

DICTA

**IF IT AIN'T BROKE,
BREAK IT:
More Legislative
Revisions to the Health
Care Liability Act**



By: Douglas J. Toppenberg
Toppenberg & Burke, P.C.



PRENUPTIAL AGREEMENTS

“Dr. Moorebucks?” I ask the gentleman in my waiting area.

“Yes, hello. I’m Macon Moorebucks and this is my fiancée, Lisa Lesriche.” They stand and flash smiles my way, his more pronounced than hers. “We’d like you to draft a prenuptial agreement for us.”

Ms. Lesriche looks at least twenty years younger than the doctor. My assistant worked them into the schedule at the last minute, and I haven’t had time to quiz her on the details. We shake hands and exchange brief pleasantries.

“I’m afraid I can only represent one of you,” I tell the happy couple. “I’d be in violation of ethical rules if I attempted to represent both your interests. Besides, an agreement without review of separate counsel would likely not hold up in court.”

Ms. Lesriche’s smile fades. “You go ahead,” she says and sits down. Dr. Moorebucks starts to respond, thinks better of it, and turns to follow me back to my office.

“Lisa’s stressed with planning our wedding this weekend,” he says when I shut the door. “This weekend?” I gulp. “That’s not much time to negotiate an agreement, but let’s do a quick rundown of your financial situation.”

“I have a medical practice that brings in about \$500,000 a year. I have rental properties that bring in another \$300,000 and about \$100,000 in investment income, but Lisa doesn’t know about my stock portfolio, and I’d rather keep it that way.” He paused a moment. “My ex-wife got the house in a recent divorce, and I pay her \$15,000 a month in alimony and \$5,000 a month in child support. The divorce agreement says I’m responsible for my two kids’ college education, and I told Lisa I’d help with her eight-year-old’s education when the time comes.”

I go through our asset and liability form with him and write down what he owns and owes. “Tell me more about your medical products business.”

“My father owned this business for years, but he’s ready to give it to me, and I’d say at this point, it has little or no equity. Lisa will manage it for me, and with my contacts in the medical community I’m sure it will be profitable within a year. She’ll also manage my rental properties. She’s quitting her receptionist job at my suggestion.”

“Will you buy another house?” I ask.

“I bought a lot in Prosperity Hills, and we’ll start building our dream home soon. I have enough cash to pay half the \$1.7 million cost, and we’ll get a mortgage for the other half.”

He shifts in his chair. “I don’t want to lose everything if this marriage doesn’t work out. If we divorce, we’ve agreed she gets her stuff and I get mine. I want to keep my house, rental properties, investments and business.”

“How will she support herself if you divorce five or ten years from now or if you die before her?” I ask.

* * * *

While Dr. Moorebucks is a fictional character, you’re likely to encounter some of his issues when drafting PNAs. The following are suggestions for the preparation of such an agreement:

1. Most couples seem to think they can show up at a lawyer’s office and have an agreement drafted like two hour dry-cleaning (find a



caterer, order the cake, get a prenuptial agreement...). Make it clear from the outset that the process will take time and effort, and more importantly, make it clear who you will be representing. If you discuss the matter with both parties, you’re probably conflicted from representing either of them (see Tennessee Rules of Professional Conduct, Rules 1.7(b) and 1.8(g)).

2. If you draft the PNA, insist the other party seek independent counsel. T.C.A. 36-3-501 states “... any antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage that is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined, in the discretion of such court, to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse.” I include a certificate in my agreements to be signed by both counsel stating we have reviewed the document with our respective clients.
3. Every PNA must list all assets and liabilities of both parties, together with values on each entry. Income must be stated (I list income from last the three tax years), and these disclosures are usually done as separate exhibits for husband and wife. Without full disclosure, the court will probably find the agreement wasn’t entered into “freely [and] knowledgeably and in good faith.”
4. Unless you want to clear your calendar and bite your nails, insist on 30 days to negotiate, draft and execute an agreement. Even if you have time on Wednesday to prepare an agreement before Saturday’s wedding, it’s likely the bride’s and groom’s attention will be focused elsewhere.
5. There are a number of good prenuptial agreement forms floating around, but everyone’s situation is different. Take the time and effort necessary to customize the document to meet the needs of your client. Is she primarily worried about preserving a family

(Continued on Page 10)

business or ancestral home? Is he worried primarily about providing for his children upon death? Glean from your client his or her primary concerns, and focus your drafting efforts around them.

6. While a waiver of alimony is not prohibited per se, it's not always recognized by the courts, particularly if there has been no review of the PNA by independent counsel (note the statute cited above refers only to "property owned by either spouse before the marriage," and not support). Sometimes I incorporate a structured alimony agreement based upon the number of years of marriage prior to a divorce. For example, no alimony award if a divorce action is filed within the first five or ten years of marriage and then an incremental amount of alimony (periodic, transitional or rehabilitative) for every subsequent year of marriage up to a maximum of whatever is appropriate.
7. In the example above, Dr. Moorebucks seems to expect Ms. Lesriche will work at building and maintaining his business and properties, but in the event of a divorce "she gets hers and I get mine." Similarly, she will probably assist with the design, building and maintaining of a residence titled to him. If value is added over time through her efforts and an ongoing mortgage payment, is it equitable to ask her to walk away from it all years later when the marriage falls apart? If this is the agreement, make certain the parties enter it with eyes wide open.

8. It's sensitive and at times difficult to negotiate an agreement between parties who are planning their wedding and anticipating many years of bliss together. This is yet another reason to allow maximum time for the parties to discuss and absorb the potential future consequences of the agreement. Presenting a PNA to a prospective spouse days or hours before the wedding might be later interpreted as bad faith and "exertion of duress or undue influence upon either spouse."
9. PNAs are not a substitute for estate planning, but many forms include a waiver of statutory inheritance rights. Is your client concerned with controlling the outcome of a divorce or with preserving his estate in the event of death, or both? With a twenty year age difference, it's likely Dr. Moorebucks will predecease his new wife. In that event, does he intend that she return to her \$10 an hour receptionist job?
10. For a good review of the appellate courts' views of prenuptial agreements, see *Ellis v. Ellis* (Tenn.App 2014) and *Randolph v. Randolph* (Tenn.1996).

If you have an invitation to the Moorebucks/Lesriche wedding, be forewarned the date might need to be pushed back.



- The nation's largest direct writer of lawyers' malpractice insurance
- Endorsed by more State Bars than any other carrier
- Most competitive pricing for the broadest coverage
- Financial Strength
- Founded by lawyers, for lawyers

(800) 367-2577 | www.alpsnet.com

