



# What Does Love Have to Do with It?

A prenuptial agreement should not kill the romance, but should quell your clients' fears about marriage and divorce

BY JEROME H. POLIACOFF

## ● Marriage as an economic vehicle

Historically, before the advent of modern "romance," parents of the bride and groom negotiated a financial agreement on the new couple's behalf as marriage was often exclusively used as a means of distributing wealth and inheritance, making marriage choice more about the exchange of economic capital, and less about romantic love. Although economic independence was the main prerequisite for marriage, the reasons people married were heavily entrenched in the exchange of economic capital between families. Dowries and marriage as an economic exchange of capital remained the norm until the advent of the industrial revolution, marking the move from an agrarian to an industrial economy.

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Property agreements between engaged couples are nothing new. People have been making prenuptial agreements for thousands of years.

Soon after the Prophet Mohammad's death, his great-granddaughter, Sukayna, who was married several times, at least once stipulated in writing that her husband was forbidden to disagree with her about anything.



The Hebrew marriage contract, called the "ketubah," is at least 2,000 years old. This contract was intended to protect women in case of divorce or widowhood by setting out the husband's financial obligation to the wife. This agreement also made it expensive for a husband to divorce his wife and so made marriages more stable.



Dowries, often considered to be early prenuptial agreements, were mentioned in seventh century writings as a necessity.



By the ninth century, in Europe, husbands were required to secure one-third of their property to their wives on their deaths as dower rights. Under English common law and in colonial America, "dower" was the share of a deceased husband's real estate to which his widow was entitled after his death.



Wives sometimes brought dowries of money or land to the marriage. These arrangements were covered in an agreement drawn up before the marriage.



In fifteenth century England, Edward IV reportedly had a prenuptial agreement with Eleanor Butler sometime between 1461 and 1464.



Up until the nineteenth century in the United States, married women could not own property. This began to change when New York State passed the Married Women's Property Act of 1848. Before then, women needed marriage contracts to guarantee them property in case of divorce or the husband's death.

## ● Marriage and romantic love

The second major force for “modern” marriage dates to 1740 when a flood of novels poured on to the market with romantic love as their theme. Hardy, Jonathan-Gathorne, *Love, Sex, Marriage and Divorce*. London: Jonathan Cape, 1981, p. 129. The transformation of the marital relationship, however, could not come from literature alone. With families clustering in cities to work in factories, economic exchange became less important as there was less land or inheritance to bequeath to future generations. As people moved from a peasant economy, and, therefore, the land, the familial exchange of economic capital became irrelevant as the land itself became less important.

The musical, *Fiddler on the Roof*, set in Tsarist Russia in 1905, and based on *Tevye and his Daughters* (or *Tevye the Milkman*) and other tales by Sholem Aleichem, best captures the change in marriage choices and prenuptial contracts affected by the advent of the industrial revolution and the rise of “romance” in early nineteenth century Europe. The story centers on Tevye, a poor milkman, the father of five daughters, and his attempts to maintain his family and religious traditions while outside influences encroach upon their lives. He must cope with the strong-willed actions of his three older daughters, as each one’s choice of a husband moves further away from the customs of her faith. In the end, after much soul searching, Tevye relents to the marriage of Perchik and his daughter Hodel. The world is changing, and he must change with it. Tevye explains these events to his astonished wife Golde. “Love,” he says, “it’s the new style.”

This may be the first popularized example of the change in how prenuptial agreements were made. Where historically marriage contracts were negotiated by parents, the modern prenuptial allows couples themselves to assure the safety of their economic assets.

## ● Destructive to marriage

Although the nature of marriage contracts may have changed, there was little room in the United States for prenuptial contracts. Until the 1960s, American courts refused, on public policy grounds, to enforce prenuptial agreements designed to apportion property in the event of divorce as the enforcement of such contracts was viewed as being deleterious to the constancy of marriage.

That changed in 1968, when a Florida appellate decision followed precedent in invalidating a prenuptial agreement, but a dissenting judge indicated that the contract should have been upheld as “not in contemplation of divorce, but in contemplation of marriage.” *Posner v. Posner*, 206 So. 2d 416, 420 (Fla. Dist. Ct. App. 1968) (Swann, J. dissenting), *rev’d*, 233 So. 2d

381 (Fla. 1970). On appeal, the Florida Supreme Court agreed with the lower court dissent and held that prenuptial agreements settling alimony and property rights upon divorce are not void as contrary to public policy. Thus, the era of prenuptial agreements began.

From *Posner* on, prenuptial agreements have increasingly entered the awareness of marrying couples as the prevalence of divorce and remarriage has prompted both men and women to plan more carefully, realistically, and independently for their economic futures.

In addition, women increasingly bring tangible assets to the marriage as a result of both their rising participation in the labor force and the older age at which they are likely to marry for the first time. These women use prenuptial agreements to protect their individually earned and held assets.

Nevertheless, despite increasing public awareness, research suggests that most people do not see themselves as needing, or benefitting from, prenuptial agreements. An online study by Harris Interactive, on behalf of Lawyers.com, reports that while more than one-fourth (28%) of Americans say that prenuptial agreements make smart financial sense for anyone getting married, another fourth (25%) think that such agreements are only for the rich and famous, not “regular” people. A romantic one in five (19%) believes in true love and feels that a prenuptial agreement is never needed when the two people involved really love each other, and another 15% are convinced that a prenuptial agreement dooms a marriage to failure from the start.

Once the romance has ended, however, divorced respondents feel differently: one-half (49%) of divorced Americans believe that prenuptial agreements make financial sense, whereas just one in five (21%) still married Americans feel the same. Although one in ten (9%) unmarried Americans say they would never get married/remarried without a prenuptial contract, only one percent (1%) of Americans currently have a prenuptial agreement with their spouse/fiancé.

The reasons for the underutilization of prenuptial agreements can be found in two studies about attitudes toward marriage and prenuptial agreements. In the first, a study of marriage license applicants and law students, psychologists surveyed applicants about their knowledge of divorce statutes, of the demographics of divorce, and expectations for their own marriage. Baker, L. A., & Emery, R. E., “When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage,” *Law and Human Behavior*, 17(4), 439–50 (1993).

Both groups had largely incorrect perceptions of the legal terms of the marriage contract as embodied in divorce statutes, but they had relatively accurate,

# 28%

**of Americans say that prenuptial agreements make smart financial sense for anyone getting married**

if sometimes optimistic, perceptions of both the likelihood and the effects of divorce in the population at large. These same individuals expressed thoroughly idealistic expectations about both the longevity of their own marriages and the consequences should they personally be divorced.

In a second study,

“Why Are There So Few Prenuptial Agreements?” *Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series*, Paper 436 (2003) ([http://lsr.nellco.org/harvard\\_olin/436](http://lsr.nellco.org/harvard_olin/436)), Heather Mahar found that in addition to what psychologists refer to as “optimism bias” (optimism in the face of reality, a well-established illusion that one’s future is rosier than it really will be), respondents felt that requesting a prenuptial agreement demonstrated uncertainty about the success of the marriage. Respondents recognized that the national rate of divorce was around 50 percent, yet they believed that their own chance of divorce was only 11 percent. Sixty-two percent of respondents believed that requesting a prenuptial agreement reflects uncertainty about the success of the marriage. That is, individuals who believe that they are significantly less likely than the average person to be divorced are less likely to consider requesting a prenuptial agreement.

Why might individuals underestimate the expected value of prenuptial agreements? One possibility, offered by Mahar is that individuals might not know the terms of marriage as embodied in the divorce law of their state. In fact, many couples do not realize that when they obtain a marriage license they are consenting to a set of laws set out in their state’s divorce statute.

Indeed, said Mahar:

[W]hen couples that had recently applied for a marriage license were asked how marriage affects their rights regarding child custody, alimony, child support, and property settlement, respondents correctly identified the current law only slightly more often than random chance would predict. Since so many couples seem to misperceive the state-provided law of divorce, their impression of the potential benefits of premarital contracting must be similarly flawed.

As in the Baker and Emery study, optimism bias was evident in Mahar’s sample. Although both law students and the general population correctly estimated the national divorce rate to be approximately 50 percent, both groups believed that their marriages were significantly more likely to succeed than average. Specifically, law students believed that they had, on average, a 16 percent

chance of divorce, whereas the general population believed there was only a 10 percent chance that their marriage would end in divorce. Perhaps even more striking is the fact that over half of the general population and almost a quarter of the law student population estimated that their chance of divorce was zero percent. Finally, more than half of law students and almost two thirds of the general population believed that divorce was more likely than otherwise if their fiancé(e) asked them to sign a prenuptial agreement.

## ● What do people object to?

Given that almost half of all marriages end in divorce (what one lawyer called a “never ending inventory of future clients”), is it possible that a prenuptial agreement would save the acrimony and disappointment for that half of the optimists whose marriage ends in divorce? Some would argue that prenuptial agreements are the rational solution to avoiding the problems facing divorcing couples. Bix, Brian, “Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage,” *William and Mary Law Review*, Vol. 40 (1998).

Others believe that prenuptial agreements perpetuate a gender bias disfavoring women. Guggenheimer, Leah A., “Modest Proposal: The Feminomics of Drafting Premarital Agreements,” Spring 1996, 17 *Women’s Rights Law Reporter*, 147.

Less caustic critics might assert that prenuptial agreements are unromantic, that asking for a prenuptial agreement reflects a

lack of trust, or that asking for a prenuptial agreement shows the lack of a life-time commitment to one another (after all, wedding vows typically pledge “until death do us part”).

The less romantic and more emotionally charged reasons naysayers might put forth in their case against prenuptial agreements is that a partner asking for a prenuptial agreement doesn’t trust the other partner to be fair and reasonable in the event of a divorce, that the asking partner is seeking emotional control through financial superiority, that the asking partner doesn’t have confidence that the other party could or would rationally discuss and work out conflict, or just plain that she (or he) just doesn’t think the marriage will last.

# 62%

**of respondents believed that requesting a prenuptial agreement reflects uncertainty about the success of the marriage**

## ● A death knell for romance?

Criticism based on distrust, romance, or gender politics aside, there are many psychologically healthy and practical reasons for signing a prenuptial agreement. First and foremost is that for reasonable and responsible partners-to-be, a discussion and the negotiation of prenuptial agreement terms can serve to strengthen a relationship by starting on a footing of open and honest communication. Asking one's intended to engage in a frank discussion about the future can be an opportunity for an open dialogue in which each partner can express his or her thoughts and feelings about a wide variety of issues that make up a marriage. This sort of discussion doesn't mean that one party is anticipating divorce. It does mean that one party (and hopefully both) are willing to discuss current and future plans about the distribution of assets, so that if they later divorce they can do so without the expense and acrimony of a legal battle over assets and finances accumulated during the marriage. After all, 50 percent of marriages *do* end in divorce.

Psychologically healthy people should be willing to discuss personal and financial matters, such as family ties and inheritance, the financial well-being of children from a previous marriage, the disposition and use of personal and business assets accumulated before the marriage, and other emotionally important expectations. Prenuptial agreements force an engaged couple to discuss thoroughly and honestly issues such as money and property, topics that some couples might avoid. These discussions can help build a better understanding of their assets and financial intentions, which can increase

the chances of a peaceful and successful marriage.

If a divorce does happen, a prenuptial agreement may make the divorce easier and/or less likely by helping to strengthen the marital relationship. Discussions about prenuptial agreements can provide a more realistic view of what life after a divorce would be like. Likewise, the process of working out the terms of a prenuptial agreement can benefit both partners by helping them to understand the level of support either partner could anticipate. The less financially secure partner can realistically consider the possibilities of divorce and be assured that, regardless of the state of the marriage, she (or he) will not be financially disadvantaged. The more financially secure partner won't need to worry about losing his (or her) assets in the event that the marriage fails. In sum, the request for a prenuptial agreement can become an opportunity for a couple to engage in planning for their future in an open and honest manner. **FA**



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