

***Fox Rothschild Podcast***

**Texas Family Law Podcast Series: Prenups, Postnups and Reducing the Fear of Filing for Divorce**

***Featuring Laura S. Hayes and Erin M. Garza of Fox Rothschild LLP***

**Laura Hayes:** Hi, welcome to the Fox Family Law podcast. I'm your host, Laura Hayes, a Partner in the Fox Dallas Office. We are here today for the third in our series of eight podcasts about the process of divorce. Today my associate Erin Garza and I are going to be taking about prenups, postnups and how to reduce the fear of filing for divorce for people who want a divorce but aren't really sure about the process. How are you doing, Erin?

**Erin Garza:** Doing well. How are you?

**Laura Hayes:** Good, thank you. Thanks for joining me today on the podcast. I think a lot of people get scared by the term prenup. They think you are entering a marriage contemplating your divorce. So I want to talk about how that's not really the case, and how prenups can actually be helpful and protect people, even if they never get divorced – how it can be a good step before marriage.

**Erin Garza:** I'd like to start off with a study out of Harvard University from 2003. That study found that, while most people understood that about half of new marriages end in divorce, only 12 percent of people surveyed actually thought they would be a victim of that statistic. More often than not, we are seeing people go into marriage hopeful, which is always good, but we have to acknowledge the reality there. Sometimes it might be good to have these agreements in place before the marriage. That way you can approach financials, in the event of divorce, more easily, as well as child custody issues and things like that. We really want to talk today about some of the advantage of prenuptial agreements. Laura, I think you can attest to this with all of your experience, but one of the advantages we have seen is been that the parties can minimize their exposure. Would you agree?

**Laura Hayes:** Absolutely. I like to compare this to going into a business with your best friend. Everything is great, but you never know when you might hit a speedbump. You want to documents to be in place while things are good and you are happy. You don't want to be worrying about them and arguing over those when things are not good and happy. So I look at it sort of as a business agreement, too. You want to protect yourself for worst-case scenario and hope that you never have to actually look at this document.

There are a lot of advantages to entering into a prenup and one of those advantages is actually understanding what the laws are. I see a lot of times in divorces when people have received gifts from parents or other family members, and they're thinking, unintentionally, that they'd still be protected, and they're not. One of the advantages of entering a premarital agreement is understanding what the laws are, and what the consequences of various life events can be during the marriage. It is good to know those things in advance.

**Erin Garza:** That is important to note. I actually have several friends who have gone into marriage and have this trust. Especially for individuals who are getting married in their 20's or in their 30's, they may not be worrying about these things right now. As you mentioned, it's important to know what the laws are on those issues, and how the assets that you have before you get married and the assets that you accumulate once married are affected, and how you can negotiate around that with a premarital agreement, to an extent.

**Laura Hayes:** Yes, one of the things about Texas, as a community property state, while you can protect inheritance or separate properties, income out of those assets is considered community. That is where a lot of people get into trouble in a divorce, not realizing that and they lose the ability to protect some of those assets. Having that knowledge in advance, like you said, sometimes younger people getting married, or people getting married for the first time, don't understand that, or don't even think about it because they don't have those assets. However, understanding the consequences in the event that you do get assets, or as you accumulate your marital estate, those things are very important.

**Erin Garza:** That is true. You mentioned not having a lot of assets, maybe if it is your first marriage, or you are getting married very young. One of the things we have seen is individuals who come to us and say, "I don't think I need a premarital agreement, I don't have anything. I don't have a house, I don't have student loans to pay off. I don't have a car." But one asset that is intangible, and people forget about, is your capacity to earn income. You were talking about earning income on the assets that you bring into the marriage that were yours before and how that becomes community property, but any income that you earn once you are married is affected. It is important to understand how that can be affected once you are married, and avenues that are available to you in a prenuptial agreement to protect those assets.

**Laura Hayes:** Absolutely. Some other assets that people do not think about are intellectual property assets. I have seen different spouses involved in startups say "Oh, they don't have value right now, it's no big deal, I don't need a prenup. I won't worry about it." Then all of a sudden, that business takes off and, because you didn't really protect it in the first place, it's now become community property whether that was the intention or not. Sometimes people who go into a marriage do not necessarily have those assets, but those assets can change. Life can change quickly, so contemplating these life events in advance is a good idea.

**Erin Garza:** That is very important. It's funny because I think one of the first times I ever heard a premarital agreement mentioned recently on TV was on *The Real Housewives of Dallas*. They had asked in an interview question, "how many of you have premarital agreements?" Almost all of them said, "of course, why wouldn't we have this going into marriage?" It's important to point out that it's not something that is only reserved for individuals on *The Real Housewives of Dallas*. It can be anyone, any stage in life, any level of income, any amount of assets. You can work with more than just your property and your financials entering into a marriage, you can decide things for your future that you may accumulate down the road.

**Laura Hayes:** Absolutely. One thing I do want to point out though. While premarital agreements can contemplate what happens in a divorce and how assets are divided and treated, the one thing a premarital agreement cannot refer to is possession of children. There are certain things about children that you can agree to, but possession and access to children is not something that can be put into a premarital agreement.

A premarital agreement does focus on, most of the time, assets, but you can reach other agreements. Some people put into premarital agreements that, even in the event of divorce, one party will pay the other party's expenses for a certain period of time – some kind of temporary maintenance agreement, or they agree that there won't be any temporary maintenance. Sometimes, if you have a marriage where one party owns the house in advance, you can contemplate issues such as the other spouse can stay for a certain period of time in the event of divorce so that they are not automatically kicked out. You can contemplate taking care of each other on a temporary basis, even if worst-case scenario happens.

It is about protecting your assets, but also contemplating "what if divorce happens," or "what if worst case scenario happens." I've seen people put in provisions for like what if one party cheats, you don't have to put those provisions in there but I have seen it done. You can really think about and contemplate "what if a bad thing happens" in your marriage and how that would be treated. Again, it is negotiating these things while things are good vs. when you are in the middle of a divorce and it is not so easy to negotiate, so that everybody is protected.

**Erin Garza:** That is a good question, the "what if?" I think that is a question that people may not think of before they get married, but it is certainly something that you can address after you are married. There are such things as postnuptial agreements, post-marital agreements that maybe people don't talk about as much, but they're still really important. Wouldn't you agree?

**Laura Hayes:** Absolutely. I don't think post marital agreements are used as often as they should be. Although, I have actually seen a large increase in requests for post marital agreements since COVID. A lot of people have heard about the rise in divorce rates, but there are a lot of people who are afraid to file for divorce but they know they are ready. Entering into a post marital agreement is a good vehicle to allow people to separate and move on with their lives without actually processing a divorce. There are a lot of different reasons for people to enter into post

marital agreements, but I think they are a really effective tool for lots of reasons. Especially, when you are in a state like Texas because there is no legal separation. There are some states that allow for that and for the parties do remain married, but to be legally separated Texas does not have that. In Texas, a way to get around that, if parties aren't quite ready to actually have the divorce — whether that's for religious reasons, insurance reasons, whatever the reason might be — a post marital agreement is a great way to address that.

**Erin Garza:** I'm glad you mentioned that there is no legal separation in Texas because that is something that distinguishes Texas law from other states. We have seen certain cases, I have personally seen some situations, in which a couple is not ready to get divorced but they want to be separated, maybe living in the same condo but living on separate floors. A post marital agreement, I think that can be something very helpful to help them legally separate within Texas while still being married.

**Laura Hayes:** Absolutely. I've done this several times. I'm helping a couple who pretty much lives separate lives right now, but because one of them has a very serious health issue, and the other spouse's employment is how their health insurance is maintained, they don't actually want to file for divorce. They have been married a long time and they still want to take care of each other but they are essentially living separate lives. One of the spouses also recently inherited significant assets and that spouse wants to protect them. So we are working on a post marital agreement to allow them to live completely separate lives, not worry about who is moving on with their lives, who is spending what money. They are dividing the assets and then making sure the spouse with the health issue has enough to take care of herself going forward. Neither one of them actually wants to terminate the marriage, they just want to have the time apart knowing that they can live whatever life they need to live at this point in time, but they are still taking care of each other.

So that's a tool that I have used on several occasions and I find that very helpful. Especially when there are some people who, again, do not want to actually go through a divorce process for things like religious reasons, or just their own personal beliefs that divorce is wrong, but they just need to be able to move on with their lives, or they want to stay married for kids or other reasons. The post-marital agreement is good, although it can sometimes lead to a divorce. If things are not good but they're not ready for a divorce, sometimes dividing the assets through a post-marital agreement and allowing people to kind of separate for a little bit, that makes it a little bit easier to finalize the divorce if the marriage comes to that point. That is another way you are essentially handling the divorce negotiation. Then, if one party decides they want to proceed with an actual divorce, the post-marital agreement can be the guide for easily dividing the assets and making the divorce process less painful.

**Erin Garza:** I think a lot of people listening to this podcast might want a guide to the divorce process. Hopefully that is what this podcast is serving for them, but a lot of people we see have a fear of filing for divorce. They are worried about taking that first step and what it is going to

mean. I think there is somewhat of a misconception that every divorce has to be very contentious and take a long time and is very expensive. We know that is not always the case – maybe in some situations, but not always.

**Laura Hayes:** Absolutely. You're right. There are a lot of people who don't understand that it can be amicable, but it takes two people. It takes both parties really wanting to make the process less painful and reach agreements. I've seen it happen a lot of times. I think that, at the end of the day, if you can handle it that way, it's better for both parties. I think there are some people who come out of divorce celebrating it as the greatest day of their lives, but for most people there is still some emotion and it is still a difficult process. It does not have to be as ugly and nasty as a lot of the real high conflict cases can be. So a lot of people hesitate on filing. There is still a stigma in society about being divorced, and so they hesitate on filing, or proceeding. I think one of the things I want to get across is that it does not have to be a scary process. If you have the right team of people surrounding you, while it is emotional and it is painful, it does not have to be scary, it does not have to be ugly and nasty. It can be resolved in a relatively quick way.

**Erin Garza:** I'm glad you mentioned having a team in place because something we have seen outside of the family law context, too, is a movement to make sure you are taking care of your mental health, your physical health, your emotional wellbeing. That's something you can't leave at the door whenever you're walking into a divorce process either. It is important to have your family in place, have your friends with you, and also important to have your legal team in place to be by your side as you are entering the divorce process. Just to emphasize, if you are going into it, you are certainly not going into it alone.

**Laura Hayes:** Absolutely. I think it is important, like you said, to have friends and family, and also having a lawyer that you can trust, but also having an outside team. In the first podcast episode, Judy and I talked about a financial team and having a wealth advisor, or accountant, and other things. Having the, like you said, the mental health and taking care of yourself, the self-care side of it, too. Making sure that is at the forefront of the day-to-day life of someone going through a divorce because it is. Again, even if you are the one who wants the divorce, it is still an emotional process – just how long it takes, and going through finances, dividing everything and moving onto the next chapter, is sometimes scary. So taking care of yourself through the process is very important.

**Erin Garza:** Right. I think one of the ways to address the fear of filing, too, would be becoming more familiar with the process. A lot of people who are thinking about divorce, but have not been married or divorced previously, do not know what the process is, they do not really know what to expect. Especially given COVID, they are uncomfortable filing through this time. So coming in to talk to an attorney who can educate you, provide resources on divorce and through the process overall, and what are your next steps moving forward – that can help to alleviate some of the initial fear of filing.

**Laura Hayes:** Absolutely. The hardest part sometimes is taking that first step. Especially for longer-term marriages, you become comfortable having that person in your life, or having someone else for support. A lot of people find it very difficult to move on by themselves. One of the things that I find rewarding about this career is when I have a client who comes in and is very emotional and scared of the whole process, but then they go through it and they learn and they're educated by all the members of the team and their friends and family, and then they realize how great life can be even after a divorce. I think one of my favorite things is when I hear from clients several years later about how wonderful they are doing and how life has changed. It can be really a great thing, even though it is scary learning to grow and learning through the process. But having the support team can really end up – it is obviously life changing but it can put an individual who has been unhappy on a much happier trajectory. That is one of the good things about this career.

**Erin Garza:** That is certainly always the goal.

**Laura Hayes:** Right, absolutely. Well, this has been great. Erin thanks for talking through prenups and postnups and the fear of filing. I appreciate our audience listening to us today. I just have one final question for you today, Erin. Do you have any favorite divorce movies or TV shows that you can recommend to our audience?

**Erin Garza:** I do. I would say this one is always a feel good, no matter how many times you have seen it. It would "Parent Trap." Throw it back to the initial Lindsay Lohan days and re-watch it every now and then.

**Laura Hayes:** That is a great one, and, you're right, it is funny. It shows it does not always have to be super ugly, there can be happy endings. Thanks so much.