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Barron's

Prenuptial Agreements Gain Traction in Asia

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You may think only the most unromantic of couples would think about divorce before their wedding day.

Yet formalizing who gets what in the event a marriage falls apart even before vows are exchanged is an increasing focus for Asia's wealthy, especially those keen to avoid the size of their family's fortune becoming headline news.

"It certainly is a rising trend," says Cynthia Lee, head of North Asia wealth advisory at JP Morgan Private Bank. Agreed, says Jonathan Hubbard, head of wealth planning, APAC, at UBS Wealth Management: "It is definitely coming up more."

How to warmly welcome your son or daughter's future partner into the family, and yet ensure the family's wealth is protected for generations to come, is a dilemma for the region's wealthy families who know not all marriages last forever. "The patriarch and the matriarch are more and more aware of the risks of these potential breakdowns," Hubbard says.

A prenuptial agreement lays out who owns what property and how it will be divided in the event of a divorce. And it can allow you to "ring-fence" family wealth that a son or daughter may have inherited or will be inheriting during their lifetime, says Jonathan Mok, a partner at Mayer Brown JSM in Hong Kong.

Many of the region's wealthy seek to protect their family's wealth, ensuring it exists for generations, by placing assets in offshore trusts, but that strategy doesn't guarantee protection in a divorce. If a trust is set up just before the marriage without the knowledge of the future spouse, then he or she can claim they weren't consulted. "A prenuptial is better, it puts everything on the record," Mok says.

One strategy is for the family to lay down the law and require all members to sign a prenuptial agreement before they get married. This can be stipulated in a family charter or constitution, a document ideally created with input from the whole family. What's great about this approach is it allows your daughter to tell her future husband, "this prenuptial agreement isn't my idea, my family is making me do it," which could smooth over what would otherwise be a difficult conversation. "It's a much better sales pitch," Mok says.

But writing a prenuptial agreement requirement into a family constitution, while practiced in Europe and the U.S., is not common among wealthy families in East Asia, at least not yet, says Professor Kevin Yuk-fai Au, director of the Chinese University of Hong Kong's Center for Entrepreneurship.

One reason discussion of prenuptial agreements is on the rise in Asia is because of recent court developments in Hong Kong that make it more likely these contracts will be considered should a couple divorce. Hong Kong law, like English law, historically has benefitted the "financially weaker" spouse in a break-up. As a result, partners in Asia seeking more preferential treatment tend to turn to Hong Kong for divorce, which has earned the city the dubious title of "divorce capital of Asia" and has led to large payouts.

But in June 2014, a Hong Kong court upheld an English court decision that said prenuptial agreements can be considered if it's clear neither spouse was forced into the agreement and both parties provided "full and frank disclosure" of their assets and information related to his or her decision to enter the agreement, according to Mok. The agreement could be considered unfair if one spouse, for instance, is left with significant resources and the other has none.

A couple also has to prove the process of putting together the agreement was "fair and impartial," says Lee at JP Morgan. "It is understood parties have their respective rights to carve out assets prior to marriage and not to include them as part of matrimonial assets," Lee says. Any exclusion to the marital pie has to be reasonable, though, she says.

"If both parties are independently represented, if there's no evidence of duress, if there's a fair agreement and if there's fair disclosure, on the face of it, the court would say, 'ok, you went into this with your eyes open, so why not?'," Hubbard at UBS says.

Crafting a prenuptial agreement can prove tricky

The steps to creating a fair agreement can present challenges for a future couple and could make some think twice about going through with it.

Consider the concept of "full and frank disclosure." On a practical level this can prove difficult if you don't have a complete picture of your assets, or what is in your name and your family's name. "So it quite difficult to enter into something when you actually have no clue what exactly you own or you will own," Lee says.

And she adds, "Do you really want to put it into a contract with the specifics?" Or, would you want to do it the "Chinese way," and keep it more generic.

The other challenge will come as each member of the couple hires an independent lawyer. "Do you want to invite your future spouse to engage an independent lawyer and to go through a hundred issues that were never on his or her mind?" she asks.

Also couples need to understand the laws in the country where they plan to live as a married couple. In Hong Kong, prenuptial agreements that are freely entered into, and include fair and full disclosure, are likely to be considered, but each country in Asia is different.

In Indonesia, Malaysia and India, for instance, laws concerning marriage may depend on your religion. In Singapore, a court can refer to a prenuptial agreement when considering how to divide a couple's assets "in a just and equitable manner," but it's not bound to follow it," Lee says. In China, the agreements are enforceable, but courts in China tend to be conservative, and most families have approached the issue by using trusts and other means to protect their wealth, Au at CUHK says.

Even if laws vary and precedents are still being set, Mok at Mayer Brown JSM says couples who plan to marry should consider them. "It's better to have one than not," he says. "At the very least, it shows the parties intention."

Au believes a better approach is for families to ensure their values are instilled in their children at a young age and that they're encouraged to meet friends and eventually long-term partners who share these values. "Imagine if your son does not understand the importance of wealth and enjoys a luxury lifestyle, and doesn't think about family values and what the family expects," Au says.

Lee at JP Morgan says that whatever approach you take, it's important for families to be inclusive of future family members.

"I trust this 200%," she says. "This is the only way to make it work."