



The MARRIAGE CURE

BY AARON GELL

THE CELEBRITY LOVEBIRDS—two well-known actors—emerge from a late-model Lincoln Navigator, take the elevator to the 30th floor of a Madison Avenue skyscraper, and settle with their handsomely paid his-and-hers legal teams at the far ends of a mahogany conference table. After the standard pleasantries, one of the attorneys segues into the burning issue. Who'll get what—homes, cars, kids, pets—should divorce become unavoidable?

The document that comes out of today's meeting will resemble many financial agreements between partners of substantial means but for one distinction: this couple is already happily married—they have been for years. Indeed, their happiness has been buoyed by an airtight prenup. But things change. Assets pile up. Ownership lines blur. And so, like a growing number of couples, they want this latest matrimonial must-have. Some call it a marital contract, others an internuptial agreement. Mostly, though, it's just called a postnup.

A postnup can govern things like who gets to keep the Eric Fischls (and the Gothic Revival townhouse they're displayed in) in the event of a divorce and how many nights a month are allotted to dinner and dancing if the couple stays the course. It's a legal contract between husband and wife that spells out their mutual obligations. And it's signed long after the last handful of birdseed has been thrown.

In certain high-flying circles, such contracts are being brokered like there's no tomorrow. "It's an explosion," reports Arlene Dubin, a partner at Sonnenschein Nath & Rosenthal and the author of *Prenups for Lovers*. "They're still not as well known as prenups, even among people who are fairly sophisticated. But lately it's like a cascade."

"It's really a function of the increase in marital litigation overall," the New York matrimonial-bar mainstay Raoul Felder notes. "Often someone will come in—marriage on the rocks, looking for a divorce—but then they futz around, maybe decide to make a go of it and reconcile. Before we kiss 'em goodbye, we explain this new animal that the law allows, and they usually leap at it. It's a fertile new area."

John W. Jacobs, a psychiatrist who counsels a number of Manhattan's more affluent couples, thinks he knows the reason: "We seem to be in a time of 'What do I get out of it for

myself? We can't really count on the natural generosity of our spouses that much." With divorce rates holding steady at 50 percent, romance has increasingly given way to a hard-nosed pragmatism. These days, hogging just the bedcovers seems almost naive.

FOR YEARS, AGREEMENTS between married couples were legally prohibited, on the theory that husband and wife were a single unit (or, perhaps more accurately, the husband was a unit and the wife was the unit's domestic adjunct). Even after that chestnut went the way of the steel-boned corset in the early part of the last century, the courts continued to frown upon marital contracts until, in the 1970 case of *Posner v. Posner*, the Florida Supreme Court ruled that since divorce had become "such a commonplace fact of life" it was reasonable for spouses to spell out the terms in advance. Other states quickly followed suit, and in 1983 a national commission on uniform state laws adopted the Unified Premarital Agreement Act, or UPAA, setting a standard for prenups that has since been widely adopted.

As a result, according to Dubin, the number of prenuptial contracts has quintupled in the past two decades. But a lot of couples just can't bring themselves to don their green eyeshades until the very eve of their wedding—at which point most attorneys will turn them away, mindful that judges often throw out marital agreements signed under duress—in the limo, say, on the way to the chapel. Hence one reason for the postnup. "We don't want people to have a gun to their head when they do this," explains Stanford Lotwin, who has litigated divorces and negotiated postnups for Donald Trump, among others.

The Manhattan psychotherapist Rita Bigel-Casher has been recommending postnups to her patients for years. "The wedding-planning phase is fraught with so many emotions and issues that a prenup often blows things out of the water," she says. "My clients were experiencing so much conflict before the wedding that I began suggesting people think about a postnup—which at least is based on a modicum of trust."

A postnup isn't just an after-the-fact prenup. Many couples who begin with a prenup later find it insufficient, and the ensuing negotiations can become a never-ending aspect of the relationship itself, pushing the idea of marriage as a series of compromises to a comical extreme. Almost every circumstance of married life can be put in writing—from how often to visit the in-laws to who'll take out the garbage. (Dubin has even seen a "no-diaper clause" prohibiting pregnancy: "He's done his family bit and doesn't want to have more, and so he puts into the agreement that if she gets pregnant there'll be an abortion.") Some contracts impose stiff fines for weight gain or drinking—despite the fact that the other party is often subtly enabling the misbehavior. While provisions about how the children will be raised or who will get custody in a divorce aren't enforceable, others have yet to be tested.

Postnups can offer recompense for one spouse if the other

misbehaves. Typical scenario: guy strays, wife busts him, purse strings slacken. "You kiss and make up, and this is your security blanket," Dubin explains. In such cases, couples may be tempted to get creative with what are often called bad-boy clauses, which impose a cash penalty for further shenanigans. Dubin remembers a client who'd caught her husband cheating and thrown him out of the house. "He wanted to promise her that if he lapsed again there would be huge penalties against him. His lawyer told him he wouldn't represent him if he groveled his way back in. So he fired the lawyer, hired another one, and entered into the agreement."

Most lawyers frown on stipulations they fear will undermine the monetary provisions of the agreement. "I don't like to cloud the document with too many items a court wouldn't uphold," says Brett Kimmel, attorney to one half of our actor couple. But J. Herbie DiFonzo, a professor of family law at Hofstra, believes that so-called behavioral or lifestyle clauses will eventually gain acceptance. "One interesting provision of the UPAA says couples can do basically any agreement on any topic that doesn't violate public policy. And that's enormous," he says. "What's to stop someone from saying, 'We don't like the divorce laws in this state, so we want to get divorced only on the following grounds—like cruelty?'"

According to the sociologist and family therapist Constance Ahrons, this evolution is probably for the best. "I think it's pretty healthy for people to have marital contracts and renew them every five years," she says, arguing that if one spouse is feeling insecure, a contract may well put the relationship back on track. Bernard Clair, who counts Jocelyn Wildenstein, Catherine Bryan, Judith Ross, and Caroline Roehm among his former clients, tells the story of a client whose marriage was on the rocks. He was an advertising executive who'd been offered an equity stake in a company, and he was concerned that if his wife's attorneys set about determining the value of his participation in the new venture, "his partners would be exposed to a financial proctology exam. So he comes to me and says, 'Look, I'd rather press the divorce button now while I don't have an interest in this company.' But in talking to him I observed a gaping ambivalence about divorce. So I suggested a postnup that would obviate the need for a disclosure process, and in return we were able to step up the wife's interest in his net worth. And it worked out beautifully. I happen to know from the gossip columns that they had an extremely well-attended cocktail party recently, and the pictures presented a happy couple."

BY SAYING "I DO" you enter into a binding legal contract governed by state matrimonial law. But a postnup can redefine that contract. As Hofstra's DiFonzo puts it, "You either create a contractual alternative or you agree to the contract the law imposes on you. And an increasing number of couples are saying 'We want to set the terms.'"

Consider, for example, the notorious concept known as

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equitable distribution. Under the laws of New York and 40 other states, any property obtained during the marriage goes into the marital pot, to be divided up upon divorce according to a judge's assessment of such factors as the parties' ages, their earning power, custody of the children, and so on. Add to that the issue of transmutation—which basically means that, although the assets each party brings to a marriage go back to that party in the event of a divorce, appreciation on those assets is shared—and you have a recipe for confusion.

Even thornier is the notion of enhanced earnings, under which matrimonial courts look at one's theoretical ability to make money in the future (think of an imminent medical degree or real-estate license) as an asset to be shared. "It's an incredible field in New York, valuing the future career," Lotwin says. "It's a big issue for celebrities."

Changing financial circumstances can also open the possibility that a prenup will come to seem grossly unfair. Such was the case with Donald Trump and his first wife, Ivana, who updated their prenup with three separate postnups as his wealth increased. Harriet Newman Cohen, a divorce attorney at Cohen Hennessey & Bienstock who handles high-profile clients like Andrew Cuomo, followed Ivana Trump's divorce action closely at the time (a case that proved, if nothing else, that a postnup is no guarantee of an easy split). After his wealth shot up, she explains, "what he had promised in the prenup" would have been "unconscionable as alimony." Since the postnups made that argument moot, Cohen continues, "she argued she was under duress—that if she didn't sign she was going to be a single parent with three kids. She had no leverage. He was The Donald. She was going to sign it or she's fired."

The court believed the postnup to be valid, but, ironically, signs of trouble in Trump's financial empire at the time may have actually made the postnup work in Ivana's favor, according to Lotwin, who represented the developer. "He was in such debt that there's a good possibility she would have gotten substantially less. But he had to meet this obligation. I remember we had to go before about 25 bankers in a room telling them why we had to pay her the money. So, for the women, one thing you get is certainty. And that's a wonderful example of certainty."

OUR ACTOR COUPLE freshens the ink on their marital agreement nearly every year, to bring it into line with new real-estate acquisitions, business deals, and emotional ups and downs. "It's like tattoos with them," says Kimmel. "They just want more and more. Any time they put a significant amount of money into an asset, they draw up a postnup." Despite the specter of divorce that unavoidably hovers, these meetings don't tend to be contentious. "They're actually very friendly negotiations," Kimmel says of the two actors. "They never talk about divorce, although of course it's the foundation of what they're doing."

They may be in a minority. You never think your house is going to burn down, the argument goes, but you take out

insurance just in case—but as Virginia Sadock, a professor of psychiatry at NYU Medical Center, points out, there's one significant difference between a fire and a divorce. "If you're taking out insurance, you're not depriving someone else. By insisting on a marital agreement, you're ignoring the subtleties of the other person's feelings. It may not doom the relationship, but it does change it somehow."

Even attorneys who write postnups admit there's nothing inherently fair about such contracts, which are generally drafted to protect the wealthier spouse. "All these agreements are basically exploitative agreements," Felder says. "The person with the money says to the person without the money, 'I don't want to give you what the law would give you.'"

"Let's be honest," Clair agrees. "No one is asked to sign a postnuptial agreement granting more rights."

"When the weaker party comes to me requesting a postnup," Cohen says, "I tell them to try very hard not to sign. They're better off with state law. I explain that the person is being asked to waive very substantial rights." But sign they do. "They'll say, 'Things aren't going well, but I want to hold the marriage together.'"

It should be pointed out, however, that the postnup rarely patches up a marriage—and it's not only wives who may blanch at a toughly worded contract. Clair represented one husband who had married into a family of considerable means. "Going into the marriage, he didn't match his wife's wealth. Ten years later he became a very successful money manager—I don't think I exaggerate in calling him one of the masters of the universe." When the wife decided she wanted him to manage her trust, though, her family insisted he sign a postnup stating that he wouldn't claim any part of the appreciation. "His thinking was, 'If I'm going to be devoting myself to increasing this fund, why shouldn't I get a share of it? And the discussion ripened into a seismic shift in the relationship. In the end, he felt so brutally betrayed that he bailed.'"

Lotwin has seen plenty of similar cases. "The majority of postnuptial agreements quickly turn into full-fledged separation agreements," he admits. "One we had recently started as a postnup, and emotionally it just fell apart. The anger level got so high it couldn't get done. We're now in our third year of litigation, and between the experts, lawyers, and accountants, the divorce is going to cost \$4 million."

Perhaps that's why Brett Kimmel and his wife, Jodi—both hard-boiled divorce lawyers, who met and fell in love while working in Felder's practice—still don't have a marital agreement of their own. "We thought about doing a prenup," he says. But they shelved the idea when they jetted to Vegas for a top secret marriage last April. "I said, 'We'll just do a postnup.' And then we never thought about it again." He quickly adds, however, that both parties are aware they're running a risk. "Because of our experience, we do understand the economic implications. No doubt about it—a marriage is a business deal." ■