

## **Yours, mine and ours Experts urge care in proposing and crafting prenuptial pacts**

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Dr. Carolyn Ashworth and husband Barney Auton have the utmost confidence in their love and commitment to each other.

But they're also aware that 50 percent of today's marriages end in divorce.

Drawing up a premarital agreement was as much about demonstrating their love for each other and their children as it was about protecting the assets they accumulated before their marriage.

"We were in our 50s and we each had children from previous marriages," said Dr. Ashworth, a Dallas pediatrician. "They are adult children, and we felt we had an obligation to provide them with some benefits of the previous marriage and make sure that everybody was handled in a fair way."

A prenuptial agreement is a private agreement between two people contemplating marriage. A couple generally settles in advance financial matters in the event of death or divorce. Lifestyle or nonfinancial topics also may be covered.

The contract overrides and pre-empts state, family and probate laws that otherwise would apply.

Prenuptial agreements aren't for everyone, and they must be carefully crafted to ensure that the deal is fair for both parties, lawyers say.

"The typical young couple just starting out does not need them," said John McShane, a family law attorney and partner at McShane & Davis LLP in Dallas.

"For a middle-aged couple or older couple who has accumulated significant assets, it can be appropriate."

Prenuptial agreements are best in situations "where both parties have a lot that could potentially be lost in the horrible event of a divorce," says Shannon Lynch, a Dallas family law attorney who represented Mr. Auton in negotiating the prenuptial document.

"That's the best situation for people to do it - older couples getting married who have worked for a long time and have built up a substantial estate where there are children to protect," she said.

### **Give and take**

"The disadvantage is that in prenups, a spouse will often give up valuable community-property rights to participate in assets that they would have had, but for the prenup," Mr. McShane said. "The nonmoneyed spouse gives up the opportunity to participate in what might be an extraordinary windfall later in the marriage."

Prenuptial agreements have been as common in the celebrity world as divorces. Here are some examples:

\*Heather Mills offered to sign a prenuptial agreement with new husband Paul McCartney, but the former Beatle turned down the offer, according to published reports.

\*Actress Joan Collins and fiancé Percy Gibson signed a premarital agreement.

\*Actor Michael Douglas and actress Catherine Zeta-Jones signed a prenup.

\*San Francisco Giants slugger Barry Bonds and his first wife, Sun, signed a premarital agreement, but she didn't have an attorney when she signed. That caused trouble for her when they divorced.

The California Supreme Court eventually ruled that prenuptial agreements are valid even if only one party had a lawyer.

For Dr. Ashworth and Mr. Auton, drawing up a prenuptial agreement is an acknowledgement that although they love each other, they also realize that there are no guarantees.

"Your judgment is very clouded when you're in love and you're getting married and everything is so wonderful," Dr. Ashworth said.

The prenuptial agreement brings a "practicality and realism to what is a real idealistic kind of state," she said.

"You want to count on everything [lasting] forever, but there are things that happen and change, and you can't count on all that," Dr. Ashworth said.

She also sees her premarital agreement as demonstrating that her marriage is about much more than money, because it lays out how the couple's finances will be handled and distributed.

"Barney wanted me to know that it's not about money, and it has nothing to do with that," Dr. Ashworth said. "It really is kind of a nice declaration that, 'I'm in it for you and I don't care about your stuff.'"

Mr. Auton says he had "no problem whatsoever" about signing a prenuptial agreement.

"The personal aspect never entered into it," said Mr. Auton, a salesman. "I look at it from a business standpoint, and to me, marriage is an agreement just like in any agreement in business.

"If you both have assets, whether they're even or uneven - if you've worked really hard to get to that point and something goes sour down the road, you don't want to lose those things you worked so hard for."

He says neither he nor Dr. Ashworth "expects to exercise our prenuptial."

"Yes, we're both madly in love with one another, but when you take your heart out of it, you have to put your head into it," Mr. Auton said. "You just can't feel slighted or take it personally."

### **Level of comfort**

That level of comfort with a premarital agreement has a lot to do with whether it's crafted properly, experts say.

Experts advise being honest and forthright when talking to your beloved about a premarital agreement.

"The whole idea of a premarital agreement is to decide what the two of you think is right and fair while you love each other, not after you hate each other," said Dr. Ashworth's lawyer, **Janet Brumley**, a partner at Verner & Brumley in Dallas.

"You are simply realistic that the marriage will end either through the death of one party or divorce, and that you want to settle the outcome of either."

However, don't spring a premarital agreement on your beloved on the day of the wedding.

"It needs to be done far ahead of the wedding or they can be challenged that they're under fraud or duress," Ms. Lynch said. "The closer you get to the wedding, the easier to prove that."

### **Two attorneys**

One way to make sure that both parties' interests are represented is for each person to hire an attorney, experts say.

"If you both have your own attorney, it's very hard, in the event of a divorce, to say there was coercion on either party's side," said Courtney Knowles, spokesman for the Equality in Marriage Institute in New York, a nonprofit group that promotes marriage as a partnership of equals.

It's crucial that there be a full disclosure of all assets, liabilities, income and expectations of gifts and inheritances.

Specify the status of gifts, inheritances and trusts each spouse receives or benefits from, whether before or after marriage.

Texas is a "community property" state, which means that each spouse owns an unspecified, undivided interest in assets.

Under Texas law, anything that one spouse receives by gifts or inheritance during marriage remains that spouse's separate property.

However, the income generated by separate property is community property.

For example, if one spouse inherits stock, the stock itself is separate property, but the dividends are community property.

"In Texas, the presumption is that all assets owned by a married couple on the date of divorce are community property," Ms. Brumley said.

"You can rebut that presumption by 'tracing' or by showing that you owned the asset before marriage or you got it during your marriage by gift, bequest or inheritance."

Tracing is a method of proving that an asset came from separate property and therefore is separate property.

For example, if one spouse inherits a valuable vase, sells the vase and uses the proceeds to buy a dining room table, the dining room table is separate property.

A premarital agreement should describe how premarital debts will be paid. It is especially important to discuss debts, Mr. Knowles says.

"As a partner entering marriage, it's crucial that you know what your joint debt is," he said. "There's a chance you might be responsible for that."

Decide who will own your home in the event of death or divorce and clarify what will happen to each type of property, whether jointly or individually owned, such as real estate, artwork and jewelry.

Don't be greedy.

"Pigs get fat, but hogs get slaughtered," Ms. Brumley said.

Courts are more likely to strictly enforce a premarital agreement that seems fair than they are a premarital agreement that gives one party an overwhelming advantage over the other, she says.

Be prepared for give and take.

"This is not a contest to try and win control," Ms. Brumley said.

"You love the person with whom you are negotiating and want to do right by him or her or you shouldn't be

contemplating marriage," she said. "Don't get caught up in who's getting their way."

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