Premarital Agreements: "To Do Or Not To Do; That Is The Question."

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Introduction

"Will you give us the girl for a donkey, two sheep, summer grazing rights on the high pasture of Mount Bride and seven amphoras of wine? We will keep her in our family compound run by her husband's mother, the family matriarch. By the way how large is her dowry?" (Transcript of negotiations for an early premarital agreement in PUSA (pre-U.S.A.) times).

Presentation

Marriage law in the United States creates a status upon which is conferred many benefits because the status exists. Those benefits include everything from filing joint income tax returns to having equitable distribution and alimony available upon termination of the marital status. The legislative branches of state and federal governments often add to these conferred benefits, only occasionally reducing or eliminating benefits previously provided. At the same time, the state and federal governments generally have been reluctant to define the actual content of the marital status.

With the Iowa version of the Uniformed Premarital Agreement Act (IUPAA), Iowa Code Chapter 596, the parties to a prospective marriage have an opportunity by contract to alter the usual course of law with respect to:

a. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.

b. The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.

c. The disposition of property upon separation, dissolution of the marriage, death, or the occurrence or nonoccurrence of any other event.

d. The making of a will, trust, or other arrangement to carry out the provisions of the agreement.

e. The ownership rights in and disposition of the death benefit from a life insurance policy.

f. The choice of law governing the construction of the agreement.

g. Any other matter, including the personal rights and obligations of the parties, not in violation of public policy or a statute imposing a criminal penalty.

Under IUPAA the parties may not, however, adversely affect the right of a spouse or child to support by use of a premarital agreement. Iowa Code section 596.5(2).

Culture Psychology and Expectations When Bargaining the Premarital Agreement

Historically women as a group have been financially dependent on men as a group. Even with the positive impact of feminist thought in America, women as a group are still financially dependent on men as a group. Some believe that this reality will change only until men bear children and men value "women's work." No matter how hard we try to make changes in our individual attitudes and expectations, cultural expectations

are still powerful influences. Premarital agreements are an expression of personal expectations bargained in the midst of our larger cultural expectations.

A number of years ago, I heard a non-lawyer argue on the radio that marriage is not necessary because you can contract for everything about the marital status, anyway, including sex, property and cohabitation. There are limits to that man's argument, many of those limits are still over the legal horizon of what he envisioned as the marital status under the limited premise of his argument. One of the central features of his argument is that, somehow, marriage is a process of effective bargaining by the parties. Quite the contrary expectation exists in our marriage (and divorce) law which presumes ineffective bargaining by the prospective spouses. Love, romance, lust and unspoken expectations of the other create the caldron of chemicals which brew up the future marital status. Like an open flower, it then accepts the rain of legal benefits.

Against this legal expectation of ineffective bargaining, the legislature and the courts have recently created what appears to be a contrary assumption. Through determination of premarital agreement enforceability, our legislature and appellate courts have emphasized that effective bargaining does occur if it results in an enforceable written pre-marriage agreement. This raises the question of how Iowa lawyers will navigate through the

rocky shoals of pre-marital bargaining.

The recent case of Shanks v. Shanks, decided December 12, 2008, by the Supreme Court of Iowa, No. 06-0557, points out how this unspoken legal assumption is present. In that case the court focused on whether a premarital agreement was enforceable. The court analyzed the three provisions of Iowa Code section 596.8 of the Iowa Uniformed Premarital Agreement Act (IUPAA). The court altered its prior holdings in the case of In re Marriage of Spiegel, 553 N.W.2d at 315, the court focused on Iowa Code section 596.8(1) which required only that an agreement be executed voluntarily. In Shanks, the court emphasized its implicit holding of Spiegel that a voluntarily executed premarital agreement is one free of duress and undue influence. In Shanks they found that Teresa, the prospective spouse of Iowa Attorney Randall Shanks, testified she executed the agreement voluntarily. On de novo review they found that Teresa failed to establish duress or undue influence. The court then considered whether the agreement was unconscionable and therefore unenforceable. The court found that under IUPAA that *unconscionability alone is sufficient* to render a premarital agreement under IUPAA unenforceable. Review of premarital agreements for "unconscionability" is substantially more circumscribed than a review for mere inequity. The temporal focus of the unconscionability analysis is the time "when the

agreement was executed". Iowa Code section 596.8(2). The mere fact that a party made an imprudent bargain at the time of the marriage is not enough to find it unconscionable. The concept of unconscionability includes both procedural and substantive elements.

Procedural unconscionability generally involves employment of "sharp practices, the use of fine print and convoluted language, as well as a lack of understanding and inequality of bargaining power". Substantive unconscionability focuses on the harsh, oppressive and one sided terms of the contract. The court found that absent an unconscionable bargaining process a court should be hesitant to impose its own after-the-fact morality judgments on the terms of a voluntarily executed premarital agreement.

Shanks looked at substantive unconscionability under a standard of whether the agreement was so harsh or oppressive such as no person in the right senses and not under delusion would make such a bargain. The court went on to say that at the onset *the court acknowledges premarital agreements are typically financially one sided in order to protect the assets of one prospective spouse*. The focus of the substantive unconscionability analysis is upon whether the provisions of the contract are mutual or the division of property is consistent with the financial condition of the parties at the time of

execution. In Shanks the court found that the agreement was not substantively unconscionable.

Turning to procedural unconscionability, the court identified procedural unconscionability as the advantaged party's exploitation of the disadvantaged party's lack of understanding or unequal bargaining power. Factors considered in the analysis are the disadvantaged party's opportunity to seek independent counsel, the relative sophistication of the party in legal and financial matters, the temporal proximity between the introduction of the premarital agreement and the wedding date, the use of highly technical or confusing language or fine print and the use of fraudulent or deceptive practice to procure the disadvantaged spouse's assent to the agreement. In Shanks, the trial court stressed that Randall was an attorney and therefore was in a vastly superior bargaining position to Teresa. However the appellate court concluded that actual legal representation is not a condition of enforceability under Iowa Code section 596.8(2). The court commented that, "Although any doubt as to the conscionability of the agreement at issue in this case could have likely been avoided if both parties had been represented by competent Iowa-licensed counsel, we conclude that such legal representation is not a condition of enforceability under section 596.8(2)." Looking at temporal considerations, the court found that Teresa's failure to obtain Iowa legal counsel was a product

of her own refusal to do so despite serial encouragements from both her prospective husband and her non-Iowa licensed attorney.

In Shanks the court found that Teresa's words and actions demonstrate she placed a higher value upon marriage and Randall's companionship than upon the opportunity for greater financial security from marriage. Therein lies the question of fair bargaining in the context of intimacy. This is an important fulcrum for attorneys trying to balance things when the concern for fairness rather than unconscionability is the point of the bargain. Marriage (and divorce) law by its very nature provides *greater financial security by default.* How then can one place higher value on marriage by agreeing to greater financial insecurity for one spouse in a premarital agreement?

In Shanks the last issue discussed was financial disclosure. The court commented that Iowa Code section 596.8(3) does not impose an exacting standard of full access to financial information. Instead financial disclosure must be fair and reasonable. The court held that Teresa had sufficient knowledge of Randall's financial situation to understand the consequences of waiving of a marital interest in Randall's property.

To Do Or Not To Do Premarital Agreements

A financially dependent or emotionally empathetic prospective spouse, under the Shanks analysis, should not expect that the marital status or marital companionship will provide an

opportunity to later renegotiate financial matters during the marriage. Once a premarital agreement is enforceable upon signing and subsequent marriage it should be viewed as enforceable throughout the marriage, regardless of its length or future circumstances. It is the role of the attorney to advise that the contract negotiated before the marriage is expected to be the financial result after a marriage. The temporal focus for the legal analysis of unconscionability has this result.

As an attorney whose practice has been limited to domestic relations and family law for more than a quarter century, I have observed that we do not teach or culturally provide an expectation of fair bargaining in the context of intimacy. Since we should expect that all clients will not know how to effectively bargain in the context of intimacy, what is the role of the Iowa-licensed attorney after Shanks?

The general role of an attorney can be summarized by dual duties of discovering facts and informing the client about the facts and on the law. Under our ethical rules choice is generally the right and duty of the client. With premarital agreements the lawyer faces an odd situation, as with Teresa Shanks, that the client can choose marriage and companionship over financial security despite all discovery, information and advice to the contrary. Is this a choice of an empty vessel whose contents are drained away in the premarital agreement?

Lawyers are trained in and expect to bargain in the context of adversaries. Do you know how to help a client choose to walk away from the marriage, from the expected companionship and intimacy, when it is financially detrimental for the client to have a premarital agreement at all?

Ironically, the real gold-digger is the one who wants to enter marriage without a premarital agreement because without it there is greater advantage. On the other hand, the emotionally dependent or empathetic spouse is often the one most willing to enter a premarital agreement even though that spouse should not be giving up the financial benefits of marriage (and divorce) law. The emotionally dependent or empathetic person considers the wishes and needs of the other more than his or her own self interest. Our legal system created marriage (and divorce) law to protect spouses by automatically conferring benefits which are never bargained. So, what personal or public policy reason is there to hollow out those benefits automatically conferred on the marital status?

Summary

The Shanks case clearly puts to Iowa lawyers the question of why have a premarital agreement at all when such a contract creates an opposite legal tension to what the law prefers in the marital status. Rather than having lawyers throw up their hands and refuse to do any premarital agreement for prospective

spouses, I suggest:

- The scope of the bargained premarital agreement be limited to achieve only specific, limited and fair objectives different from what the law might otherwise confer and reasonable on the particular facts of the situation.
- The financially dependent client and the emotionally dependent/empathetic client should receive counseling, maybe together from both a lawyer and a therapist, as to the client's expectation of what marriage is and what death of the other spouse or divorce from the other spouse ought to look like.
- Remind the client that legal contracts made during a time of love and lust are likely as enforceable as legal contracts made between strangers shaking hands to consummate the deal.
- The lawyer must learn the methods and means of bargaining in the context of intimacy so that the client in love can make good and wise choices.

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