

Some Pointers for Pre-Nups

Preventing Post-Marital Predations

A prospective benedict or bride must be aware of the rights that the marriage will confer on his or her soon to be spouse. Which of those rights can and should be waived in a prenuptial agreement? What does it take to make the agreement enforceable?

Separate Representation. Each prospective spouse should have separate, independently selected counsel, who advises him or her of what rights he or she would have in the absence of the prenuptial agreement and the effect of the agreement on those rights. Consider having each lawyer certify, as part of the agreement, that he has been employed and compensated by his client and that he has fully explained the effect of the agreement on his or her rights.

In a case involving the major league baseball player, Barry Bonds, the California Appellate Court invalidated a pre-nuptial agreement on the grounds that the wife did not have independent counsel. The Court held that:

"when a party challenging a premarital agreement establishes that he or she did not have legal counsel while the other party had such assistance, and the unrepresented party did not have the opportunity to obtain legal counsel or did not knowingly refuse legal counsel, the court must strictly scrutinize the totality of the circumstances involved in the execution of the contract." and noted that: "Nothing raises the warning flag of unfairness more often than when an unrepresented party contracts with another party who is represented by an attorney and the unrepresented party waives statutory rights." ***In re Marriage of Bonds, 71 Cal. App. 4th 290, 72 Cal. App. 4th 94, 83 Cal. Rptr. 2d 783 (1999).***

On the other hand, where the "unrepresented party" was afforded, and rejected, the opportunity to receive independent advice, and,

additionally waived her right to consult with independent counsel, the agreement was held valid. *In re Marriage of McKee-Johnson*, 444 N.W. 2d 259 (Minn. 1989).

One of the commissioners that drafted the Uniform Antenuptial Agreements Act explained that parties need their own attorneys to "trot out the parade of horrors to their clients..." Proceedings in Committee of the Whole, Uniform Antenuptial Agreements Act, July 23, 1983, pp 52-53.

Full and Adequate Disclosure of Assets.

Each spouse must disclose all of his or her income and assets. Failure to do this may make the agreement unenforceable.

"When [a prenuptial agreement] provides disproportionately less than the party challenging it would have received under an equitable distribution, the burden is on the one claiming the validity of the contract to show that the other party entered into it with the benefit of full knowledge or disclosure of the assets of the proponent." *Fletcher v. Fletcher*, 68 Ohio St. 3d. 464 (1994).

What spousal rights are the parties waiving? You need to look to your own state law to determine what rights are conferred by marriage. Here are some of the ones that we take into account in our agreements: (1) To receive assets as an heir at law; (2) To contest the provisions of any will or trust agreement; (3) To receive a widow(er)'s elective share; (4) Dower or curtesy; (5) Homestead rights; (6) Alimony or separate maintenance; (7) To act as the spouse's administrator or conservator; (8) To receive damages for wrongful death or loss of consortium.

Community Property. Consider providing that the assets and income of each of the prospective spouses, including proceeds and reinvestments, remain separate, notwithstanding any community property laws.

Caveat re: Qualified Plans. The Federal Retirement Equity Act was supposed to ensure that the spouse of a qualified plan recipient receives survivor benefits from the plan even if the participant dies before reaching retirement age.

Although benefits may sometimes be waived in case of divorce, death benefits under pension and profit sharing plans are treated differently. They may not be waived, except by a "spouse." Since the parties to a prenuptial are not yet spouses, a waiver might not be effective. Perhaps a variation of a "no contest" clause used in wills would be useful. If the spouse agrees to waive her rights after marriage and has not done so, other provisions for her would be reduced by the value of the retirement benefits she received

CONCLUSION

Today, marriage is, unfortunately, not necessarily forever. Fifty percent of marriages end in divorce. Forty percent of marriages are entered into with a "pre-owned" spouse. Although it is a difficult subject to broach with clients, a properly planned and drafted pre-nuptial agreement can offer a layer of protection.