

Prenuptial Agreements for Catholics

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By Mary Cushing Doherty

The preparation of pre-nuptial or pre-marital agreements provides special challenges to the astute family lawyer. Surely clients can go to the Internet and find a form for pre-nuptial agreements. Nevertheless, it is much more prudent to talk to an experienced family lawyer who will anticipate problems before they occur. For example, family lawyers should recognize the upheaval that may occur if the lawyer fails to spot a unique issue when a Catholic fiancée is involved in the negotiation of a pre-nuptial agreement.

The Catholic Bride

Consider the circumstance in which the intended groom talks to you about preparing a pre-nuptial agreement because old family money needs to be protected in the event the parties divorce. When introductory matters are reviewed, such as the date and place of the wedding, you discover that the bride-to-be is Catholic, and that they intend to be married by a priest. You need to tell the groom that his Catholic bride is likely to refuse to sign a pre-nuptial agreement. Otherwise, you may risk the groom being very annoyed if you spend the time and money to draft a document that will be unacceptable to his fiancée.

The Non-Catholic Attorney

An attorney will not be providing effective representation if he thinks he does not need to know about a relatively arcane circumstance merely because he is not Catholic. On the contrary, attorneys represent clients from many different religious backgrounds and it is our responsibility to understand the basic religious principles that affect the negotiation and drafting of a prenuptial agreement. It is critical to recognize that a Catholic priest will not marry a couple if it is discovered that they have signed a pre-nuptial agreement in contemplation of divorce. A prenuptial agreement that provides for certain consequences upon separation and divorce contradicts the sacramental requirement in the Catholic Church that both parties make a lifetime commitment.

Annulment vs. Divorce

This precept becomes clear if one recalls the basis for a Catholic religious annulment. The request for Catholic annulment generally will not begin until the conclusion of the civil annulment or divorce. Most Catholic Dioceses and Archdioceses have a policy of not allowing someone to seek an annulment until after the civil Decree in Divorce has issued. The Church does not want to be accused of encouraging dissolution of marriage.

In the Roman Catholic church, the annulment proceeds under Canon Law, which requires the Church's tribunal to determine whether the marriage was entered into validly or invalidly *ab initio*. In other words, to allow annulment, the tribunal must find that the marriage was invalid from the beginning (for example, whether the couple failed to join in the sacrament of a lifetime commitment). There are several listed impediments to a valid sacramental marriage under Canon law. The one that applies to this circumstance is under Canon 1101 § 2: One or the other party had no intention when marrying to contract a lifelong relationship.

Church Restraints and Family Law

Family law practitioners know the wide range of motivations for drafting a premarital agreement. Take the example of the couple that wants a prenuptial agreement because parents of the bride are concerned about the infusion of pre-marital funds in the marital estate. Perhaps the bride-to-be has received money from loved ones in order to give her an enhanced economic start in life. She is marrying her true love who is deeply in debt. As they make their wedding plans, they discuss using her reserved funds to pay off the groom's debt. The two of them want to qualify for a mortgage to purchase their first home. Her family does not want her tapping into her premarital money, particularly that which was funded by other family members without a pre-nuptial agreement to protect those funds. The bride's family arranges for an attorney consultation, and is monitoring very closely whether or not their daughter is cooperating. In fact, the daughter is concerned because she is aware of the Catholic Church's prohibition on a prenuptial agreement. While the bride's parents may not be concerned about the position of the Church, the bride does not want to have an invalid sacramental marriage, nor does she want to violate the Church's doctrine.

Under the circumstances, the attorney must draft creatively. The couple could agree that the bride's money, which is used to pay off the groom's debt, will be treated like a loan, with repayment over time. Accordingly, a detailed Note can be prepared, acknowledging that the debt will be paid with the bride's premarital assets. The Note should contemplate an interest rate, so one is not imputed. The parties should have the option to both enforce the agreement and extend the repayment schedule upon joint agreement thereafter. One can envision that if the marriage goes well, the forgiveness of the periodic obligation of the husband may result in a gift from the wife if she affirmatively

waives one or more of the periodic payments. (The Note could require some formality in this regard.) The repayment of the obligation has nothing to do with the parties' marital status. The obligation would continue regardless of separation, divorce or death. The Note would provide effective protection as to the specified assets and liabilities, the funds utilized to pay the groom's separate debt, using the bride's pre-marital assets. And in order to pass muster with the Church, the document should not reference divorce or separation.

With certain assets, the waiver of interest in one or more assets by agreement, without mentioning separation or divorce, could require contorted negotiations. If the bride is a business owner and is asking the groom to disclaim any interest in her business forever, will the groom want some economic benefit in return? Perhaps the parties would agree to the use of the income from the business for marital purposes? The triggering events at separation and divorce would not be specified. The couple has to decide if such terms satisfy their needs legally, as one or both making the Catholic commitment to marriage for life. The lawyer should advise the parties of the rights and responsibilities in the event of divorce, and the legal option to sign a more detailed prenuptial agreement that contemplates divorce, but would be contrary to the Church's instruction.

Often, prenuptial agreements focus on one party's residence, which might become the joint residence after marriage. By signing an Agreement, although not referencing divorce, the asset, the residence, could be identified and valued, creating a baseline upon which the court could later rely in the event of a marital separation. An agreement addressing the house may provide that if the bride owned the house before marriage, she will continue to own the house with no claim by the groom. If the groom intends to move into the house and contribute toward the mortgage payments and other expenses, the parties could go one step further and say that the groom's interest will be limited to the increase in value after the agreed date of marriage value. The Agreement could provide that the groom's interest in any jointly titled house would be less than a 50% interest. Such terms do not provide for the extensive protection possible with a prenuptial agreement that addresses separation and divorce, but they reduce controversy over the claim to a pre-marital asset.

Conclusion

When a lawyer meets with potential clients for prenuptial agreements, he or she must consider whether a Catholic fiancée will sign the premarital agreement. This article does not suggest whether an investigator with the local Catholic tribunal would scrutinize the premarital agreement that does not make reference to divorce and rule in favor of, or deny the request for, an annulment. Every seasoned family law attorney should take responsibility to spot the issue where one or both parties are Roman Catholic. If the Agreement will not refer to separation or divorce, is there a way to meet the legal goals of the client? Basically, the Agreement may refer to economic promises, regardless of marital status. Logically, there is no prohibition by the Catholic Church against a prenuptial agreement in contemplation of death, so for estate-planning purposes, there is no restriction on the prenuptial agreement draftsman. The earlier the divorce planning issue is identified for the Catholic client or a client who has a Catholic fiancée, the more effectively the draftsman can address the issues important to the client.

Mary Cushing Doherty, a member of this newsletter's Board of Editors, has more than 30 years of legal experience in the area of family law. She concentrates her practice on all aspects of marital dissolution and family law issues including divorce, child support, visitation, custody, spousal support and maintenance, asset protection, complex property division, protection from abuse matters, and more. Ms. Doherty is also an experienced and certified arbitrator and mediator.