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Prenuptial Pacts: Bliss or a Miss?

By BETH ANN KRIER, Times Staff Writer

The man's fiancée was slim. He liked her that way. He wanted her to stay that way. And he determined to do everything within his power to ensure her continued slenderness.

He couldn't force her body to remain in his preferred configuration. But he could provide an incentive, or threat as it turned out. Before the wedding, the groom got his bride to agree to pay a fine if she gained weight, refundable upon weight loss.

This was no idle promise. The couple backed it up in writing in a prenuptial agreement negotiated by New York City attorney Jacalyn Barnett.

Welcome to marriage, contractual style, circa 1986, a time when legal documents are increasingly spelling out everything from closet space allocations after the wedding to who gets to keep the rent-controlled apartment after the divorce.

Share Equally

It is not uncommon to find recent premarital contracts decreeing that spouses will alternate in choosing vacation spots, that both parties will share equally in disciplining children or that the partners have fully disclosed to each other the nature of their sex experiences before marriage.

One Los Angeles woman about to wed a confirmed workaholic even specified in her agreement how many weeks of vacation her husband is required to take each year and how many nights per week he must take her out to dinner.

Though no one knows precisely how many premarital contracts are being negotiated today (they are private agreements and may only come to more public attention in the event of a contested divorce action), attorneys say they are unquestionably seeing rising demand for all sorts of prenuptial agreements, both the strictly financial variety and those with unusual life-style clauses as well. And there is apparently enough premarital and non-divorce work that many divorce lawyers now call themselves matrimonial practitioners or family law specialists.

Legal Terms

Why are today's couples getting so picky about the conditions of their marriages? And picky enough to pay lawyers to set those conditions down in legal terms at rates ranging anywhere from \$500 (the fee at a Jacoby & Meyers branch for the simplest prenuptial contract) to upwards of \$10,000 for a complex agreement covering a large estate?

Some attorneys, like Michael Kelly of Kelly & Cogan in Santa Monica, attribute the trend to the fact that people are marrying or remarrying at later ages—and often bringing more assets, more experience and more expectations to their marriages.

And lawyers say that because of the increasing number of remarriages in which the bride or groom may have grown children, more agreements are being initiated by those children (who wish to protect their inheritances).

In addition, prenuptial agreements are occasionally drafted at the urging of business partners of the bride or groom. According to attorneys, co-owners of companies sometimes insist on prenuptial agreements because they fear that a hostile divorce action could subject a company to litigation. The partners would rather not have the details of their business affairs divulged to divorce attorneys or appraisers seeking to place a monetary value on the company.

Then there is the influence of the women's movement. As Stanford University's Lenore J. Weitzman characterized the chief reason behind the boom in prenuptial agreements, "Young idealistic couples want to form egalitarian relationships and want to be sure that marriage truly is an equal partnership."

An associate professor of sociology and author of "The Marriage Contract, a Guide to Living With Lovers and Spouses," Weitzman also credited "people who know how disadvantaged women can be in the divorce courts" for a portion of the increase.

And, of course, there are still requests for prenuptial agreements from their most traditional customers: men who make considerably more money than their wives and who want to avoid singing Jerry Reed's country hit "She Got the Gold Mine, I Got the Shaft" in case of divorce.

With all these varied and often vested interests to consider in drawing up marriage contracts, it is no wonder that many attorneys are now bringing in psychologists to help their clients negotiate their wishes.

"We get the gamut," said Don Smith, a Santa Ana marriage, family and child counselor who is also an expert in family law, custody and molestation matters. "It goes from the silly to the stupid. We help people negotiate everything from who's going to pick up the doggie poo to the usual stuff on feeding the kids and doing the dishes."

Smith, who has worked with clients referred by two attorneys for prenuptial work, considers the

agreements a good thing, "depending on the sincerity of the couple." And he observed that the resulting documents are useful for defining "areas where people have strengths and weaknesses."

But he also noted that some soon-to-be spouses request agreements that are so definitive that the partners "can't be human."

On the other hand, Smith pointed out that it is unwise to dismiss all seemingly trivial requests as merely the petty demands of immature people; such demands can sometimes steer a couple to deeper issues that the partners have thus far not addressed.

A case in point concerned a woman with a 6-year-old son who adamantly refused to have his hair washed. When she and her husband-to-be discussed with Smith which spouse would assume or share certain roles in the marriage, the man volunteered to be responsible for washing the boy's hair.

Only in the course of that discussion, Smith said, did the man learn that the boy about to become his stepson had once been disciplined by having his head shoved into a toilet—hence his hair washing phobia. The man decided perhaps there would be a better way to inaugurate a fatherly relationship with the boy than by washing his hair.

But sometimes the demands in prenuptial agreements are so outrageous that attorneys refuse to incorporate them into contracts.

PACTS: Prenuptial Agreements

Consider a case briefly handled by Barnett, who had no trouble drafting the contract for the man who wanted his wife to stay slim. This matrimonial practitioner and partner in the New York office of Shea & Gould refused to draw up a prenuptial agreement for a childless man about to marry a woman with children from a previous marriage. The man wanted his fiancée to promise that if the two were divorced and had one child, he would automatically be granted custody.

He also insisted that the agreement state that he would get what Barnett described as "his pick of the litter" if the couple produced more than one child.

Despite the fact that courts ultimately determine custody arrangements, Barnett refused to draft an agreement in which "children were treated as commodities."

The couple never married. Said Barnett: "I didn't stop a marriage. I prevented a divorce."

Some attorneys find that premarital agreements are such powerful divorce-prevention tools that they will not even begin to negotiate these contracts unless their clients consider a whole series of personal questions on marital nitty-gritty.

Kelly, for instance, has more than 60 questions on his standard premarital agreement checklist. Some of them sound as if they came from a legalized version of "Let's Make a Deal" meets the "Newlywed Game":

"What will be the extent of contact with the relatives of each party?"

"Who will bear the responsibility for birth control?"

"What are the parties' attitudes and expectations regarding sexual fidelity?"

And, in case promises are broken:

"Do the parties wish to make a provision for liquidated damages in the event that some of the other spouse's promises are not kept?"

"Do they want to post a bond or other security to guarantee performance of the other party's promises?"

Kelly, who teaches advanced family law at USC, believes that addressing personal questions is beneficial on far more than just a legal or financial level.



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Attorney Michael Kelly with camera he sometimes employs.

"Marriage is the one contract that once you enter into it is subject to a broad range of judicial regulations. It's better that you lay out as much as possible ahead of time. The divorce rate—approximately 60% in California and 50% nationally—comes from people never asking or dealing with those kinds of questions," he said.

Reveal Differences

"What the questions do is to illuminate significant differences. People often marry with an assumption that the rest of their lives will be like the wonderful weekend they decided to get married on. In reality, life is fired at you point-blank."

"What those questions can do is save a divorce. The money matters are significantly incidental. If you cannot agree on some of the items that are on my checklist before you are married, it is for sure that you will not be able to agree on those items after you're married."

Kelly acknowledges that some of the questions on his checklist may result in agreements that are not kept—and that no court is likely to rule on broken dieting-for-dollars clauses or provisions on who dumps the trash.

But the attorney maintains that some personal issues, such as whether birth control will be used and by whom, may later carry considerable weight in matters before the court.

"Some people have agreements

to have children and that they will not use birth control," he pointed out. "In California, you can get an annulment based on one person misrepresenting to another that they would have children."

Kelly further observed that issues regarding life-style clauses in prenuptial contracts have occasionally even reached the appellate courts. He cited a recent California appellate court ruling that refused to throw out an entire prenuptial agreement because a life-style condition regarding parenting responsibilities had not been fulfilled.

"It's a very important decision," he said. "You can't get anything to the appellate court level unless it's significant. It's one more indication that courts will honor these contracts."

To avoid other potential challenges in court, Kelly often goes to the trouble of having clients videotaped during the signing of agreements. On tape, he asks them to state how willing they are to sign. This is so that if one party later claims that he or she signed under duress—which could void the agreement—a judge can review the videotape to help determine a judgment.

Palimony Pioneer

But with or without the assistance of video technology, many divorce attorneys remain strongly opposed to the whole notion of prenuptial agreements.

"I've never seen a marriage survive a prenuptial agreement," claimed Century City-based palimony pioneer Marvin Mitchelson, obviously speaking for marriages he has observed over a period of time.

"Mostly, prenuptial agreements are designed against women and they create tremendous distrust to start with and can make someone feel very insecure. It's a negative way to go into a relationship."

"What these agreements basically say is, 'In case we have a problem, you're not going to get what you'd be entitled to under the law, an equal division of community property. You're going to get something less,'" said the attorney.

Mitchelson similarly cares little for premarital agreements supposedly initiated by a bride or bridegroom's business partners to protect a firm. To him, such a reason for entering a prenuptial agreement is "a sham," an excuse for retaining more than the standard 50% of community property.

There are legal processes available to help determine the value of these businesses, he said, adding that existing laws governing the discovery process to determine the value of a business or other property are adequate.

But other lawyers contend that premarital agreements can save costly and extensive litigation over the worth of a business or other matters.

"If nothing is said about the business interests . . . this could be disastrous and could lead to very bitter litigation and unbelievable expense," said attorney Irving Kellogg, an estate planning specialist who drafts prenuptial agreements precisely because of their profound effect on estates.

Kellogg, who is with the Century City firm of Alschuler, Grossman & Pines, considers premarital agreements "a prudent business decision . . . but whether they're a prudent

emotional decision depends on the emotional makeup of the two parties."

Much like the couples involved, though, divorce lawyers themselves, both the prudent and the emotional, are deeply divided over the implications of the marriage pact.

Some, like Daniel Jaffe of Beverly Hills-based Jaffe & Clemons, an attorney who lectures on prenuptial agreements for the California State Bar, will recommend the contracts to clients—but without what he called the "cute" life-style clauses.

Other family law specialists openly despise the agreements in any form. Attorney Joseph DuCanto of Schiller, DuCanto & Fleck in Chicago argues that prenuptial contracts often "foment litigation." He calls them "the most dishonored agreements ever written by the hand of man."

"Life is not a series of predictable events," emphasized DuCanto, whose 15-member firm specializes in divorce and separation matters. A prenuptial agreement, he said, "tremendously commercializes the whole concept of what marriage is about." He said the agreements should be regulated by an act of Congress or abolished entirely.

What do judges have to say about all this?

Good Idea

Nobody has taken a poll. But in the estimation of retired Los Angeles Superior Court Judge Harry T. Shafer, who is highly respected and still active in court work despite his retirement, prenuptial contracts are an "excellent idea—if the parties are fully advised of their rights, if they know what they're doing and go into it with their eyes open."

Shafer has participated in many celebrated divorce cases, including those of Mick and Bianca Jagger, Farrah Fawcett and Lee Majors and Sheik Mohammed and Sheika Dena al-Fassi.

The judge is not impressed with life-style clauses in prenuptial contracts and considers them "burdensome." But he suspects that judges in general share his views on the usefulness of the financial portions of the agreements, if only from the standpoint of their clearing effect on the court calendar.

Shafer's wife, however, doesn't think much of prenuptial agreements, even if they do ease the pressures on the court. But as Shafer reasoned, "We've been married 46 years, so why should she worry?"