

# @ the weekend

## THE ISSUE / PRE-NUP AGREEMENTS

# Clause 27(a) I do, except ...

You've bought the dress and ordered the cake - now all you need is a pre-nuptial agreement. **Tim Dick** navigates the minefield of demands, dares and legal disputes.

For every half-kilo the wife gains during the marriage, she shall pay her husband \$500. Each time the husband is rude to his laws, he shall pay \$10,000. If the marriage ends, the husband keeps the wardrobe; the wife gets the pool boy. Pre-nuptial agreements, which lawyers report are increasingly used by Australian couples, may cover anything the couple wishes, from a sensible allocation of assets to bizarre "lifestyle clauses", regulating behaviour rather than money.

Enforcing them is another matter, but they have a life of their own among the wealthy, famous and odd. A shrewd pre-nup, the troubled pop star Britney Spears limited her payout to Kevin Federline (known as K-Fed) before the divorce, and Fed-Ex after Catherine Zeta-Jones, who has one with Michael Douglas, thinks them brilliant. The Danish monarchy had the world's most famous Tasmanian on one before marrying her prince; Paul McCartney didn't bother with one for Heather Mills.

In the United States, questionable lifestyle clauses have turned pre-nups into the stuff of legal folklore. Lawyers' websites list the most bizarre. They ban adultery and drug-taking, restrict child-minding and football-watching, and force groomsmen to help in the kitchen. A Beverly Hills lawyer proudly told CNN he once drafted a clause requiring the couple to copulate at least five times a week.

Few courts would enforce such clauses - judges don't fancy themselves as bedroom police - and suggesting a pre-nup is about as romantic as proposing for a fixed term. "Sickness and in health, until four years do us part; I get the house, you get the car and we split the dogs."

Although Jews have signed versions of them for 2000 years, most people, he hopes, are optimistic enough at the start of a marriage not to contemplate its end.

Despite divorces totalling roughly 40 per cent of the marriages registered each year, divorce and optimism are probably why pre-nups remain relatively scarce. Even in the US, accepted estimates put the figure well below 10 per cent.

Before 2000 even sensible pre-nups weren't binding in Australia, but after a law start, they now seem to be catching on, especially for older couples, or where one spouse is from a well-to-do family wanting to protect its estate.

There are no Australian statistics on pre-nups made, enforced or disputed. They aren't required to be registered, and only come to judicial attention



To sign, or not to sign ... above, Mary agreed to a pre-nup with Prince Frederik; as did Catherine Zeta-Jones, with hubby Michael Douglas, below, and K-Fed, with Britney Spears. Heather Mills and Paul McCartney didn't bother.



when contested. In 1997, three years before they became binding, the government's Australian Institute of Family Studies surveyed 650 divorced Australians, and found just 2 per cent - 13 people - had one, although 32 per cent said one would have helped.

Even after pre-nups were recognised, few decided to use them. But around 2005, things started to pick up, according to Les Stubbs, head of family law at Turner Freeman. Along with three other prominent family lawyers spoken to by the *Herald*, he believes they're on the rise.

His firm used to prepare one or two pre-nups a year, but now does one a month. Another Sydney firm reported a four-fold increase. "They are slowly becoming more prevalent," Stubbs says.

He's even seen lifestyle clauses - previously unheard of in Australia -

occasionally crop up, although courts would hardly force anyone to have sex, let alone five times a week. "I think people are getting more used to it and the social stigma is disappearing," he says.

Without official statistics, his impression is difficult to verify, but Amanda Parkin, a family lawyer from Parramatta firm Coleman & Greig, agrees they're becoming more widespread.

She identifies two classes of people who usually seek them. For older couples entering later marriages, she thinks they work quite well. But she's not so sure of their utility for the younger couples, where it is often the wealthy parents of one betrothed clamouring for a pre-nup.

She's seen weddings claimed to be contingent on signing. Some sign,

and some don't. Some weddings go ahead; some don't.

(In 2005, gossip pages went into a frenzy over the cancelled society wedding of the former editor of *Oyster* magazine, Madeliene Anderson, daughter of wealthy property developer, Warren Anderson. She called off the wedding to Paul Attard in the midst of a dispute about a pre-nup.)

A recent judgment may stymie the apparent rise in popularity. The full court of the Family Court earlier this year set aside an agreement on the most technical of technicalities, deciding only exact adherence to the statutory safeguards would allow a pre-nuptial to stand.

The case was as follows. After a brief, violent marriage, the couple split with \$348,000 in assets. Their

agreement - proposed by the husband - said any assets would be divided equally. On separation, the husband sought to vary the agreement, as the wife's car crash compensation was less than he hoped.

He wanted an 80-20 split, and argued the Family Law Act's pre-nup safeguards were not met, as the words in a lawyer's declaration were not precisely those mandated.

The Family Court rejected his claim, finding substantial compliance was good enough. "Courts should not make the legal practitioners and parties cross all of the T's and dot all of the I's to enter into and give effect to financial agreements," it found. "The form should not defeat the substance."

On appeal, the full court found that it must. It said Parliament only allowed spouses to evict the courts from