
Psychology and Family Law

Why Lawyers Now Avoid Assisting with Pre and Post-Nuptial Agreements

By Mark Baer, Esq.



Each state has its own laws pertaining to the financial consequences of marriage and how they play out in a divorce or upon the death of one of the spouses. As many of you may know, prenuptial and post-marital agreements are hot topic issues these days, especially with the highly publicized McCourt divorce case in Los Angeles. According to the statistics, an increasingly large percentage of the population is entering into such agreements. Yet ironically, fewer and fewer attorneys are willing to handle them.

There was a time, not long ago, when a person (usually the husband to be) would give his fiancée a prenuptial agreement to sign within days, hours, or even minutes of the wedding ceremony. The fiancée would sign the document under duress, because otherwise the wedding would be called off, and she would often do so without fully understanding the terms and effects of the agreement. It is not surprising that agreements entered into under such circumstances would often be successfully challenged in a subsequent divorce proceeding. More disturbing is the fact that many such agreements were actually enforced by the courts, even when the agreement was written in English, which was often not the fiancée's native language.

As a result, legislation has been enacted to protect people from such dubious practices. Nevertheless, people still regularly challenge the enforceability of prenuptial and post-marital agreements in divorce proceedings. Now they are challenging agreements, even though they were given to them the requisite number of days before the wedding, and when each party had separate counsel representing them in negotiating the terms of the agreement, explaining the basic effect of the agreement, and the rights the party was relinquishing by signing the agreement. I believe that the reason that such agreements are still challenged so regularly has a great deal to do with the fact that we are living in the "Age of Entitlement," where narcissism has become epidemic, and people do not wish to take responsibility for their actions.

By definition, people who enter into prenuptial or post-marital agreements are agreeing that certain financial issues ensuing from a marriage be governed by a set of rules negotiated by them--and not those which would otherwise have been imposed on them by the State. Unfortunately, approximately 50% of marriages end in divorce today, at which time the spouse who would be better off financially without the prenuptial or post-marital agreement will frequently challenge the enforceability of the agreement.

When such challenges arise, the attorneys involved in the negotiation of the agreements cannot be involved as the attorneys in the divorce proceedings. Instead, they are brought into the litigation as witnesses, and thus cannot charge for their time. Moreover, depending upon the enforceability or unenforceability of the agreement, one of those attorneys may well find themselves in a malpractice action.

This reality creates a great deal of risk to any attorney involved in drafting and negotiating prenuptial or post-marital agreements. As a result, every time I have been to a continuing education seminar relating to such agreements in the recent past, I have been instructed that an attorney who charges less than \$10,000 to handle such matters is foolish. While that may seem like a lot of money for each party to spend, in my opinion it is one of the unfortunate consequences of the fact that we are living in the "Age of Entitlement."

The recent ruling invalidating the post-marital agreement in the McCourt divorce is distinguishable because the attorney who drafted that agreement admitted to having changed the pages that resulted in Jamie's relinquishment of her interest in the Los Angeles Dodgers after she signed the agreement. Therefore, Jamie's reason for challenging that agreement had nothing to do with a refusal to take responsibility for the consequences of her actions. Apparently, she never agreed to relinquish her interest in the Los Angeles Dodgers, even though the agreement was altered to show otherwise.

Mark Baer, Esq. can be reached at (626) 389-8929 or by email at Mark@markbaeresq.com