

Life After Love Gone Wrong – A Fox Rothschild Family Law Podcast Series

Episode Six: Love Is a Battlefield

Featuring Sandra Fava and Katherine Nunziata

Sandra Fava: Hi everyone, welcome to Life After Love Gone Wrong. We are Sandra Fava and Katherine Nunziata, Family Law attorneys from Fox Rothschild, an *AmLaw* 100 firm with offices all over the country, in New Jersey and beyond. We are here to ask and answer the tough questions about Family Law topics like divorce, custody, prenups and all sorts of other Family Law issues, which may come up in your life that you need to be informed about.

Katherine Nunziata: We recognize that if you are involved with a family law issue, your life doesn't begin or end with the law. We are bringing you this legal lifestyle podcast to answer your questions about a difficult process, while helping you live your life to the fullest along the way.

Sandra Fava: Family law matters are no laughing matter, but we hope to bring some levity, transparency and, dare I say, fun to these difficult topics. We hope you enjoy this podcast designed to help you through life after love gone wrong.

Katherine Nunziata: Hi everyone. Welcome back to this week's episode of Life After Love Gone Wrong, a podcast designed to ask and answer the tough questions about divorce. I'm Katherine, here with my colleague Sandra. Our goal is to give you the information your google search can't. Today, we're broaching one of the most uncomfortable topics that come up in our practice: prenuptial agreements. Literally no one on the planet who is about to get married wants to talk about a prenup, so we want to help you figure out: number one, if you need one; number two: what you need to think about when negotiating and executing one; and number three: how the existence of a prenup can affect a divorce.

Sandra Fava: Okay, so let's cover some basics first because prenups make amazing plotlines in soap operas, but there is a lot of confusing language out there.

Katherine Nunziata: What do you mean?

Sandra Fava: So most people call them prenuptial agreements, or prenups for short, but they can also be called premarital agreements or antenuptial agreements. These terms all mean the same thing. Regardless of what you call it, it's a contract between you and your soon to be spouse that sets forth your respective rights and obligations in the event that you ever get divorced. It basically allows you to contract around what the laws of your state say about divorce so you are in control of what happens, if it comes to that.

Katherine Nunziata: Right, so basically the law says, here are the standards and the things we look at to decide issues like alimony and division of assets and liabilities. If you can't come to an agreement during the divorce, ultimately you have the right to have a trial and the judge hearing your case with apply your facts to the law, and make a decision about what is fair. But with a prenup, you can override that process by predetermining what will happen, if a divorce happens in the future.

Sandra Fava: In some ways, it's like pre-settling your divorce case before you even get married.

Katherine Nunziata: One important thing to note is that a prenup can't resolve every single issue that may come up in your divorce. You can get pretty specific with the language and what things you want to decide in advance, but one thing you can't do in a prenup is predetermine child support. It can be weird to think of, especially if you're thinking about hypothetical children, but the theory behind that is that the right to child support belongs to the child, not the parent, so the parents can't contract away the children's rights.

Sandra Fava: That's true, but you'd be surprised with the level of detail you can get into with a prenup. Some prenups can become really complex, like if you're married for 0-4 years, here is what happens. If you're married from 5-10 years, here is what happens. You can get right into the nitty gritty and divide assets down to the pots and pans in a prenup, if you want. You can choose who keeps Fluffy the dog. Fundamentally, it is a contract, so as long as you can agree to it, you can include it, with limits.

Katherine Nunziata: Yes. Each state has rules, which govern when prenups are enforceable and when they should be voided, or set aside. Unsurprisingly, people often do not like the deal they struck with their loving fiancé, when that person is now their good-for-nothing ex. So if you have a high conflict divorce and there is a prenup involved, it's fairly common to have the party disadvantaged by the prenup seek to have it invalidated.

Sandra Fava: In New Jersey, for example, the court looks at things like whether the agreement was executed freely and voluntarily without coercion from the other partner. That's not as easy to prove as you might think. Surprisingly, threatening not to marry the person if they don't sign it, is not coercion. And the agreement can't be so one-sided that it is against public policy. This is a pretty broad standard though. Basically, as long as the result of the agreement doesn't leave you as a public charge, like needing government assistance, it passes muster.

Katherine Nunziata: And that factor always surprises people. They think, if my spouse is worth \$100 million and my prenup only gives me \$1 million in assets, surely that's so unfair that I can get the prenup set aside, but that's usually not the case. That person just struck a pretty bad deal.

Sandra Fava: One thing the court is often very concerned with is whether there was full and fair disclosure to the other party. So when you're getting married, no one is in what I like to call litigation mode. They're in wedding planning mode, they're in romantic bliss. That's where we come in with our doom and gloom scenarios. But that's the point of a prenup, right? To be prepared and plan ahead. For example, we just had a client who wanted a prenup and he disclosed his assets and liabilities, but his numbers were very, very fuzzy. Like changing by the millions between drafts of the agreement. He was eager to put this unseemly task behind him and focus on the wedding. Understandably, he had the mentality that the value of his stuff was irrelevant if his fiancé was giving up her rights to it in the prenup. Right?

Katherine Nunziata: Wrong. Because you have to know what you're giving up in order to give it up knowingly and voluntarily. It may seem tedious to order appraisals and valuations of your assets at the same time as ordering wedding invitations, but that's sometimes just how it works.

Sandra Fava: Okay, I know this is what we do and Katherine and I see this day in and day out, but from the outside looking in, this seems like a painful and uncomfortable task. It is not pleasant for anyone. You might be thinking to yourself, does everyone need a prenup?

Katherine Nunziata: Well, not necessarily. I say that if you're on the fence about whether you need a prenup, you probably do. If you have an asset, or an anticipated asset, like maybe an inheritance you're expecting, and you have questions about what will happen to it when you get married, you definitely want to seek the advice of a lawyer to help you understand what's at stake. So if you fall into one of those categories, where you have a trust fund, or an inheritance, or you're expecting one of those things, you should definitely talk to an attorney.

Sandra Fava: You might be thinking, why does it matter? Well, in New Jersey for example. The general rule is that anything you own before the marriage and that goes for assets and debts, are considered separate property. Anything that you obtain during the marriage, and again I mean any assets you get or debt you accrue, is considered marital. When you get divorced, marital property and debt is subject to equitable distribution, meaning that it will be divided between you and your spouse in some fair way. But if you have separate property and you co-mingle it, meaning that you use it for marital purposes during the marriage, you open up the argument that some, or all of it, can be considered marital and subject to division.

Katherine Nunziata: And so, for the person coming into the marriage with very few assets, this probably isn't a huge deal. But if you already have a substantial net worth before getting married, and you want to protect those assets, then you need to make sure that you take the appropriate measures. Entering into a prenup might be one of those steps.

Sandra Fava: One category of people who should strongly consider a prenup is business owners. If you plan to keep the business during the marriage and you earn a living and provide for your family that way, the marital portion of the business' value will be subject to division. And I want to clarify that I don't mean for purposes of alimony and how much support you may need to pay, but I mean that your spouse is entitled to a portion of the value of that business. But businesses aren't so easy to value. It's not a bank account that has a balance you can easily figure out years later. If you want to be sure that marital portion is accurate, you may need a business valuation and specify that in a prenup. Or maybe you want to negotiate that your spouse will get none of the business if you get divorced. We have many clients with family businesses that go back generations, or clients who own businesses with partners, and the last thing they want is to cut their ex a big fat check to buy out their interest or equitable share of a business at the end of a divorce. This may sound scary to you, but these are all things you can plan for and negotiate.

Katherine Nunziata: Absolutely. And maybe it's not a business, but royalties, or patents, or some kind of invention, or some other kind of asset. You can negotiate to protect those. The beauty of a prenup is that you're only limited by your own imagination when it comes to how you structure the deal.

Sandra Fava: Well, that, and what your spouse will agree to.

Katherine Nunziata: Right, of course, but my point is that there's an opportunity to take a look at what you have and plan for your future to make sure that you're informed about the possible outcomes in the unfortunate event that you do get divorced.

Sandra Fava: Alright, so, who else might want a prenup? If you have children from a prior relationship, or your fiancé does, and you want to be clear about how those expenses will be paid, maybe a prenup is right for you. Or maybe you have family members with special needs, or aging parents and you want to safeguard their support. Honestly, there are so many reasons why a prenup can be a good idea. We get that it's uncomfortable, but it can be well worth it if things don't go how you plan.

Katherine Nunziata: Another reason why a prenup can be a good idea is to cut down on litigation costs in the event that your marriage does end. Instead of fighting over alimony and equitable distribution, and all of these other issues, a prenup predetermines, or at least limits, that outcome. So instead of spending months, or years, hashing it out in court, you've already narrowed the scope of what could happen. The investment of hiring counsel to negotiate a prenup might pay for itself in divorce costs that you can then save.

Sandra Fava: So maybe you're listening to this podcast and you're thinking, oh my gosh, I am in all of these categories and I definitely need a prenup. You might next think, how am I supposed

to raise this issue with my fiancé? What if they freak out, or get angry or even worse what if it makes them not want to marry me?

Katherine Nunziata: Okay, so I'm going to be really blunt about this and this is just my personal opinion, but if asking for a prenup makes your fiancé not want to marry you, maybe you don't want to marry them. The harsh reality is that many marriages end in divorce. If you're acting rationally, and reasonable and trying to be proactive about your expectations by planning for the worst, your partner should understand that. Your partner, who is about to embark on a lifelong journey with you, should support that. And if you can't have these kinds of conversations with the person you're going to marry, well, I'm not therapist, but my armchair psychology tells me maybe that's the sign of a bigger problem.

Sandra Fava: And here's what I think, even if you don't end up getting a prenup, you should be having prenup like talks with your fiancé. You should both know what assets and liabilities you both have. In theory, you're about to legally bind yourself to another in perpetuity. Think about that, it carries huge significance, legally and just in general. It is really unfortunate that we have clients come to us in divorce and say I had no idea my husband had a gambling problem and came into our marriage with thousands of dollars in debt. I didn't know there was a problem, but now that debt is tens of thousands of dollars. Well guess what, that's thousands on the book for some of that. Or some clients come in and say I thought my wife made X amount per week because that's what she put in our joint account, but really she makes double that and was pocketing the rest of her income into a separate account, and I had no idea. These stories sound crazy, but they are true and they are common. Having an open dialogue about money at the beginning of your marriage set you up for marriage financially. You are probably already having money talks in connection with your wedding planning, especially if you are trying to stick to a budget. That may be a good segue into having these tougher discussions.

Katherine Nunziata: The other thing about negotiating prenups is that with counsel it makes it a very professional task. A business arrangement, if you will. I would recommend that all communications about the prenup go through your lawyers. His makes it easier to take the emotions out of the way and let you focus on the best way to plan for your future.

Sandra Fava: I want to conclude by reminding you that every state has different laws about divorce, and different laws about prenups. If you're listening to this and feeling like any of this applies to you, talk to a lawyer. There is no harm in getting educated, even if you decide not to go through with it. But regardless, you need to have those tough money talks with your fiancé. As always, we like to give you our top three takeaways from the episode. On prenups, first, you should think about how you are entering your marriage and whether you are a good candidate for a prenup.



Katherine Nunziata: Second, you should consult a lawyer to learn about the ramifications of your current financial status as a single person and determine what protections, if any, you could put into a prenup.

Sandra Fava: And third, no matter what, carve out time prior to getting married to have the prenup life talks with your fiancé. Find out their financial health. Maybe you need to do some homework on your own and get your own financial house in order. Regardless, starting your marriage without financial transparency is setting you up for a bad scenario. Just have the talk.

Katherine Nunziata: And that's a wrap on prenups. If you have any questions about what we've covered, or are looking for additional resources, please reach out to us at lifeafterlovepodcast@foxrothschild.com. Next time, we'll be talking about changing your name after a divorce and how that process works. Until then, we're Katherine and Sandra, here to help you through life after love gone wrong.