

Infidelity Clauses: Proceed With Caution

BY ALYSSA ROWER, KARINA VANHOUTEN AND LEO WISWALL

Broadly defined, an infidelity clause is a provision in a prenuptial or postnuptial agreement (collectively, “marital agreements”) that stipulates that if one party is unfaithful during the marriage, he or she will suffer a financial penalty.

In popular media, infidelity clauses have been classed as a subset of “lifestyle clauses,” or clauses that dictate how parties should live during the marriage. Courts have viewed infidelity clauses more starkly, recognizing them as merely one type of provision which aims to punish one party for perceived misconduct during the marriage (“misconduct clauses”).

While infidelity clauses often mandate a one-time financial award (a “distributive award”) from the unfaithful spouse to the aggrieved spouse, they may also modify equitable distribution or

alimony in the aggrieved spouse’s favor. In one Hawaii case, *Croford v. Adachi*, the parties signed a postnuptial agreement stipulating that the husband would waive his rights to the marital yacht if he engaged in a subsequent “extramarital event.” 150 Haw. 518, 506 P.3d 182 (2022).

Infidelity clauses, spurred on by popular articles and celebrity tabloids, have grown in popularity over recent years. Despite this increase in popularity, however, the legal enforceability of such clauses remains an unresolved question in most states. This begs the question: Are infidelity clauses advisable?

Infidelity Clauses: A Good Idea?

As to whether infidelity clauses are advisable, we unequivocally answer “no.”

Proponents of infidelity clauses point to the fact that they may deter infidelity. This is true only to an extent, as infidelity clauses are often unenforceable. Moreover, this perceived deterrence



Credit: Elena Abrazhevich/Shutterstock

belies a financial, emotional, and social cost.

While a well-drafted marital agreement will limit litigation upon a divorce, a marital agreement that includes an infidelity clause injects a new litigable issue into matrimonial proceedings. Because an infidelity clause imposes some financial penalty on the unfaithful party, be it a distributive award or equitable distribution, it creates a question of fact (whether infidelity occurred), which must be resolved by the parties or a court.

If one party disputes having breached the provisions of an infidelity clause, the other party has the burden of proof. This often translates into messy and vitriolic factual disputes, like in *Gilley v. Gilley*, where the plaintiff-wife hired a detective on at least three separate occasions to catch her husband engaging in extramarital relations with his paramour. Such a dispute not only contributes to legal fees and acrimonious litigation, but also thrusts the most intimate and embarrassing details of a private relationship into a public courtroom. In *Gilley*, for example, the detective's salacious findings about the husband's extramarital exploits became part of the public record. 778 S.W.2d 862 (1989 Tenn. App).

And, even if one party can successfully prove that an infidelity clause was breached, they have the added burden of convincing a court that the terms of the infidelity clause are enforceable. This is oftentimes no easy task.

Where Are Clauses Unenforceable?

In states that only permit divorce on "no-fault" grounds ("strictly no-fault states"), like California and Nevada, appellate courts have ruled infidelity clauses unenforceable on the grounds

that they conflict with public policy.

In the seminal case, *Diosdado v. Diosdado*, a California appellate court held that infidelity clauses, and misconduct clauses more generally, are unenforceable. The court considered the enforceability of a postnuptial agreement that imposed a \$50,000 fine on either party caught engaging in an extramarital affair. Citing to a California statute (Cal. Fam. Code, §2335) stating that "evidence of specific acts of misconduct is improper and inadmissible [in divorce proceedings]," the court ruled that the agreement was "in direct contravention of the public policy underlying no-fault divorce." The postnuptial agreement violated California's requirement that a contract have a "lawful object," and was therefore unenforceable. 97 Cal. App. 4th 470, 118 Cal. Rptr. 2d 494, (2002 Cal. App).

In 2004, a California appellate court extended this holding, voiding a postnuptial agreement that awarded the wife certain items of marital property if the husband used cocaine. See *In re Marriage of Mehren & Dargan*, 118 Cal. App. 4th 1167, 13 Cal. Rptr. 3d 522, 2004 Cal. App.

Diosdado established an influential interstate precedent

across strictly no-fault states. In Nevada, a court ruled it was "tak[ing] a page from California's book" and, citing *Diosdado*, voided a prenuptial agreement that awarded the wife alimony on the grounds of the husband's infidelity. In *re Marriage of Cooper*, the Supreme Court of Iowa likewise cited to *Diosdado* and voided an infidelity-conditioned postnuptial agreement in order to avoid "empower[ing] spouses to seek an end-run around [its] no-fault divorce laws through private contracts." 769 N.W.2d 582, (2009 Iowa Sup.).

Although Hawai'iian courts had previously ruled infidelity clauses enforceable, the Supreme Court of Hawaii recently reversed course and followed the precedent set by Nevada, Iowa, and California in *Crofford v. Adachi*. The court found that the state's no-fault regime extended to the division of marital property, and ruled that the agreement in question required the court to engage in fact-finding as to whether infidelity had occurred, which violated the legislature's intent to "avoid abrasive evidence in divorce proceedings."

Where Are Clauses Enforceable?

The only states in which courts have explicitly held infidel-

ity clauses enforceable are Pennsylvania and Tennessee, both of which allow for divorce on grounds of adultery.

In *Laudig v. Laudig*, a Pennsylvania appellate court affirmed the enforceability of infidelity clauses. The appellate court ruled that because marital agreements allow parties to dispose of property “regardless of the reasons,” the court should not prohibit disposition of property based on the occurrence of a specific type of (mis)conduct. 425 Pa. Super 228 (624 A.2d 651).

In *Gilley v. Gilley*, the Tennessee Court of Appeals considered a reconciliation agreement that did not contain a specific infidelity clause but offered the wife extraordinarily favorable conditions upon a divorce. The defendant-husband argued that the terms of the marital agreement were inequitable, thus encouraging the wife to end the marriage in violation of public policies favoring the preservation of marital relations. The court rejected the husband’s argument, finding that the agreement aimed to deter the husband from subsequent infidelity, which cohered with public policy. 778 S.W.2d 862, (1989 Tenn. App).

Conclusion

The rulings directly addressing the enforceability of infidel-

ity clauses have thus followed a clear pattern where the issue has been raised: Every state that allows for divorce on only no-fault grounds has ruled infidelity clauses unenforceable, whereas every state that allows for divorce on fault-based grounds has ruled infidelity clauses enforceable.

It is possible to make general predictions on the basis of this pattern. In Oregon, which only allows for divorce on no-fault grounds, courts would likely rule infidelity clauses unenforceable. In Connecticut or New York, which allow for divorce on grounds of adultery, a well-drafted infidelity clause is likely to stand a chance.

At the same time, given the relatively sparse and dynamic nature of the case law, it is inadvisable to draw firm conclusions about the enforceability of infidelity clauses. When considering this issue, courts often consider a wide variety of factors, including the state’s grounds for divorce, statutory and common law governing marital agreements and dissolution, and the legislative intent underpinning such laws. The multifaceted analysis has led to disparate outcomes even in states with similar matrimonial regimes. For example, Hawaii,

which is a strictly no-fault state, had affirmed the enforceability of misconduct clauses prior to March of 2022.

Given the unsettled status of infidelity clauses under the law, and the potential downsides of including them even when such clauses are ruled enforceable, they should be treated with caution. If clients insist on including an infidelity clause in a marital agreement, it would be advisable to check the statutory and case law of the state in which the couple plans to reside.

Alyssa Rower is the founding partner of Rower LLC, a New York law firm started in 2017 dedicated to matrimonial and family law.

Karina VanHouten is an associate with the firm and focuses her practice on prenuptial agreements and the intersection of divorce and estate planning. **Leo Wiswall** is a paralegal at the firm who assists the firm with prenuptial agreements and other matrimonial matters.