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YOUR MONEY-Breaking up is hard to do, breaking prenup is harder

By Geoff Williams

Though it's relatively rare, there are ways to break a prenup.

Agreements are just agreements, after all, says Paul Talbert, a matrimonial lawyer in New York. "The most common way is paperwork mistakes," adds Talbert.

He's had clients come in to divorce and produce a copy of their prenuptial agreements. A form wasn't filled out correctly, and the prenup is derailed, says Talbert.

There are no statistics on how many prenuptial agreements are made a year, says Randall M. Kessler, a divorce lawyer in Atlanta, but he estimates that half of high-net-worth marriages have prenups. And, he says, "Overall, I'd say prenups are ten times more common than they were 20 years ago, when I started practicing. It's not taboo anymore."

Whether you can break a prenup depends mostly on where you live, as laws and judicial tradition vary by state. Beyond geography, what matters is how the agreement is drafted.

Prenups usually specify a division of assets, should a couple divorce down the road, and the reason for drafting one is that one or both parties want to protect the wealth they had coming into the marriage.

Frequently, prenups also dictate how much alimony an ex-spouse will receive if there is a divorce, and sometime detail the amount of child support as well. But since these are private agreements, anything goes.

Kessler knows of cases in which the prenup stated that in-laws aren't allowed to visit more than once a month.

David Steerman, a family law attorney in Philadelphia, has heard of cases with clauses, "where if you gain more than 10 pounds, that can be cause for divorce, or if you change your hair color, you might be rewarded extra in a prenup."

Steerman thinks that might not get very far in court, but he notes, "I have done some agreements with an infidelity clause."

If the marriage breaks up due to an affair, the cheater has to pay even more to the other spouse.

So if you're regretting that prenup, here are some situations that might make your prenup null and void.

1. Your spouse wasn't honest about assets.

You may think outright fraud should be enough to break any legal agreement, but it can still be tough to overturn a prenup based on fraud. In New York, for example, even if a spouse hides a few million dollars in a bank account, that may not be enough, says Talbert. It depends on intent. If someone is worth \$100 million and they don't report \$3 million, the court probably won't see that as a big deal.

But if someone says they're worth \$400,000 and doesn't report \$3 million, that may not go over well with the judge.

R. Scott Downing, a family law attorney in Dallas, Texas, had a client who was able to get her prenup overturned after a court ruled her husband had community property worth millions that he hadn't disclosed to his wife.

One of the husband's downfalls was that he had given his wife a revised prenup on their wedding day. When she said she wanted to call her attorney, he lied, saying that her attorney had said it was okay to sign it.

"People need to know that if you're going to promise somebody a complete disclosure in a prenup, you'd better give it to them," says Downing.

2. You were coerced into signing the prenup.

"Literally, you'd have to have a gun next to your head," says Steerman, who finds coercion difficult to prove. "I've never had a case in over 23 years of practicing family law where a client claimed coercion or duress."

Steerman says even if a bride was told as she walked down the aisle that she needed to sign a prenup or the wedding would be called off, it would not be considered duress.

Inconvenient or rude, perhaps, but not enough to overturn a legal agreement in Pennsylvania.

But in New Jersey, where Steerman also practices, he says that a prenup case involving coercion would have a much better chance at being overturned.

3. There are unenforceable conditions.

By unenforceable, think repugnant. Such as if your prenup says that your ex won't provide child support. "It would have to shock the conscience and be something that no person in their right mind would agree to," says Heidi Opinsky, a divorce attorney in Connecticut. "There's a very high bar."

Still, it happens.

Silvana Raso, a family law attorney in Englewood Cliffs, New Jersey, had one client with a prenup that said she had to move out in a certain number of days in the event of divorce. Meanwhile, the couple had a child.

"He wanted to move the girlfriend in the house, and he wanted to chase the mother and newborn out of the house," says Raso. She was able to get the court to agree that the mother and baby needed more time to find a place to stay.

Raso had another case in which a wife agreed to take no alimony, but, then, during her marriage, she developed a mental illness and was not able to support herself. Raso was able to get the courts to agree to break the prenup, much to the husband's chagrin.

"I've never met a spouse who wanted to pay alimony," says Raso. "Nobody feels it's fair."