolfe, a divorce lawyer at Skoloff & Wolfe in Livingston, New Jersey and New York City. So let's dive right in. Jon, first thing, what's the craziest prenup you've ever done?

Jonathan Wolfe: How much time do you have Warren? So I was thinking about this question. It's a great question. I mean, people will put all sorts of crazy things into prenuptial agreements. One of them, there's an infidelity clause that you see comes up every once in a while. And I had one where they tried to define infidelity to include something such as passionate kissing. I just always got a

kick out of that thinking about the litigation as to whether or not the kissing was passionate or not passionate. But one of my favorite stories was I sat down with a client. And one of the reasons I always loved working with people like you and Eric on prenups is that, obviously, the prenups have to deal with both divorce, which is what most people think of, but also death, which I know we're going to talk a lot about today as well.

And so I sat down with a client and explained this to him and said, "We really need to include something for your spouse in the event of death." And he wouldn't do it. And we talked and we talked and we talked, and I said, "Well, why won't you do it?" And he said, "Well, she'll kill me." And I thought to myself, "Why are you getting married?" Right. I've seen plenty of divorcing spouses who want to kill each other, but not before the marriage. So that's just some of the interesting world that I know you find yourself into as we all do these prenuptial agreements.

Warren Racusin: Well, leaving aside passionate kissing provisions and murderous fiances, what's the first thing you would think about if you were advising our \$6 million girl?

Jonathan Wolfe: Well, the first thing is really, I wish she hadn't called me. Because I hate prenuptial agreements. I know I tell you that every time we work on one together, because nobody likes doing that. People put them off until the last minute. You're dealing with people who want to be thinking about their wedding and they don't want to be thinking about what happens if they get divorced. They certainly don't want to think what happens if they die. And people can have such different views on what's fair. Right? Some people come to me and they say, "Well, just give me the prenup." As though that's a uniform thing. And we know, and you and Eric know, it can be so different. That said, we do them all the time. And the first thing that I would have to explain, which I know is what you do is, what happens if you have no agreement?

Because you can't understand why you're doing an agreement if you don't understand the law without one. So I start by explaining what is equitable distribution. I have practiced mostly in the New York and New Jersey area. And in most states in the country, we have something that's called equitable distribution. What does that mean? That means everything that is earned, everything that is acquired during the marriage is going to be marital property. What does that mean? It means, when there's a divorce, it's going to be subject to equitable distribution, which means that it's going to be divided in the divorce. Now you notice I said, equitable, not equal. I know we'll come back to that. But anything that is earned, whatever you've saved, your house, your stocks, whatever you have left over if it was earned during marriage, it'll be subject to equitable distribution.

Now what's not subject to equitable distribution, and this is for the \$6 million wedding. This is really probably the most significant thing to know. Is that there's a good deal of protection in the law even without an agreement. Right? Because there's something called separate property. And in many jurisdictions, not all, but many jurisdictions, assets that you have prior to marriage or assets that you receive by way of gift or inheritance during the

marriage, that's your separate property. Whether you have an agreement or not. So that's pretty good news for your \$6 million girl who's planning to inherit lots of money from her family. Whatever she gets from her family, that's not immediately going to be subject to attack if she's ultimately finding herself in a divorce.

Warren Racusin: Right. But separate property sometimes isn't quite as separate as you might think. Right?

Jonathan Wolfe: Well, that's exactly right. And that's why we explain to people, you actually do need an agreement because there's a common misconception that, "Oh, well, if it's separate property, why do I need an agreement? Right? It's protected." And the answer is, it's not necessarily protected. And the best example of that is, think about a premarital business. Someone might say, "Well, it was my premarital asset. I owned the business before the marriage." But what if that same person worked in the business during the marriage? Right? Worked in the business. The business increased in value during the marriage. Their spouse was at home taking care of the kids, helping to support them.

In most jurisdictions there is a recognition that if there is what's called, an active increase in value, so that business owner increasing the value of that property, even though the initial business, the business value at the time of the marriage, that separate property, that increase in value can be subject to equitable distribution. The other part is, even though something is separate property, the income from that separate property can still be available for claims like alimony. And so when you're solving for a prenuptial agreement, I say the increase in value is probably the most important thing for this client to consider and protect against.

Warren Racusin: Because if the \$6 million girl had a business, but her spouse to be says "Well, but during the marriage it grew to millions and millions and millions of dollars more. And I helped out with that. Right? I did business entertainment. I stayed home with the kids. I handled all the rest of your life so you could grow the business. I'm entitled to some share of that growth." Right?

Jonathan Wolfe: 100%. I've seen the claim. I introduced you to a really good trust and estates lawyer, and that trust and estates lawyer saved you money. And so, all that hundreds of millions of dollars of tax savings, I should get paid 50%.

Warren Racusin: Right? We think that makes perfect sense of course.

Jonathan Wolfe: Well, you were worth every penny, but [crosstalk 00:08:22] the professionals.

Warren Racusin: There you go. So, that's the basics of the divorce side, but there's a whole other side to prenups, as Jon said as well, right Eric?

Eric Weinstock: Sure. There's the finality side of the marriage. And that's what happens if one of the two spouses dies during the marriage, a perfectly happy marriage, even. And in most, every state, including New York and New Jersey, if one of the spouses dies, the surviving spouse is mandatorily entitled to a share of the first spouse to dies assets. In New York and New Jersey, that's known as

the elective share. It's one third of all of the assets that the first spouse to die owns at his or her death, not just marital property like Jon was talking about. It's a really different rule in the context of death.

So, in the example that Jon gave about the premarital business, if the wife who owns the business dies while happily married to her husband, her husband is entitled to a third of the entire value of that company. Think about it this way. If the wife had inherited assets from her parents, her husband would get a third of those, even though he had nothing whatsoever to do with creating those inherited assets or growing their value. And that's exactly what happens if there's no prenuptial agreement. It's not a question like in the divorce context of what's equitable or what's fair. It's a very bright line rule under state law, the surviving spouse's entitled to a third of the asset value of the first spouse to die. Period. End of discussion.

Warren Racusin: Right. So, Jon on and Eric, so that's where the preup comes in, because Jon, you can change all these rules in a preup. Right?

Jonathan Wolfe: Absolutely. As long as it is done appropriately. Right? As long as there's financial disclosures, and every state has a different statute, but many of them provide for the same basic criteria. As long as it's done appropriately and as long as it's not unconscionable you can protect against all sorts, all of these claims. Right? You can solve for these problems, but there's no uniform answer as to how you do it. You can make explicit, for example, right? You can say, "Look, anything I have now, anything I inherit plus their appreciation, that's going to remain my separate property. Regardless if I make it grow, regardless if you make it grow, it's going to be separate." You could agree that all of the assets that we actually earn, the earned income during the marriage, we're going to split whatever we save equally. Right? That's actually a benefit potentially to the non-moneyed spouse.

Because as we talked about a little bit, right, equitable distribution doesn't necessarily mean equal. So that could be a good thing. I mean, one of the things I tell my clients when I'm representing the non-monied spouse, is prenups, you can potentially do better in a divorce if you have a good prenuptial agreement. Because one of the things that I know we sometimes talk about is, you might agree in a premarital agreement that a share of your separate property over time becomes subject to equitable distribution, or at least there's a payment tied to that. And so there's no correct answer.

And I know we're going to talk a little bit about communication, but there's no correct answer, but you can solve for all of these things. You can certainly address the issue that Eric mentioned in terms of a waiver and of an elective share and we do that all the time, but then you have to think about, well, what is the balance? What are you giving instead of those things? And that comes down to really a subjective not objective measure of fairness which we spend a lot of time talking about on both sides of these deals.

Warren Racusin: Right. So there are ways, there's no one size fits all preup. There's one size fits one. There are issues that have to be worked through if you're doing this right. So how do you get the two love birds to start working these issues out?

Jonathan Wolfe: One person's view of fairness can really be offensive to the other side. Sometimes I've seen people who agree very easily. What I think that the most important thing here is, communication. Right? And timing. It's not waiting until the eve of the wedding to start talking about these things. It's some sort of an explanation for what you're trying to accomplish and why. And I also think it's a mistake to just start off by saying, "Oh, here, honey, here's the 80 page prenuptial agreement." Right. It can be overwhelming, I think, having some bullet points where you could actually talk about it. Makes a lot of sense, because, again, I know you like to talk about communication. Right? I mean, I think, if you're not able to communicate about these things in advance of the wedding, it probably is not a good sign for the wedding itself.

Warren Racusin: I had that conversation literally earlier this afternoon with a prospective new client, we were talking about these issues and the client said, "Well, is a way to solve this simply not to tell my spouse to be, how many assets there are, what I own, et cetera." And I said, "I really don't think that's a great idea. Marriage is a romantic relationship. The marriage is also an economic relationship." And what makes prenups hard is that the couples got to talk about what happens to the assets if the relationship fails even before the marriage even happens. And that can bring up all kinds of feelings of anxiety and guilt and insecurity about themselves. Plus, Eric, as you know, we're not only talking about the two people who are about to get married, there's a whole other potential set of players involved here also that make the dynamics even more complicated and sensitive. Right?

Eric Weinstock: Yeah. They're called the parents of the two intendeds. That's correct. And often they're the trickiest aspect of prenuptial agreement negotiations to manage in my experience. Parents walk in with certain expectations. Oftentimes, our client is nominally on paper in reality, the wife to be or the husband to be. But what motivated them to come to us is that mom and dad said, "If you don't get a prenup, we're not going to pay for your wedding." And so, their child comes to us but in the background is mom or dad or both sometimes. And oftentimes it's really hard to remember who your client is. The child who's getting married can be rather passive. And mom and dad can be really pushing certain things.

And it's important as the lawyer involved in zealously representing your client to find out what your client wants in the prenuptial agreement, not just what their parents want. Their parents have perfectly good motivations often. They want to protect their kids. They want to protect the family's wealth. But sometimes, and also some less positive aspects, they seem to want to influence the dynamic of their child's marriage with their future son-in-law or daughter-in-law. And it makes the negotiation and the communications an awful lot more messy.

Warren Racusin: How do you break through that? As we've all been talking about, and this really goes beyond the legal side of a prenup, but I think is equally if not more important, if the couple can have an open and honest communication about money at the beginning, it's most likely that they're going to continue to be open and honest with each other about finances during the marriage, and that's going to make the marriage stronger in the long run. So here's what you don't say to your spouse to be, as one of our clients suggested saying to his fiance, "I'm going to give you X dollars if we get divorced." That should be

enough to tie you over. Right? That's not the way you begin this conversation. And Eric, maybe you can suggest a couple of better ways to introduce the topic.

Eric Weinstock: Now, listen, I think one of the keys to being an effective prenuptial agreement attorney is being a good choreographer. It's really key to script things out as best you can with the client. And I know I do. I know you do. I know Jon does. We spend a lot of time sitting with our clients, talking with our clients and counseling them about how the conversation with their spouse to be should go about particular aspects or issues in a prenuptial agreement. And we stress to them how important it is to communicate effectively with their fiancée, that she wants a prenuptial agreement that's fair and reasonable, and emphasize how the agreement can protect both of them and to help figure out ways to do it and make it as fair as possible so that each one really does enter it voluntarily and doesn't feel that it's harming the marriage before the marriage begins.

Warren Racusin: Right. So, as Jon suggested, one of the options is the wealthier spouse can say to the less wealthy spouse, if the marriage lasts more than X years, then on divorce the less wealthy spouse will get some portion of the wealthier spouse's separate property. The amounts going to the less wealthy spouse can even ramp up or ratchet it up with the length of the marriage. They can agree that if the wealthier spouse dies during the marriage, the wealthier spouse will provide a life insurance policy for the less wealthy spouse. That way, the less wealthy spouse knows that he's going to get a check from the insurance company. And even if he waives any rights that he might have to the family business or other family assets of the wealthier spouse, he's still going to be financially protected.

Jonathan Wolfe: Maybe if you're accomplishing what's the biggest, like if your biggest primary objective is making sure that your business is going to be protected, maybe you don't care that the marital house which you bought is going to be put in joint names so it doesn't just feel like you're asking someone to live in your house. I ask them to really prioritize and think about, what can you do that's going to be a benefit for the other side to make this better.

Eric Weinstock: And Warren, I've often found that avoiding blind siding the other party is really of critical importance. And what I mean by that is, I will often have an initial discussion with my client, typically the wealthier of the two spouses, and she or he will discuss with me at my prompting, what their goals are, what's important to them, what's motivating them to want to pre-nup. Sometimes they are independently motivated. Sometimes it is mom and dad. But in any event, that's step one.

And then step two, if they can pull it off, is to have an informal discussion with their spouse to be about certain areas so that when we eventually prepare a draft prenuptial agreement and present it to the spouse to be and their lawyer, because they're going to be represented by a lawyer also, hopefully what's in that agreement doesn't come out of left field and totally upend the other party. But rather they had a sense of what was coming, there was some discussion and were able to massage it a little bit to kind of fit the goals

and the wishes of both parties so that it does come across as being a lot more fair and a lot more equitable.

Warren Racusin: Yeah. We'll often have the wealthier client sit down with the less wealthy spouse with a little one page checklist. Here are the major things we want to talk about. Have them have a discussion and a communication about it. Get buy-in from both sides, have the discussion work through the disagreement that you're probably going to have, and get to the point so that when the actual 80 pages done put it agreement gets prepared everybody says, "I know this is a big document, but here are the key points we agreed upon. I see these key points right here in the agreement. This works for me. Let's get it signed, put it in the drawer and hopefully never have to think about it again." Eric.

Eric Weinstock: And I'd also add that by doing that, by avoiding the surprise to the other side, you also tend to disempower the lawyer on the other side from causing mischief in the negotiation. If the party on the other side says to their lawyer, "Here's the draft that my fiance gave to me. Everything she said that was going to be in it that we talk talked about I think is there. Here's the checklist. I want you to be sure that it's actually there. And if it is, I'm good with it." That actually takes away the possibility of much more difficult negotiations spurred on by the lawyer on the other side as opposed to by one of the two parties.

Warren Racusin: Exactly. One of the things you get to find out as you listen to these podcasts is that I love music and I really love opera. And opera isn't like life mostly, but sometimes life does imitate art a little bit. And what better opera to talk about then than Marriage of Figaro. And at the end of The Marriage of Figaro, the philandering husband get his comeuppance and he realizes the error of his ways. And he apologizes to his long suffering wife and she reveals her pain about all of his infidelities. And for the first time in their lives, they're truly communicating with each other. You can hear it in their music.

I'm not going to get all spiritual here, but there's a reason that that music reflects that feeling at that point. Will the husband and wife keep communicating and live happily ever after? Who knows? There's no Marriage of Figaro part two that I'm aware of. I hope so. Oh, and the \$6 million wedding, the prenup got signed, it was followed by a beautiful wedding, after the groom's mother turned down the wedding planner's suggestion for a triumphal arch made out of exotic plants and flowers, a \$900,000 savings. Economical? Right? So far, they're a happy pair. So you can see we have not blown up a wedding yet.

That's all we have for today. Thank you so much to Jonathan Wolfe and to my colleague, Eric Weinstock. Thanks to all the folks here at Lowenstein, our Chief of Marketing, Kevin Iredell, his colleague, Stephen Kimmerling, the irreplaceable Linda Aschettino, Rosa Colon, and Melanie Canto, all the folks in Good2bsocial. Thanks to all of you for listening. We'll see you next time. Until then, as we say in these parts, have a good one.

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