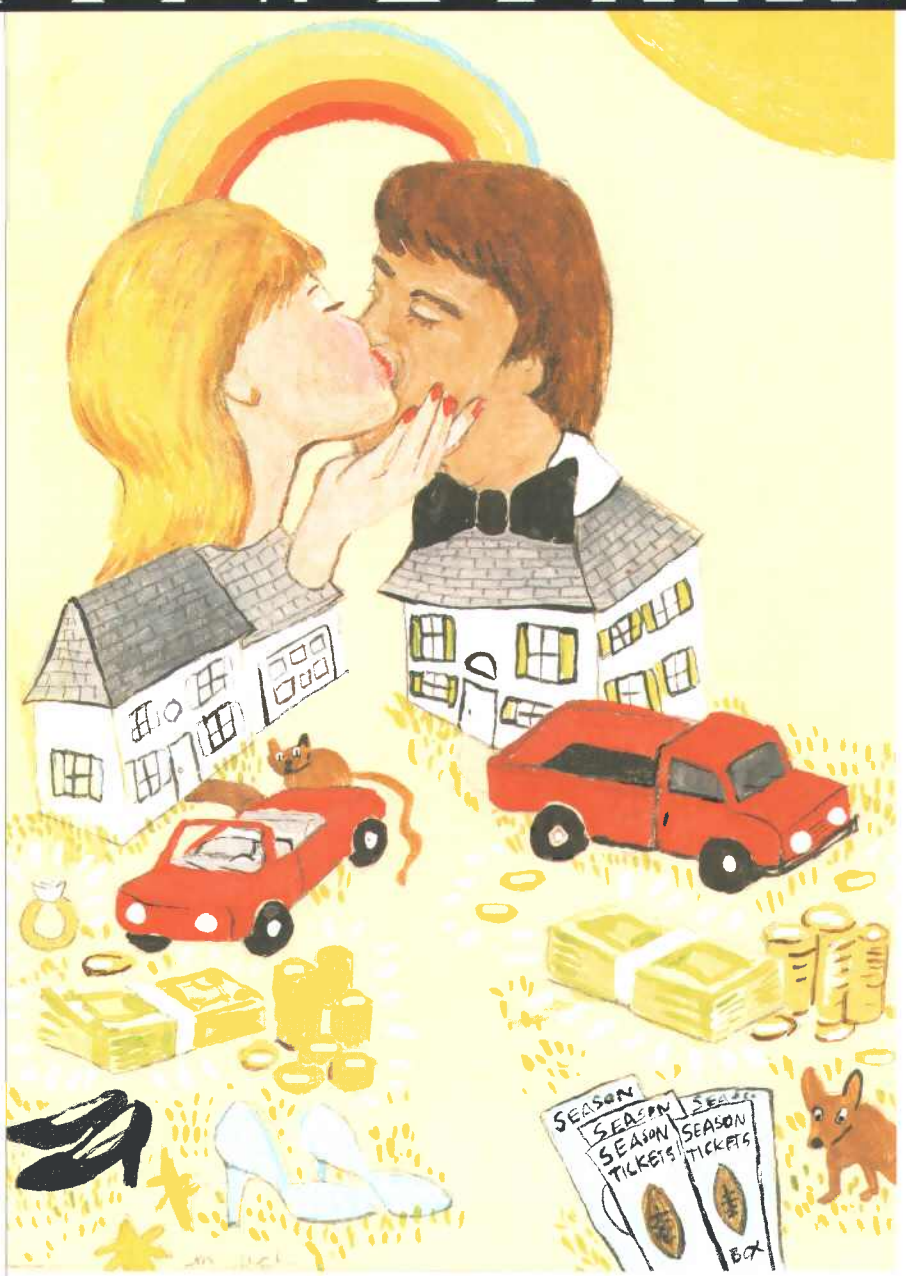
Marriages may not last forever, but a properly drawn prenuptial agreement does.

BROKEN VOWS, SOLID CONTRACTS

By Gregory Taggart



FOR MANY—IF NOT MOST—LOVE-STRUCK couples, the words "prenuptial agreement" are anathema, a blanket so wet that it threatens to extinguish their burning love for one another. "Forget that!" they chorus. "We're in the mood for love!" So, rather than engaging in an important financial discussion before they marry—when they are most likely to treat each other fairly—they wait until the end of their marriage, when they're least likely to do so.

That's a shame, divorce experts say. A frank and early discussion about all things financial actually may prevent divorce. "There are studies that say 70 percent of marriages founder because of financial matters," says New York divorce attorney Arlene Dubin, author of *Prenups for Lovers: A Romantic Guide to Prenuptial Agreements* and a partner at Sonnenschein Nath & Rosenthal. "But if you address money issues with clarity and openness before you marry," she adds, "there is a greater chance that your marriage will last."

Where do you, as the financial advisor, come in? The idea is that by proposing a prenuptial agreement, you open the door to that clarity and openness. "A marriage has to be based on reality as well as romance," Dubin argues.

Dubin is not alone in praising the merits of prenuptial agreements and the frank financial discussions that lead up to them. Wealth managers, financial planners and other advisors see such conversations as essential to a successful marriage. It helps that

Illustration by Martha Rich

since the early 1980s, courts have increasingly upheld prenuptial agreements, due in large part to the standards established by the Uniform Prenuptial Agreement Act (UPAA) currently adopted in 26 states and the District of Columbia. "Courts used to routinely overturn prenups because there were no clear legal standards for enforcement," Dubin explains. "Today, if a prenup is properly done—it's in writing and signed before a notary, for example—it's going to be enforced in all 50 states."

Keep in mind that the divorce laws vary from state to state, even among those states that have adopted some variation of the UPAA.

But in general, courts will enforce a prenuptial where the agreement is fair and balanced, the parties have separate counsel, and both partners understand what they are getting or giving up under the agreement.

Dubin also cites timing as an important element. "I think that a good prenuptial agreement is one where there is a fair amount of time between the beginning and the end of the process, and then a fair amount of time between the end of the process and the wedding, so both parties have time to deliberate, consider, negotiate, and understand what they're doing," Dubin says. In short, if there's full disclosure, separate counsel, and plenty of time, courts will enforce the agreement.

On the other hand, for a good idea of what makes a prenuptial agreement unenforceable, turn to Section 6 of the UPAA: If the contesting spouse can prove that he or she "did not execute the agreement voluntarily," the section reads, or that the "agreement was unconscionable when it was executed," [and] in which case he or she "was not provided [and did not waive] a fair and reasonable disclosure," or that one of the parties "did not have, or reasonably could not have had adequate knowledge" of the other party's assets and financial obligations, a court will strike the resulting agreement.

Of course, you can't enforce an agreement unless you have one, and there's the rub. Frankly, prenups are wet blankets. If you're in the mood for love, you're hardly in the mood to sit across the conference table from your intended with your attorney. There are exceptional cases, of course. People considering a second marriage, especially if they have children, are generally willing to broach the subject. And if they don't, their children often will. Likewise, the stereotypical wealthy person who is marrying someone of little or no means, is often quick to think prenup. However, there is a world of love-blind sweethearts who are loathe to think that their intended spouse will ever take advantage of them financially. To them, and any others who are similarly reluctant, financial planner Susan Freed, president of Washington D.C.-based Freed Myers, presents prenups as just one more risk management tool—much like life, disability, health, and property/casualty insurance. "It's a financial planner's dream tool," she says.

And that it is, or can be, if used properly. For example, Freed often uses the prenuptial discussion to help an engaged couple learn how each party to the marriage approaches money. As she explains it, her premarital financial counseling is much like what a priest might do, "except we put dollar signs in front of it." Is one party a spender and the other a saver? What are the couple's financial hopes and objectives? Are they both going to work, or will one stay home with the children? These and other typical financial planning questions are a natural lead-in to the prenuptial discussion. "How you want to handle money within the family? How you want to handle his, hers, and ours? Handled that way, the financial planning discussion puts the prenuptial discussion in a very positive light," Freed explains.

Among other advantages, prenups can be used to divide marital property, to decide how to handle marital and non-marital debts, and to dictate who gets the family home or the vacation cottage in the event of death or divorce. A prenup can also detail how pension, 401(k), and IRA plans are to be split (although in most cases the couple must actually be married before executing the forms necessary to divide retirement plan assets). The parties can even contract to make a will or waive their elective share in the event their spouse dies. And of course, the prenup can be used to set alimony or to waive it in favor of a property settlement. "It's also important to establish which state's law will apply in the event of divorce, especially if there's a chance you may move in the future," says Dorene Marcus, partner at Chicago-based Davis Friedman.

Nevertheless, prenuptial agreements are neither for everything nor for everyone. For instance, in her book, Dubin mentions the LeGalley prenup in which a New Mexico couple contracted for sex five-times a week and even agreed that they would not follow other cars closer than one car-length for every 10 miles per hour. That's probably taking things too far and, in fact, risks the possibility that a court may find the parties were not serious about their prenup. Dubin suggests dealing with such issues in a separate agreement, "—perhaps in the form of a personal letter."

Still, it is proper to include so-called "life-style" issues in a prenup so long as they don't run counter to public policy or criminal law. Thus, the agreement should not encourage divorce or require anything that might go against the "best interests of the children." And if you try to limit spousal support to such a degree that the ex-spouse ends up on welfare, the court will step in and modify the agreement. "One lady I know has an agreement where every time her husband doesn't do the dishes, she can charge him $50," says Beverly Hills attorney Peter Walzer. "I try to avoid that. No personal issues should be in prenups. For that kind of thing, people should go to a psychologist."

Given the value of the financial conversation that should precede a prenup, it seems that almost anyone with a ring and a wedding date should have one. Nevertheless, Chicago divorce attorney Andre Katz says there are two reasons that he's not a fan: "First, prenups sometimes can create a lot of conflict—not something you want when you're preparing to marry; and second, there is no crystal ball to tell you what your circumstances will be if and when you divorce, so a prenup can't take them into account."

Instead, Katz counsels many clients to

rely on state law rather than a prenuptial agreement, and to let the courts decide who gets what should they divorce. State divorce laws, he says, lay out a number of factors a judge can consider, including a party's health, income potential, and the number and age of children in the marriage. The theory is that rather than using a crystal ball, the judge will be aware of a myriad of unforeseeable circumstances, weigh the equities, and make sure that the parties to the divorce are treated fairly. "In essence, what you're doing when you agree to a prenup is opting out of that system," Katz explains.

Depending on where you live, that system may be either community property (nine states) or equitable distribution (41 states). Generally speaking, in community property states, the judge divides community property—commonly defined as property acquired during the marriage—in half, although there is often room for the judge to take extenuating circumstances into account. In equitable distribution states, the judge divides the marital property—defined much the same as community property—equitably, taking into account whatever factors state law allows. According to Katz, if you depend on a judge to divide the property, it might be costly and there could be conflict, "but at least you're getting a ruling based on the actual circumstances at the time of the divorce."

Under both regimes, property acquired before the marriage or by gift or bequest during the marriage is called separate property and belongs solely to the owner. There are a few states—Indiana for one—that make no such distinction and divide all property, whenever acquired, at divorce. Finally, in many states, you can blur the distinction between separate and marital or community property by co-mingling the two. For example, if you deposit marital funds into the brokerage account you brought into the marriage, a judge could treat that account as marital or community property. It's that possibility that worries Walzer. "Over a 20-year marriage, you would have to be a very anal bookkeeper to avoid co-mingling."

In virtually every case where there is a significant disparity in wealth or where one party participates in a family business, couples should consider a prenup to ensure that family wealth stays in the family and that divorce doesn't result in the ex-spouse becoming an unwelcome partner in the family business. "These [prenups] are really documents for the wealthy, not for the average person or younger people who are getting married for the first time," Walzer says. "For somebody worth $5 million, $10 million, or $50 million, it's foolish not to do a prenup, because you're going to get into a lot of litigation and accounting fees that you could avoid with a clearly drafted prenup."

Of course, prenuptial agreements are not the only way to handle financial matters. Trusts can be a handy tool to ensure that an inheritance does not become marital property and are particularly effective when parents have not informed children that they stand to inherit a large sum of money. A more mature individual might use a Q-Tip trust to provide income to a surviving spouse, yet guarantee that his or her children ultimately receive the trust corpus. "You can also use an intervivos trust to keep your assets outside your estate to protect those assets from your spouse's elective share," Marcus explains.

In the end, any discussion of prenuptial agreements is academic unless the parties can get past the stigma to initiate a discussion. Many advisors recommend giving copies of Dubin's book to clients to help them see the light. One couple actually came to Deerfield, Fla. financial planner Marianne Shine for her advice after reading the book. "Though it doesn't have to be, prenuptial planning can be very painful," says Shine, but if they do it right, people look back and say, 'That was a good experience. We learned a lot.'" And probably avoided greater pain down the road, as well.

GOOD MARRIAGES, BAD MATH

FINANCIAL PLANNER MARIANNE SHINE IS QUICK TO CORRECT PEOPLE WHO REPEAT THE adage that 50 percent of marriages end in divorce. "You've hit a hot button there. That's not true," says the Deerfield, Fla. advisor. To support her case, Shine refers to two articles, one—in a 1997 edition of *TheCPA/Law Forum*—claiming that "the divorce rate for all married couples is about 20 percent," and the other stating that in 1993, "there were 146 divorced persons for every 1,000 married persons; in other terms, the divorced segment [of the U.S. population] equaled about 12 percent of the married segment of the population" (anthropologist Paul Bohannan for Grolier Electronic Publishing).

Attempting to explain why divorce statistics can be so misleading, the Bohannan article stated that in 1992 there were about 2.4 million marriages in the United States and around 1.2 million divorces. Do the math: that's 50 percent. But according to Bohannan, "it would be equally true . . .to say that 80 percent of all married people were still in their first marriage." Confused? Think of it this way: The 2.4 million represents new marriages that year. On the other hand, the 1.2 million divorces represent the fallout that year from all the marriages that occurred that year and in years previous, and most of those—80 percent if you believe the article—are still married.

According to Shine, the 50 percent statistic we hear so often is the result of some bad math by a good minister who was trying to encourage his flock to approach marriage carefully. "He went to the county courthouse and noticed that in the same period of time there were something like 2,000 new marriages and 1,000 divorces." As they say, the rest was history...bad history. —GT

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