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Family Law Issues in Agriculture: Nuptial Agreements

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Pre-nuptial agreements are oftentimes viewed as taboo; instead, farmers, ranchers, agribusiness owners, and food entrepreneurs should view pre-nuptial agreements like an insurance policy for a marriage. Nobody gets on an airplane thinking that it is going to crash, but you still go over the safety instructions. A pre-nuptial agreement simply notes the safety instructions in case the marriage terminates for whatever reason.

It is a common misconception that pre-nuptial agreements are only for the rich and famous; in fact, almost anyone entering a marriage can benefit from a pre-nuptial agreement. It allows the parties to put the law into their own hands and “create their own rules” for the division of property and other ancillary economic issues with a divorce or separation. Pre-nuptial agreements should be viewed as an empowering exercise, allowing the couple to have their own autonomy to dictate their own rules.

Arguably, the exercise of preparing and negotiating a pre-nuptial agreement requires couples to have tough conversations that may strengthen their bond. Both parties are forced to become financially naked and share intimate details of his or her finances prior to the wedding date; this alone can be a healthy exercise for most couples as each party must attach a Schedule of Assets and Debts to the pre-nuptial agreement. In some instances, parties may decide to exchange tax returns or limited financial documentation to support the figures. Clarity as to the financial picture of the soon-to-be spouse is oftentimes gained during this process.

Pre-nuptial agreements are typically enforced in most states if (1) both sides are represented by separate counsel, (2) the terms are fair and reasonable, and (3) there was not any duress or undue influence (i.e.,

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signed voluntarily). Furthermore, the prenuptial agreement should be properly signed and executed in accordance with state law.

Although the agreement should be specially tailored for each individual family, the purpose of this Fact Sheet is to discuss the major issues with prenuptial agreements, as they apply to the food and agriculture industry. Issues that cannot be discussed in the prenuptial agreement include provisions regarding children (except for religion in some states). Additionally, cheating clauses and lifestyle clauses (i.e., promises not to smoke or drink) are typically not enforceable.

A. Identification of Separate and Marital Property

Property in a marriage fits into one of three buckets: two separate (or nonmarital) property buckets and the marital property bucket.

Spouse 1 Bucket	Marital Bucket	Spouse 2 Bucket

Prenuptial agreements always identify what is in each party's separate property bucket and what is in the marital bucket. Parties can decide to deviate from the law in this area on how they decide what fits in the three buckets. For example, property in joint name or property gifted to the parties in joint name are clearly marital property, but here are some other areas to consider:

Property and Debt Prior to the Marriage

Generally speaking, all property acquired prior to the marriage is considered separate property. Prenuptial agreements will attach a Schedule of Assets and Debts for each party and usually (but not always) the prenuptial agreement will note that it is that person's responsibility. With a minority of prenuptial agreements, couples put certain accounts or property into the marital bucket.

Furthermore, what if one person enters the marriage with substantial student loans or other debts? The prenuptial agreement can include provisions if the other party helps pay down this separate debt during the marriage.

Business Interests

With farmers, ranchers, agribusiness owners, and food entrepreneurs, this is perhaps the most important issue to focus on. In the laws in most states, businesses formed during the marriage are considered marital property. If the business was already in existence on the wedding day, then the appreciation of the business during the marriage can be considered marital property if the other spouse was either actively or inactively involved in the business itself. To illustrate, if Susie married Farmer Sam and the farm was owned in his individual name but Susie helped him for decades around the farm, then the court would look at her efforts and the appreciation of the farm enterprise during the marriage thanks, in part, to her involvement at home

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or in the farm business.

Therefore, the prenuptial agreement should clearly note whether any present or future businesses will fit in a separate or the marital bucket. There can be negotiation with this issue, especially for the non-titled spouse, so it is important that couples are on the same page. Parties can negotiate a clean walk away from one spouse, a vesting schedule in accordance with the years of marriage (i.e., after X years the spouse will own Y percentage of the business).

Income

Income itself is typically a negotiated issue with a prenuptial agreement. By default in most states, income from wherever derived is considered marital property. Even if a spouse puts monies in an individual account, said income is still considered marital. This is an important point for agriculture couples to be on the same page and they should ask themselves how they view each other's income and how they plan to manage their finances as a married couple.

The prenuptial agreement should not only address whether income as an employee and independent contractor income is separate or marital, but it should also clearly identify how income derived from businesses, whether in salary, draw, and or profits, is handled. With business owners, such as farmers and ranchers, this is a hot issue as so much of the monies generated from food and agriculture operations are put back into the business itself. Spouses waiving his or her rights to the business itself may need safeguards on income requiring that the farm business pay the spouse a reasonable salary and that income be considered marital.

Retirement and Investment Accounts

Retirement devices, including pensions and annuities, and investment accounts, including stocks and bonds, are an important topic to discuss with prenuptial agreements. This can be an emotional topic and oftentimes, but not always, goes hand-in-hand with how the couple views income. Self-employed farmers, ranchers, and agribusiness owners have a lot of control over what monies are put into retirement and investment devices.

Down Payments and Contributions to Real Property

The law varies in this area from state-to-state, but couples entering into a prenuptial agreement can make their own rules. It is not unusual for the prenuptial agreement to note that if either party uses his or her separate property for a down payment of real estate, then that person will receive a dollar-for-dollar credit back if the marriage is dissolved.

For example, Farmer Jane and John live together in a farmstead adjacent to John's family. The neighbor's farm comes up for sale. John takes \$50,000 from his premarital wealth to use for the down payment

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for the \$500,000 farm. Depending on how the prenuptial agreement is drafted, the new farm may be marital property and is jointly titled. If the couple dissolves their marriage 20 years later, John would receive back his \$50,000 down payment and the couple would split the equity 50/50 (or whatever rules the prenuptial agreement dictates).

That being said, some prenuptial agreements take this concept one step further. Not only would John in the above example receive his dollar-for-dollar credit back, but he too would receive appreciation on that separate property down payment.

To keep the math simple, this \$500,000 farm is now worth \$1 million 20 years later and the parties have a \$100,000 mortgage at the date of separation (i.e., whatever operative event language used in the prenuptial agreement). John would receive a \$100,000 separate property credit (i.e., \$50,000 plus 100% appreciation). The parties would then split the remaining equity of the farm after the payment of the mortgage equally (\$400,000 each) (or in accordance with the terms of the prenuptial agreement).

Gifts and Inheritance

The general rule is that gifts and inheritances during the marriage are considered separate property. Prenuptial agreements will typically note that gifts in an individual name are considered separate property, but gifts in joint name, including wedding and engagement gifts, are considered marital property.

B. Distribution of Marital Property

The next issue usually (but not always) discussed in the prenuptial agreement is how the marital bucket will be divided in a divorce action. There are three options here:

1. Silence on the issue or defaulting to the law;
2. Splitting the marital bucket equally (50/50); or
3. Make your own rules.

This area can be as simple or complicated as the couple desires. Perhaps the farm couple wants all assets to be divided equally (50/50), but then has a certain vesting scheduling in accordance with the length of the marriage for the farm business and its assets.

Example: Farmer Jane marries Farmer Fred, who comes from a multi-generational farm family. Farmer Fred owns a 20% interest in the family farm, which is identified as non-marital property in the prenuptial agreement. The couple agrees on a chart where based on

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the number of years of marriage that Farmer Jane would acquire an ownership interest into the family farm. After a 25 year marriage, she will have a 50% interest of the 20% shares (i.e., 10% ownership interest) based on her sweat equity and efforts during the marriage. The couple agreed, for illustration purposes, on the following vesting schedule:

Length of Marriage	Husband's Ownership Interest	Wife's Ownership Interest
5 years	90%	10%
10 years	80%	20%
15 years	70%	30%
20 years	60%	40%
25 years	50%	50%

Furthermore, this section of the prenuptial agreement can include provisions relating to valuation of any farm, ranch, agribusiness, or food company. For example, it may specifically note that the parties will hire an agreed upon business valuator to value the company(ies) at two points of time -- (1) date of the marriage and (2) date of separation -- splitting the costs of same on an equal or pro rata (based on income) basis. The prenuptial agreement can then provide for the scenario if they aren't able to agree on a business valuator (e.g. each party hires their own valuator and averages the two).

C. Spousal Maintenance

Spousal maintenance is almost always discussed in a prenuptial agreement in one shape or form. Here again there are three options:

1. Silence or follow the law in that state;
2. Waiver (or partial-waiver); or
3. Make your own rules.

Parties should be cautious to waive their right to support. Even though a party may be healthy and employed at the time of signing the prenuptial agreement, it may not always be the case. If one or both parties choose to waive their right of support, they should consider a limited exception if they are disabled and no longer employable or are out of the workforce for whatever reason for X number of years.

For couples that wish to "make their own rules," they should begin with the law in that state and determine the spousal maintenance calculations at that snapshot in time. Then the couple should consider how they wish to deviate from that formula in any way. For example, there can be income caps or a set formula for the number of years of maintenance. Couples may determine support based on the years of marriage. The sky is the limit on how the rules can be determined. What is important here is that the parties understand the inherent risks with these provisions in either direction.

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D. Estate Rights

People oftentimes assume that all provisions in a prenuptial agreement are only applicable if you get divorced; estate rights are an example of provisions that come into play even if the couple decides to never divorce. Estate rights are usually (but not always) discussed in the prenuptial agreement.

As a general rule in most states, you cannot disinherit your spouse. Your spouse will be entitled to a certain percentage of your estate even if you do not include any provision in your Last Will and Testament for this person. With estate rights, the parties again have three options:

1. Silence or follow the law in that state;
2. Waiver; or
3. Make your own rules.

Waivers are more typical with parties with substantial premarital wealth or second/third/fourth marriages, especially when there are children of prior relationships that may receive the inheritance. Parties are free to give what they wish to their spouse in their Last Will and Testament, but the law's "security blanket" disappears. Thus, parties wishing to waive their right of inheritance in a prenuptial agreement should do so cautiously. People can change their Last Will and Testament on their death bed and the law will no longer protect the other spouse.

Couples that decide to make their own rules may come up with their own minimum guaranteed award in accordance with the years of marriage or contribution to the estate. There can be promises about bequeathing certain property. If the prenuptial agreement conflicts with the Last Will and Testament, then the prenuptial agreement will take precedence.

As a caveat, a party has the right to inherit from the other's estate even while the divorce is pending. It is recommended in most cases that the prenuptial agreement note a waiver of estate rights upon separation or the operative event in the agreement.

E. Promises During Marriage

This is another example of provisions in the prenuptial agreement that are applicable even if the couple never divorces. This can include provisions regarding insurance (life, disability, or long-term care) or access to money.

If there is a waiver of estate rights as discussed above, financial security can be given to the other party with a promise to maintain life insurance to a certain amount. There could also be a promise to maintain life insurance to pay for any marital debt. Parties marrying farmers or those in other professions that are more physical could consider promises for disability insurance; similarly, parties who have health issues or are older may wish to promise to maintain long-term care insurance.

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Access to money or the promise to put X% of income in a joint account is an issue for some families. The couple should discuss how they wish to manage finances. This provision is rarely included in prenuptial agreements but can be added for couples that wish to have that structure.

Lifestyle clauses with promises not to smoke/drink, exercise each day, maintain a certain weight, go on a weekly date night, participate in couples counseling, help doing chores on the farm, or bring you lemonade in the field, etc. are usually not enforceable. Similarly, cheating clauses can be problematic and should be avoided.

F. Break-Up Procedures

“Breaking up is hard to do...” but terms in the prenuptial agreement can help by providing some clear structure. Some couples do not wish to include these provisions, while others want the break-up instructions laid out. For example, there can be clauses on who will move out of the marital residence if the property is titled in the name of only one party or the procedures for buying out the other party if the marital residence is owned in joint name. Procedures for putting the marital residence up for sale, including an agreed-upon choice of a real estate broker, can also be spelled out.

Parties may also wish to include an Alternative Dispute Resolution (“ADR”) clause (e.g., mediation for economic issues) or promise to use a collaborative divorce process in the case of separation.

G. Miscellaneous Terms

This includes a choice of law provision. Oftentimes, couples request a confidentiality clause so that terms of the prenuptial agreement are required to stay private, but for the exception of financial advisors, lawyers, and immediate family members.

Although you can see “sunset provisions” in any area of prenuptial agreement, the couple may choose to have an overarching sunset provision noting that the prenuptial agreement itself is not valid after they have been married for X number of years or if X event takes place.

Conclusion

The prenuptial agreement process can be empowering for parties and requires the couple to have those tough conversations. This is an important liability protection device for farmers, ranchers, agribusiness owners, and food entrepreneurs because, if a divorce occurs, the parties understand the rules because they created them. Divorce is one of the Big D’s along with destruction and death that can harm multigenerational food and agriculture businesses. Every farm and ranch should have a business and succession plan, there too should be a game plan if relationships dissolve. Prenuptial agreements can be a helpful insurance policy for those involved in any segment of the food and agriculture industry and set forth a clear roadmap for both parties.

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For more information:

Cari B. Rincker et al., ONWARD AND UPWARD: GUIDE FOR GETTING THROUGH NEW YORK DIVORCE AND FAMILY LAW ISSUES (2015) available at <https://www.amazon.com/Onward-Upward-Getting-Through-Divorce/dp/0692556540>

Cari B. Rincker, “I’m Talking About the Big D and I Don’t Mean Dallas” (May 2019), available at <https://www.slideshare.net/rinckerlaw/im-talking-about-the-big-d-family-law-issues-in-agriculture>

American Academy of Matrimonial Lawyers, Online Book store, available at <https://aaml.org/store/ListProducts.aspx?catid=704530>

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