# Panel: Make Sure Prenup Terms are Clearly Defined

By Julia Swain

Clearly defined terms are an important component of a comprehensive and successful prenuptial agreement. On May 4, the anatomy of a prenuptial agreement was presented to the Family Law Section by attorneys Lisa Shapson, Sarah Slocum, Randi Rubin and Renzo Cerabino, a former attorney now wealth manager for BNY Mellon.

Slocum opened the panel with a discussion of *Simeone v. Simeone*, the seminal case on prenuptial agreements. In *Simeone*, the Pennsylvania Supreme Court determined that the test for validity of a prenuptial agreement was not whether or not the terms were reasonable. Instead, prenuptial agreements should be assessed under contract law. Therefore, in order to overturn a prenuptial agreement the moving party must prove, with clear and convincing evidence, fraud, misrepresentation or duress. It was further determined that presenting and/or signing a prenuptial agreement on the day of or the eve of a wedding is not considered duress.

Although a subsequent case, *Lugg v. Lugg*, held that while full financial disclosure could be waived by the parties, such disclosure was still recommended by the panel to support the validity of the agreement. The practice tip suggested was to ensure that all prenuptial agreements contain an averment that each party has made a full and fair disclosure of assets and liabilities, as well as including a citation to *Simeone* within the body of the agreement. Rubin recommended that each party include their respective financial disclosure as an exhibit attached to the agreement.

Shapson discussed the nuts and bolts of a prenuptial agreement, stressing the importance of appropriate definition of the following terms: separation; marital property (as distinguished from the definition in the Divorce Code); separate property; gifts; increase in value; and income available for alimony.

In negotiating the terms for a prenuptial agreement, Rubin recommended considering a client's needs, which can differ dramatically for first time marriages versus subsequent marriages. Rubin suggested asking the client getting married for the first time, whether he/she plans to start a family and will be the stay at home parent, thereby giving up a career. In such cases Rubin suggested quantifying or otherwise considering the value of what the future stay at home parent may be giving up. Some suggestions included securing a life insurance policy, securing benefits under a retirement plan and possibly including a sunset clause after which time the prenuptial agreement would terminate.

Rubin also discussed avoiding ambiguities in prenuptial agreements by considering future triggering events such as separation of the parties. Mechanisms should be included in the prenuptial agreement not just for parties' physical separation but also for any payments that may be due from one to the other and timing for such payments.

Cerabino provided a wealth management perspective on prenuptial agreements and considers them to be a form of asset protection. It is important to consider whose assets are being protected in the prenuptial agreement, as frequently it is the parents of one of the spouses who are seeking to protect their estate. Cerabino recommended asking about any pre-agreement transfers and dispositions of assets such as trust interests, to avoid inaccuracies in disclosure statements. Best practices would be to mention any contingent beneficiary interest in any trust or estate even if such interest may never vest in the future.

The panel closed by outlining protocol for signing prenuptial agreements. It was recommended that if the attorney does not attend the signing, that he or she secure a fully signed copy of the agreement as soon as possible to ensure that the version signed contains no last-minute changes.

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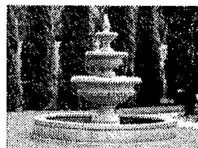

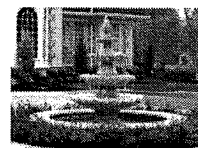

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