

Introduction

General Purposes

Why write another book on marital agreements? The subject has already been addressed in a large number of works. Some of these works cover the entire field of marital agreements from a nationwide perspective.¹ Other works cover marital agreements from specific state's viewpoint, often as part of a broader discussion of that state's domestic relations law.² Taken together, the existing body of legal literature covers marital agreements with both breadth and depth. Why are the present authors venturing upon ground that has been so well trodden by others?

The answer lies in the viewpoint from which the existing works are written. These works generally approach marital agreements from the viewpoint of the attorney who must negotiate and draft a marital agreement. They provide much practical guidance for negotiating, and a large volume of sample clauses for insertion into draft agreements. In the case of the state-specific works, these sample clauses are consistent with local practice, and they often have a very well-settled meaning under local law. Readers seeking to draft a marital agreement will probably find more guidance in such works than in this one.

1. *See* 2 HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* ch. 19 (2d ed. 1987); ALEXANDER LINDEY & LOUIS I. PARLEY, *LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS* (1994); STEPHEN W. SCHLISSEL, ELENA KARABATOS, & RONALD E. POEPPLEIN, *SEPARATION AGREEMENTS AND MARITAL CONTRACTS* (1997); GARY N. SKOLOFF, RICHARD H. SINGER, JR., & RONALD L. BROWN, *DRAFTING PRENUPTIAL AGREEMENTS* (1994).

2. *See, e.g.*, PETER SWISHER, LAWRENCE D. DIEHL & JAMES COTTRELL, *VIRGINIA FAMILY LAW: THEORY AND PRACTICE* ch. 3 (2d ed. 1997 & Supp. 1998).

The existing literature on marital agreements, however, tells only part of the story. Negotiation and drafting are important, but they are not the only relevant concerns. Parties who agree on Monday frequently have second thoughts on Tuesday, and then seek to convince the court that their agreement is invalid. Moreover, even if both parties continue to agree on Tuesday, they may still have very different views on what their agreement actually provides. The existing works provide considerable guidance to the drafter, but they provide very little guidance on questions of validity or construction. Since it is a rare practitioner who does not face questions of validity and construction on a regular basis, the limited scope of coverage of the existing literature is unfortunate.

As professional research attorneys, the authors of this work learned early in their careers of the lack of literature on validity and construction of marital agreements. After struggling for several years to use drafting-oriented treatises for guidance on postdrafting issues, we decided to address the need ourselves. Since we served for many years as editors of the monthly journal *Divorce Litigation*, our initial efforts took the form of articles for that publication.³ Those articles were well received by others, and we ourselves found them much more useful in answering questions of validity and construction than other works. We therefore decided to expand the articles into a full-length book—the first edition of the current treatise.

This treatise, now in its second edition, continues to primarily address what happens *after* a marital agreement is signed by the parties. While we offer drafting tips at appropriate points, our primary focus is upon the twin issues of validity and construction. In addressing these issues, we will mostly assume that the reader has no independent knowledge of what took place during negotiation. This will not be true in many cases, of course, but in almost all cases the court itself will lack such knowledge. It is therefore generally true to note that this work approaches questions of validity and construction from the same viewpoint the court will stand at when it resolves these questions.

The primary purpose of this work is to provide practical guidance to attorneys who are faced with questions of validity and construction. We have tried to keep the text as readable as possible, and have banished most of the citations to the footnotes. To assist the attorney who must argue a particular question of validity or construction, we have tried to describe all of the arguments that find minimum support in the available case law. To assist the attorney who must objectively evaluate the chance that these arguments will prevail, we have tried not only to describe the possible arguments, but also to discuss their general strengths and weaknesses.

3. See Brett R. Turner, *Attacking and Defending Separation Agreements*, 3 *DIVORCE LITIG.* 61, 73 (1991); Brett R. Turner, *Attacking and Defending Separation Agreements: A 1995 Update*, 7 *DIVORCE LITIG.* 225, 245 (1995); Brett R. Turner, *Recent Case Law on Construction of Separation Agreements*, 4 *DIVORCE LITIG.* 25 (1992); Brett R. Turner, *Recent Case Law of Modification and Enforcement of Separation Agreements*, 4 *DIVORCE LITIG.* 45 (1992); Brett R. Turner, *A Mini-Encyclopedia of Ambiguous Separation Agreement Provisions and Their Construction by the Courts*, 4 *DIVORCE LITIG.* 51 (1992); Laura W. Morgan & Brett R. Turner, *Attacking and Defending Antenuptial Agreements: A 1993 Update*, 5 *DIVORCE LITIG.* 129, 149 (1993).

It has been our general observation over 20-plus years of family law research practice that many practitioners are too quick to argue positions that they have not yet fully evaluated. These practitioners often find themselves making unsuccessful arguments for a “home run” result, while missing much stronger arguments for a lesser result that will still be of substantial benefit to the client. To identify and make the best arguments possible, the attorney must be able to evaluate objectively the strength or weakness of his or her own position. Assisting the practicing attorney in making and evaluating arguments on the validity and construction of marital agreements is the core purpose of this volume.

In addition, we have attempted to accomplish two secondary purposes. First, in the course of reading thousands of cases on marital agreements, we inevitably observed areas in which law either needs clarification or is unusually difficult to explain clearly. The authors are strong believers in the tradition of resolving most family law issues at the state level, but the states cannot function as test laboratories for new rules of law unless someone compares the results, highlighting those rules that experience shows to be unworkable or unsuccessful. An important secondary purpose of this work is to make note of these areas, in the hope that courts and legislatures might be led to address some of the problems we have identified.

Second, in reading marital agreement cases, we also observed various different types of provisions that tend to cause problems for one or both parties. In many instances these provisions were not an essential part of the agreement, and one or both parties were left wishing that the agreement had been differently drafted. There is an obvious benefit to highlighting these provisions, so that future drafters are alerted to think long and hard before including them in an agreement.

Our discussions of these problematic provisions should be read with awareness of the limited expertise of the authors. Most drafting advice is given by experienced practitioners, based upon their own valuable but anecdotal experience of what provisions work best. As research attorneys, the present authors have essentially no personal experience in the negotiation or drafting of agreements. What we do have is a substantial knowledge of the reported appellate case law, and in particular a clear awareness of what types of provisions have ultimately resulted in more harm than benefit. Since research attorneys are sometimes the remedy of last resort when an unwisely drafted agreement calls for a harsh result, we also have a body of personal experience dealing with the consequences of poor drafting.

As a result of our position in the legal system, we feel well qualified to discuss what types of provisions are likely to cause serious problems for one or both parties. The reader will find that we are strongly against clauses preventing the parties themselves from modifying their agreement (§ 6.07), and strongly in favor of verifying informal financial disclosure through the formal discovery process (§ 4.053). We cautiously support provisions terminating spousal support upon proof of cohabitation alone, where they are an attempt to avoid the practical problems of proving financial dependency or similarity of the relationship to remarriage, and not a device to control postmarital sexual behavior (§ 3.05). We confess to particular

distaste for nonmodifiable spousal support provisions, which we liken to playing Russian roulette with the parties' financial futures (§ 6.032).

When the issue becomes what types of provisions work particularly well, however, our base of knowledge is less substantial. Appellate cases are most often heard, and research attorneys are most often consulted, when at least one party is unhappy with the agreement. When a provision works well, the parties never come back to court, and the authors of this volume are unlikely to encounter them. Thus, it is generally accurate to say that we have much knowledge of provisions that failed, and only some knowledge of provisions that succeeded. The reader should keep this fact in mind when reviewing our drafting advice.

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