

What can be written into the pre-nuptial agreement under Chinese family laws?

Description

Recently I came across a very interesting article posted on Ifeng.com, a very popular Chinese web portal, talking about pre-nuptial agreements between various type of stars in the world such as UK prince Williams and Kate, Beyonce and Jay-Z, Britney Spears and Kevin.

Some of the fun points in their pre-nuptials are:

(1) In the agreement between Mike Douglas and his wife Diane Andros, Douglas will have to pay 3.4 million pounds once found guilty of being unfaithful;

(2) Hong Kong actress, Cecilia Cheung, insists in her agreement with her husband Tse Ting Fung that she will be entitled to take their children with her if they divorce for whatever reasons;

(3) More weird is the piece of provision the Japan female star Erika Sawajiri has with her husband saying that they will have sex four times a month, and for each one more time, her husband will pay her 500,000 Japanese Yen. Jesus! What a marriage!

I am not sharing the funny things with you only but getting you aware and informed about what you can write into the pre-nuptial agreement under Chinese laws. People who get married with a Chinese minister or miss, or simply get married in China because of their residence in China, may be interested to know this if they are contemplating a pre-nuptial agreement. For avoidance of doubt, the said people don't have to [follow Chinese laws in drafting their pre-nups](#), and the parties can agree on the applicable laws governing their marital agreements.

1. On Marital Properties

Strictly speaking, a couple can only write about the division of marital properties in their pre-nuptial or premarital agreement under China Marriage Law. Article 19 of the Law reads that a couple can stipulate in a written agreement that the properties (real or personal) earned or acquired during or prior to their marriage be jointly or separately owned in whole or in part. There are no other provisions authorizing a couple to agree on anything else in the life of their marriage except in the case of a divorce settlement agreement.

In the absence of a pre-nuptial agreement, all properties acquired by one spouse in the course of their marriage will automatically turned into a piece of community property of the couple except as otherwise provided by laws. For more in regard of legal rules governing marital properties, please refer to another post on this blog: [basics about China Marriage Law](#).

So for people who do not want to easily lose half of his earnings and income in China, it will be definitely necessary to prepare and sign a well-drafted pre-nuptial agreement.

Chinese courts have been refusing to split marital properties between a couple unless the couple divorce till the issue of the third judicial interpretation of China Marriage Law by Chinese Supreme

Court. Under the new interpretation issued in August of 2011, before divorce, one spouse may sue to divide their community property in two situations:

- (1) the other spouse is engaged in conducts that cause material damage to community properties and interests, such as concealing, transferring, damaging or squandering the same, or creating false joint debts etc.; and
- (2) one spouse's relatives to whom the said spouse owes the statutory obligation of paying their medical expenses are seriously ill, the other spouse does not agree to pay such expenses.

2. On Child Maintenance, Custodianship/Guardianship

Children are the most innocent party to any divorce dispute. Always, the child issues including the guardianship, maintenance and advancement of the child are one of the core concern in the dispute. So it is not strange to see many pre-nuptial agreements include clauses dealing with the maintenance, custody and custodianship of the Child.

However, the couple contemplating such clauses shall be careful so as not to render such clauses void. Under China Marriage Law, Chinese family law, it is both statutory right and statutory obligation of the parent to maintain, raise and educate the child. In other words, one spouse cannot deprive the other of the right to custodianship for the child.

On the other hand, China Marriage Law does allow the parties to discuss and agree on how the child should be maintained and supported between them. So it is my understanding that the couple may stipulate that in case of divorce, given conditions, the child will live with one parent with the other giving necessary financial support. The wording shall avoid meaning that the other party will lose his right to take custody of the child.

Very often, upon divorcing, one spouse wants to leave the child to the other by offering the other some money, hoping that he or she will no longer be obligated to maintain and raise the child. This is illegal in China. The China Marriage Law provides expressly that after divorcing, the parents have the right and OBLIGATION to maintain and educate the child. This statutory obligation is also applicable in the case of a child that is born out of wedlock. The child will always be able to ask for maintenance fee from the other parent that is not living with the child.

Unfortunately, under Chinese family laws, the obligations for custodianship and maintenance are not well defined as they should be, and are very much mixed and misused in various laws and regulations. This poses another layer of problem to the issue and drafting in this regard shall be well considered and thought over.

3. Penalty for Infidelity

Nowadays, fidelity is something precious in our world. It is very common for a couple to think about using financial penalty in their pre-nuptial agreement to prevent the other party from committing unfaithful conducts and adultery.

However, such agreement is not upheld in Chinese courts. In Shanghai where I practice law, the Shanghai High People's Court has made it clear in its [notice](#) back in 2004 that such agreements are

related to moral obligation instead of legal obligation, and therefore should not be treated as a cause of action.

On the other hand, there have been reports in which courts uphold claims for liquidated damages stipulated in pre-nuptial agreement. In 2011, an intermediary people's court in Beijing granted RMB 800,000 to the wife after finding that her husband breached his obligation of fidelity under the premarital agreement.

In such a case, it is always advisable to insert such a clause in your pre-nuptial agreement. Personally, I tend to believe that such agreement on fidelity obligation shall be supported because the claims for such spiritual and material interests are reasonable and commonplace in society. Chinese Marriage Law provides that a couple shall be faithful and loyal to each other. There are no reasons why such traditional morality is not protected by courts.

It will be reasonable to expect a change of attitude on the part of Chinese Supreme Court with the advancement of Chinese society in which the concept of contract and individualism is growing.

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