TILL PRENUP DO US PART?

By Y. Jennifer Lee

Marriage is one of the oldest institutions in the world and perhaps still one of the most romanticized acts that modern-day human beings engage in. Yet, changing priorities in our society based on gender norms, financial considerations, and many other factors have slowly evolved the concept of marriage and transformed the traditional values that it used to uphold.

In the old days, marriage was primarily a financial consideration. Women, who were usually unable to own land, have financial rights, or earn income, had only marriage to rely on for a protected future. Societal expectations of gender roles and the natural transition from marriage to starting a family have also played, and continue to play, a major role in marriage. In the modern era, while some of these same considerations are still at play, marriage is now seen much less as a necessity but a choice.

This choice, however, comes at a hefty price if the marriage ends. While easy it's to get married, the process of divorce can be significantly more complicated. Add in considerations for children and custody issues, and the process becomes even more complex.

THE EVOLUTION OF DIVORCE

The process of divorce itself has evolved through history just as much as the institution of marriage. Not even a century ago, divorces often required a specific reason before one could be petitioned, and absent sufficient evidence proving this reason, the divorce could be denied. These reasons often centered around proving adultery, domestic abuse, abandonment, or some other unsavory issue such as bigamy or fraud; simply not wanting to be married anymore was not an option. In short, if you wanted a divorce, you would not necessarily get one.

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Even as time went on and the ability for people to divorce became more accessible, the process of actually getting a divorce was still, and remains today, an incredibly complex one. For example, in California, the concept of a "no-fault" divorce was only established in 1969. Until then, parties seeking a divorce still had to prove the same emotionally traumatic issues such as adultery or abuse that directly impacted how much of their marital estate they would receive at the end of it all.

Even in today's "no-fault" divorce environment, couples going through the divorce process are left to the mercy of their attorneys, the court system, and sometimes antiquated laws to resolve their case. Despite the legislature's and the judiciary's attempts to create statutes and case law that turn the financial elements of a divorce case into merely a math problem, many family law courts still operate as a court of equity. Thus, family law attorneys remain gainfully employed because the way the math shakes out and what is "fair," particularly to warring parties, can be complete dichotomies. Absent a prior, signed written agreement such as a prenuptial agreement, much can be disputed for years in a divorce.

THE ROLE OF PRENUPTIAL AGREEMENTS

It should go without saying that most people do not get married to get divorced. Those couples who are facing a divorce likely never thought it would happen to them, nor did they even consider it a possibility at the time they got married. So, the idea of putting together a legally binding document that prepares them for such a situation would seem like a bad omen. Negotiating a prenuptial agreement while you're picking out flower arrangements and sorting your wedding guest list hardly screams romance.

However, a prenuptial agreement should be seen more as a vehicle of pragmatism than a bad luck charm. A prenuptial agreement can be likened to an insurance policy, one that you hope to never need but shouldn't live without. Just as nobody expects to get in a grisly car accident, or be hospitalized for a major illness, or die unexpectedly, we still have car insurance, health insurance, and life insurance policies to prepare for the unforeseen. Depending on your own individual circumstances and lifestyle, the amount of coverage you obtain may vary. And just like an insurance policy, a prenuptial agreement can vary in the issues that it covers. It cannot cover everything, but it can significantly limit the problems that arise later in the event of a divorce.

A prenuptial agreement should be seen as a vehicle of pragmatism, not a bad luck charm.

In most divorce matters, there are four primary areas that become subject to dispute: (1) property division, (2) financial support such as child or spousal support (or alimony), (3) child custody issues, and (4) attorney's fees. Each area is the subject of thousands of statutes and case law that become fodder for costly litigation when there is a dispute. However, most of these areas can be predetermined by a prenuptial agreement.

ENFORCEABILITY

In 28 states, including California, prenuptial agreements are governed by the Uniform Premarital Agreement Act (UPAA). The UPAA governs the enforceability of prenuptial agreements entered into on or after January 1, 1986. The remaining 22 states that have not adopted the UPAA still allow for prenuptial agreements but have different rules regarding their enforceability.

A prenuptial agreement can effectively contain whatever provisions the parties agree on regarding any issue, provided the provision is not unconscionable, but it is limited by basic rules of enforceability that are governed by public policies of equity and legality. In other words, you can't have a prenuptial agreement that would otherwise violate public policies, require a court to violate public policies in order to enforce it, or attempt to do something illegal.

This means no provisions regarding children. An enforceable prenuptial agreement cannot contain terms that relate to custody and visitation issues, child support issues, or anything to do with children that the parties may already have or plan to have. From a public policy perspective,

this makes sense, given that nobody can predetermine what is appropriate for children at an unknown time in the future.

For example, in California, issues relating to children are generally governed by the principle of "best interests"—what is in the best interests of the children. Whether a certain parenting schedule, amount of child support, or ability to make important decisions about a child's welfare is in the child's best interests may differ drastically today versus an indeterminate time in the future. Thus, divorcing parties who have a prenuptial agreement but also have children may still find themselves in court litigating custody or child support issues.

Even with a prenuptial agreement, parents may still find themselves in court litigating custody.

An enforceable prenuptial agreement also should not have infidelity clauses. As popular as they may seem, particularly in celebrity social circles, a prenuptial agreement should not have one set of terms for a divorce under simply irreconcilable differences and another set of terms for a divorce due to infidelity or adultery.

Again, from a public policy perspective, such a provision would require the fact-finder (usually the court) to determine whether infidelity or adultery has actually occurred, violating the concept of a "no-fault" divorce. While you could include such a provision anyway and then include a severability clause that carves out the offending "infidelity" clause, the same enforceability issue remains regarding that particular clause, rendering it meaningless to include at all.

Similarly, an enforceable prenuptial agreement cannot have provisions that would make it more advantageous for a party to obtain a divorce than to remain married. This usually takes the form of provisions where a party would receive substantial payouts of money or assets that exceed what they would ever be entitled to under the law absent a prenuptial agreement. Public policy is meant to encourage the bonds of marriage and discourage divorce, and a party should not be provided the opportunity to get married solely to get divorced because they would profit from such a transaction.

Absent these particular offenders, prenuptial agreements can run the gamut in the protections they can provide. This can include specific provisions regarding premarital property or financial interests, characterization of property or financial interests acquired during marriage, limitations on spousal support, assignment of assets or debts upon divorce, and allocation of payment of attorney's fees. This can also include entire waivers of a party's interest in the other party's assets or property, including retirement benefits, acquisition of property, and survivor or death benefits, regardless of the length of the marriage.

The UPAA only requires that the agreement be in writing and signed by both parties, and it is enforceable without consideration and effective upon marriage, with some exceptions. However, each jurisdiction will have additional requirements regarding representation by counsel and sufficient passage of time prior to execution of the agreement. For example, in California, absent extremely limited exceptions, prenuptial agreements are generally unenforceable if a party to the agreement was unrepresented by counsel. Similarly, if fewer than seven days have passed between when a party received the final agreement and when it was executed, it may also become unenforceable.

The agreement must also contain provisions that reflect full disclosures by both parties prior to entering into the agreement. This includes a complete disclosure of all assets, debts, incomes, and expenses by both parties, to be put into writing, incorporated into the agreement, and exchanged between the parties prior to execution of the agreement. This helps ensure that both parties are entering into the agreement with a complete understanding of their respective financial circumstances.

When all is said and done, a prenuptial agreement is a contract. And with all contracts, the legal profession remains on standby to find ways to either attack the contract or fortify it, depending on which side you represent. However, a carefully, well-drafted prenuptial agreement where both

parties are represented by counsel that meets all the requirements of an enforceable contract is as close to an iron-clad agreement as you can get. Such an agreement can quite literally save parties years of litigation and hundreds of thousands of dollars in attorney's fees to dispute these same issues.

WHO BENEFITS?

So, ultimately, who can benefit the most from having a prenuptial agreement? The answer is anyone planning on getting married.

One of the most common misconceptions about prenuptial agreements is that they would only be beneficial for parties entering the marriage with significant assets already or if there is a significant disparity between the parties' financial circumstances prior to marriage. While such parties would certainly benefit from a prenuptial agreement, so would parties entering into a marriage with few or no assets.

Prenuptial agreements are meant to protect against the unknowns of the future. Parties who enter into a marriage with significant assets could lose those assets over time, just as parties entering into a marriage with few or no assets could grow or accumulate significant assets over time. Those gains and losses, and perhaps who was responsible for them, are among the biggest areas of contention in a divorce. They take the form of disputes over the amount of alimony, the value of assets received by either party, and the responsibility for debts incurred. The purpose of prenuptial agreements is to provide for how those potential gains and losses are allocated between the parties in the event of a divorce.

Another common misconception is that even the specter of a prenuptial agreement itself can have a chilling effect on the marriage, possibly derailing the marriage before it's even begun. The party against whom a prenuptial agreement is sought can often be heard accusing the seeking party of not trusting him or her or assuming the marriage will end before it's even started. But this perception of prenuptial agreements should change.

Discussing a prenuptial agreement requires both parties to make a full financial disclosure.

Parties with few assets would still benefit from a prenuptial agreement.

It requires parties to have those uncomfortable conversations about who would be responsible for what, who should keep what, and who should pay for what. It requires them to explore whether they want to create a joint account for household expenses or if they want to continue keeping their expenses separate. It requires them to discuss who will keep working while the other stays home and who will keep contributing to their retirement while the other uses their income for expenses. These are just some of the issues that arise when negotiating a prenuptial agreement.

More importantly, these discussions will be had regardless of whether there is a prenuptial agreement. Married couples cannot avoid having challenging discussions about finances, and perhaps it is the avoidance of communicating about those issues that can lead to a divorce. Couples on the precipice of marriage may be so caught up in the romance and the excitement that they have not even considered these issues, hoping that the strength of their relationship will carry them through any challenge. Parties may fear that discussing these issues would result in discord on the eve of a celebratory occasion or even the realization that their values and principles may not be as aligned with their partner as expected. When on the precipice of their big day, such a confrontation with reality would be most unwelcome.

CONCLUSION

Whether it is prenuptial agreements that have weakened the constructs of marriage or whether it is the weakened constructs of marriage that have led to the prevalence of prenuptial agreements will remain controversial. However, what remains certain is that until death do you part, in sickness and in health, for richer or for poorer, the family law community will be around. ■

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