

## PREMARITAL AGREEMENTS - YOUR CLIENTS, YOUR CHILDREN, YOURSELF

"For better or for worse," premarital agreements are being considered by more and more people. [\(1\)](#)

What are they? Why would they be of interest to you? [\(2\)](#) What can they cover? Are they enforceable?

In my capacity as a mediator, I have with increasing frequency been asked to meet with couples prior to their marriage and facilitate their arriving at agreements for the premarital contract. Thereafter each party goes to independent counsel to review, advise, and sign-off the agreements. These premarital agreements often define the law in California, and how the parties want the law or a variation of the law to apply to their marital property.

### I. HISTORICAL PERSPECTIVE

Especially in light of the recent court cases regarding the definition of marriage and the rights of Gay people, a historical perspective provides a backdrop to today's events.

2000 years ago, marriages were largely economic matters. Women were "property" and had very few rights. If there was a divorce and a financial settlement was reached, the settlement was not paid to the woman, rather it was paid to her father because he was the previous owner of the "property."

Divorce rates are high now. One of two marriages ends in dissolution and two out of three second marriages end in dissolution. The high rates are not because people take their marriage vows lightly. Divorce is extremely difficult. Today we think of marriages as legal contracts: There is an offer (a proposal of marriage), and acceptance (engagement), and consideration (living together for life). Over the centuries the government has played an increasingly important role in enforcing and regulating contracts that citizens enter into - including the marriage contract.

In early times, churches took little interest in marriage. Roman law spelled out what was required for a marriage contract (render unto Caesar what is Caesar's . . .). Early on, following the financial negotiations, couples and their families "announced" there was going to be a marriage. The church was not involved and there was no specified or required ceremony to mark the beginning of a marriage.

Over the following centuries things stayed pretty much the same until the 8th or 9th Centuries when the Roman Catholic Church slowly and unevenly began to exact its control over Europe and the social and political life of

Europe, including the writing of laws regarding marriage and sexual activities. It was not until the 12th Century, however, that the Roman Catholic Church made marriage a sacrament, and established ecclesiastical courts to enforce its Canon Laws.

During the Protestant Reformation of the 17th Century, among other things, the Protestants rejected the idea that marriage was a sacrament. As a result of this redefining, marriage became "pronounced" (not announced by the parties or their families). As a result of this "pronouncement," marriage had to be a public ceremony presided over by priests and attended by witnesses. The couples being married had to obtain parental consent (if under 21 years), and the marriage had to be entered into a registry. The Catholics went along with this because the Catholic Church had Canon Law for 500 to 600 years, they had a built in structure to handle the marriage registration, etc. However, Protestants did not have the Canon Law infrastructure, so they elected to hand these duties off to local government. This is when the state first began to take a strong interest in marriage - much more than the Romans - and began to dictate who could get married (age) and the acceptable reasons for dissolution of marriage.

## **II. WHO GETS PREMARITAL AGREEMENTS**

While those who participate in premarital agreements are numerous and varied, they tend to group themselves in the following categories:

- ! Those who have earned a lot of money (millions) and sometimes those who have saved \$100,000 through hard work.
- ! Persons who own assets (home, stock, retirement).
- ! People who own all or part of a business.
- ! People who own a professional business (attorneys, doctors, dentists, accountants).
- ! Those who anticipate receiving an inheritance.
- ! People who have children or grandchildren from a prior marriage.
- ! One party is much wealthier than the other party.
- ! Persons who need to support others through college/professional degree.
- ! Persons who have elderly parents to care for.
- ! Persons who anticipate large increase in income.
- ! Persons who want to control their own destiny.

## **III. WHY PEOPLE ENTER INTO PREMARITAL AGREEMENTS**

Again, the reasons are varied, but those most frequently articulated are as follows:

! You need to find out what the other wants from the marriage, appreciate the concerns of the other, and make sure each get what they want.

! Half the marriages end in dissolution, so why not save the anguish and tens of thousands of dollars later, and enter into an agreement now when you are in love.

! Love - you may still love your partner, but the relationship may no longer be satisfying, so you define your commitment now and give your love a better chance to stay the same.

! It is like premarital counseling.

! You can negotiate the nuts and bolts of the relationship while you are full of love, not hate.

! If you cannot agree on important matters now, maybe you shouldn't marry. How will you know if you are incompatible?

#### **IV. REASONS NOT TO GET A PREMARITAL AGREEMENT**

! Not very romantic.

! It predicts doom.

! I'd rather have some unknown judge decide (goes to the four ways to resolve conflict).

! How would you react if your fiancé requested a premarital agreement?

! Requesting a premarital agreement "signals" uncertainty in the relationship (are you planning for a dissolution?).

! Just asking reflects a positive probability of dissolution. (Notably, most people questioned about premarital agreements state they believe this.)

#### **V. WHAT CLAUSES ARE COMMONLY IN PREMARITAL AGREEMENTS**

! Discloses assets and debts - full, fair and reasonable. (Sometimes waives disclosures beyond what is provided - good idea?)

! Waives community property rights in: business, real estate, retirement, intellectual property, personal injury damages [\(3\)](#).

! Preserves assets acquired prior to marriage as separate property.

- ! If one party is to be the stay at home mom and raise the children, more protection can be given to her than the law would give in a long-term marriage.
- ! Contractually limit the basis for dissolution (contract marriage not valid in all states).
- ! Eliminates all or various forms of community property.
- ! Proceeds of loans on separate property are not community property.
- ! Waives the right to spousal support in certain limited circumstances.
- ! Gives a property as an incentive not to attack the premarital.
- ! Sunset clause - provides after 10 years the agreement expires.
- ! Provides review - revisit after 5 years of marriage which allows one to be more generous with their separate property.
- ! Provides for living arrangements for the less wealthy partner in the event of the untimely death of the wealthy partner.

## **VI. PROVISIONS GENERALLY NOT ENFORCEABLE**

- ! Enforceable outside California (courts in California can only compensate with California property).
  - ! Unconscionable spousal support waiver: Courts in California require a party be represented by counsel and look to the fairness when the agreement is entered into and when it is to be executed (even if years later!).
- Alternative: A party creates wealth in the other party to protect/limit support exposure since enforcement of a waiver is so questionable versus waiver.
- ! Law may change.
  - ! Eliminates defense of duress fraud, undue influence.
  - ! Mix-up separate property.
  - ! Agreement gets lost.
  - ! No complete disclosure. If disclosure is not complete can it be waived?
  - ! Agreement cannot promote dissolution.

## **VII. SUBJECTS NOT ENFORCEABLE**

- ! Custody of children.
- ! Religious preferences of children.
- ! Personal habits.
- ! Penalties for unfaithfulness.

A recent report of the “set of rules for marriage” proposed by Jennifer Lopez to Ben Affleck to be incorporated into their premarital agreement, included some items that are technically not enforceable, yet most interesting: stipulations included conjugal relations every other day at a *minimum*, a \$5 million fine for Ben if he strayed from the marital bed, as many children as Jennifer wishes, and they must surprise each other with lavish gifts.

An Egyptian dowry agreement was sought to be enforced which provides the bride (described as a “virgin”) would receive only 500 pounds (about \$30 today). The court rejected this as “hopelessly uncertain as to terms and conditions.”

In a recent survey in the UK of some 6,000 people, half of them said they wanted a premarital, and the clause most frequently cited to include was “no cheating.”

Last year the California Court of Appeals rejected a premarital agreement where the husband agreed to transfer his interest in certain property to wife should he use illicit drugs during the marriage. While the trial court upheld the transfer, the Court of Appeals held this violated California’s “no fault” laws. Query: If the agreement simply said in the event of a dissolution, husband would transfer certain assets to wife.

### **VIII. TAX ISSUES**

! Transfers between parties prior to marriage are taxable transfers, however, transfers between married parties (spouses) are not taxable. Note: if one spouse is a non-US citizen, there are some restrictions on gifts between spouses, marital deduction on death, and tax free exchanges.

### **CONCLUSION**

You can control your own destiny and not leave it up to the state system as a default. Why not write a martial contract to meet your individual needs?

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A groom must expect matrimonial pandemonium when his spouse finds he’s given her a cubic zirconium instead of a diamond in her engagement band, the one he said was worth twenty-one grand.

Our deceiver would claim that when his bride relied

on his claim of value, she was not justified  
for she should have appraised it; and surely she could have,  
but the question is whether a bride-to-be would have.

The realities of the parties control the equation,  
and here they're not comparable in sophistication;  
the reasonableness of her reliance we just cannot gauge  
with a yardstick of equal experience and age.

This must be remembered when applying the test  
by which the "reasonable fiancée" is assessed.  
She was 19, he was nearly 30 years older;  
was it unreasonable for her to believe what he told her?

Given their history and Pygmalion relation,  
I find her reliance was with justification.  
Given his accomplishment and given her youth,  
was it unjustifiable for her to think he told the truth?

Or for every prenuptial, is it now a must  
that you treat your betrothed with presumptive mistrust?  
Do we mean reliance on your beloved's representation  
is not justifiable, absent third party verification?

Love, not suspicion, is the underlying foundation  
of parties entering the marital relation;  
mistrust is not required, and should not be made a priority.  
Accordingly, I must depart from the reasoning of the majority.

**Originally presented to**

**WESTERN TRIAL LAWYERS ASSOCIATION**

**June 2005**

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<sup>1</sup>Although it is difficult to get statistics on premarital agreements, it appears that 5% to 10% of couples marrying for the first time and 20% of remarried couples now enter into premarital agreements. Clearly, the percentages are increasing.

<sup>2</sup>Of specific interest to personal injury attorneys, if a client is injured prior to marriage but recovers funds during marriage, what is the character of the award? Can a party prior to marriage enter into a contract that states personal injury awards will be separate property no matter when they are received? Is this something you should question your client about? What if both spouses are injured and you are initiating a loss of consortium claim? Would it be important for you to know if they had a premarital agreement and its terms?

<sup>3</sup>FC 2603 in California provides personal injury damages are community property which “shall” be assigned to the party who suffered the injury **unless** after considering the economic needs of each party, the time elapsed since recovery or accrual of the cause of action, and all other facts and “interest of justice” require another disposition . . . at least one-half shall be assigned to the party who suffered the injury.