

**THE LAW OF
PREMARITAL
AGREEMENTS**

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PART



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INTRODUCTION

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§1.01 DEFINITION AND TERMINOLOGY

A premarital agreement is a contract between prospective spouses made in contemplation of marriage.¹ Older cases generally use the term “antenuptial agreement” or “prenuptial agreement.” Some statutes refer to them as marriage contracts or marriage settlements.² Modern authorities generally use the term “premarital agreement,” consistent with the terminology of the Uniform Premarital Agreement Act (UPAA).³

§1.02 OVERVIEW

This book focuses on the following aspects of representation regarding a premarital agreement:

- The law of validity and the steps to create a valid agreement;
- The ethical components and the practical techniques of negotiating the terms of the agreement;
- Post-execution issues; and
- The content of the agreement and drafting techniques to carry out the objectives of the parties.

1. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) § 7.01(1)(a) (hereafter, *Principles of the Law of Family Dissolution* or *ALI Principles*).

2. See *Posner v. Posner*, 233 So. 2d 381, 383 (1970).

3. UPAA § 1, *et seq.* (1983).

Part I of this book covers the law relating to the creation of a valid agreement. Chapter 2 summarizes the criteria for validity.⁴ Chapter 3 provides an extended treatment of the elements of a valid agreement and the legal theories that have been used to attack validity. For example, Chapter 2 identifies voluntariness as a requirement for validity in every state, and Chapter 3 discusses in detail the case law interpreting voluntariness and the related concepts of duress and undue influence. Spousal support and lawyer's fees are covered separately in Chapters 4 and 5. Even when a premarital agreement is valid, a court may separately consider validity of specific terms addressing these issues. Chapter 6 briefly addresses terms regarding nonfinancial issues and terms regulating the ongoing marriage.

Part II of the book focuses on the role of the lawyer. Chapter 7 delves into a variety of ethical issues presented in the drafting and negotiation of premarital agreements, and Chapter 8 covers the more practical aspects of negotiating the terms. Part III discusses a number of issues that can arise after execution of the agreement. An understanding of the ways in which post-execution conduct can affect a party's rights can aid the lawyer at the drafting stage by suggesting terms to better protect the client. Such an understanding can also suggest advice the lawyer should consider giving the client to secure the rights he or she bargained for.

Finally, Part IV consists of the text of a model agreement with discussion of each part of the agreement. The discussion is designed to aid the drafter in choosing from various options to tailor the agreement to the needs of the client.

§1.03 ROLE OF COUNSEL

This book is written for the lawyer hired to negotiate and draft a premarital agreement.⁵ The goals of the lawyer for the proponent will generally include the following:

- Execution of an agreement that serves the interests of the client by meeting his or her need to protect property rights and income from a spousal claim without creating unnecessary antagonism that may alienate the other party;

4. Appendix B, State Law Summary, provides citations to key statutes and cases on validity.

5. Litigating the validity of an agreement is not covered here. *See Morgan & Turner, Attacking and Defending Marital Agreements* (ABA, 2001); see also Chapters 7 and 8 of this book for an extended discussion of the role of counsel.

- Creation of an agreement that will withstand an attack on validity after death or dissolution;
- An agreement that a putative opponent will be discouraged from attempting to have declared unenforceable; and
- An agreement that clearly and understandably defines the parties' rights and obligations upon death or dissolution.

It is a common misconception that premarital agreements are easy to challenge successfully. There are many reported cases involving challenges to validity. Few were successful at the appellate level. The threshold for validity in most states is quite low. However, the prevailing proponents were forced to litigate the validity of their agreements through an appeal, incurring the cost of litigation and the risk of failure. Unreported are the claims that settled with the proponent making financial concessions and the adverse results that were not appealed.

The lawyer hired at the drafting stage has an opportunity. Careful drafting, attention to the procedural steps leading to execution, and appropriate advice can significantly reduce the likelihood of a later challenge to validity as well as the risk that such a challenge will be successful.

The only realistic opportunity the lawyer for an economically weaker party has to achieve a good result is at the negotiation and drafting stage. It generally takes a combination of egregious circumstances to persuade a court to hold a premarital agreement invalid.⁶ Even when there are egregious circumstances, there can be no assurance a court will invalidate the agreement.⁷ The presence of counsel for a weaker party before execution dramatically reduces the likelihood a court will declare an agreement

6. *See, e.g.*, Parr v. Parr, 635 N.E.2d 1124 (Ind. Ct. App. 1994) (husband's almost complete nondisclosure, his misrepresentation of his assets, his dominance, and his attorney's failure to provide copy of draft agreement to wife's attorney in advance, although such had been requested, rendered premarital agreement invalid); Norris v. Norris, 419 A.2d 982 (D.C. 1980) (premarital agreement sprung on wife one hour before wedding with no disclosure was invalid).

7. *See, e.g.*, Pajak v. Pajak, 385 S.E.2d 384 (W. Va. 1989) (premarital agreement valid where signed one day before wedding, wife not advised to retain counsel for independent review, husband made no disclosure of assets, and wife testified she did not understand many terms of agreement); Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989) (premarital agreement seen by wife for first time and signed night before Dec. 31 departure for Las Vegas to get married was not product of duress).

invalid.⁸ Assuming a court will someday relieve an unhappy party of the consequences of a foolish bargain or a badly drafted agreement is folly.

§1.04 HISTORY OF THE LAW OF PREMARITAL AGREEMENTS

(a) Premarital Agreements before *Posner v. Posner*

Historically, public policy favored premarital agreements when fairly made because they were thought to be conducive to marital harmony by enabling future spouses to prospectively settle property rights arising upon the death of a spouse. Courts upheld premarital agreements as long as the provisions were fair and reasonable, but they limited enforcement to those agreements made in contemplation of the death of a spouse.⁹ Courts generally refused to enforce agreements that determined property and support rights upon divorce. These agreements were thought to destabilize the institution of marriage by making divorce too easy, and thus were contrary to public policy.¹⁰ Moreover, because the state is a third party in actions relating to the marital relationship, courts held that a prospective wife, who was considered to be in an unequal bargaining position, should not be bound by a premarital waiver of support that could leave her a ward of the state.¹¹

(b) *Posner v. Posner* and Premarital Agreements at Divorce

In 1970 the Florida Supreme Court, in *Posner v. Posner*,¹² held that premarital agreements determining disposition of assets upon divorce were no longer void ab initio as contrary to public policy. The contemporary view is that premarital agreements that settle questions of property and support rights upon divorce promote and facilitate marriage rather than encourage divorce. As one court observed:

8. See *Spiegel v. Spiegel*, 553 N.W.2d 309 (Iowa 1996) (premarital agreement upheld where wife had attorney who negotiated changes); *Kilborn v. Kilborn*, 628 So. 2d 884 (Ala. Civ. App. 1993) (premarital agreement was voluntary where wife signed after two different attorneys advised her against signing); *Hamilton v. Hamilton*, 404 Pa. Super. 533, 591 A.2d 720 (1991) (premarital agreement not product of duress where wife was 18, unemployed, and pregnant but was represented by counsel who advised not to sign).

9. *Posner*, 233 So. 2d at 381; *Bonds v. Bonds*, 24 Cal. 4th 1, 5 P.3d 815 (2000).

10. *Gross v. Gross*, 11 Ohio St. 3d 99, 464, N.E.2d 500 (1984); *Osborne v. Osborne*, 384 Mass. 591, 595–96, 428 N.E.2d 810, 814 (1981).

11. *Posner*, 233 So. 2d at 383.

12. *Id.* at 381.

This society's staggering divorce rate can only place any reasonable person on notice that divorce is as likely an outcome of any given marriage as a permanent relationship. Modern laws that allow alimony to be awarded in no-fault divorces, and that provide for the equitable distribution of all property acquired by joint efforts during the course of a marriage fulfill a useful function in today's society. . . . Nonetheless, it should be obvious that a person like our appellant, . . . , who enjoys a financial position that places him in the top one percent of all income-earning Americans, will be reluctant to marry when modern divorce law (including some parameter for judicial caprice) places both his property and his future income at jeopardy. Furthermore, as the facts of this case amply demonstrate, he need not marry. He can conceivably live with a woman for years without any social or financial pressure to formalize his relationship.¹³

Because couples need not marry, and may choose not to do so if marrying puts all their assets and income-earning potential at risk, courts and legislatures have recognized that allowing such persons to enter into a contractual arrangement that reduces their exposure to spousal claims, and pre-determines their rights and obligations at the end of the marriage, encourages parties, especially those who have been married previously, to take a chance on love.¹⁴ Since *Pomer* was decided, every state and the District of Columbia, either legislatively or through case law, has permitted parties who plan to marry to enter into a premarital agreement providing for the disposition of financial and property claims upon divorce or death.¹⁵ Indeed, a trial court is obliged to enforce a properly executed agreement; it is not free to ignore it and dispose of property other than according to its terms.¹⁶ In addition to permitting a premarital agreement to determine disposition of property at divorce, the majority of states courts enforce provisions fixing or waiving spousal support upon divorce as well as waivers of lawyer's fees.¹⁷

13. *Gant v. Gant*, 329 S.E.2d 106, 113–14 (W. Va. 1985).

14. "Taking a Chance on Love," Vernon Duke, John La Touche, Ted Fetter.

15. See Appendix B, State Law Summary.

16. *Lund v. Lund*, 849 P.2d 731, 740 (Wyo. 1993). But, see the discussion of the second look in Section 3.08 of this book.

17. See Chapter 4 for discussion of spousal support and Chapter 5 for discussion of lawyer's fees. Also see Appendix B, State Law Summary.

(c) The Uniform Premarital Agreement Act (UPAA)

The modern view of premarital agreements is codified in the UPAA, promulgated in 1983 by the National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission).¹⁸ As of 2010, twenty-seven states (including the District of Columbia) had adopted the UPAA in whole or in part.¹⁹ The UPAA generally allows parties to contract about any subject not in violation of public policy or a criminal statute, including disposition of property at death or divorce, spousal support, and the control of property during the ongoing marriage.²⁰

(d) Evolution of the Law of Validity

As courts and legislatures began to accept premarital agreements for purposes other than disposition of property at death, they began to grapple with the criteria by which the validity of such agreements should be judged in the modern world. The threshold requirement for validity of all agreements is voluntariness. Put another way, the agreement must not have been the product of fraud, duress, or undue influence. This is the standard set by the UPAA and is followed by many other non-UPAA states.²¹ The drafters of the UPAA opted for an emphasis on procedural over substantive fairness in the determination of the general validity of a premarital agreement. In doing so, they chose certainty of enforceability as the more important goal, overriding the views of a minority of commissioners who thought premarital agreement law should favor fairness of the result at dissolution of the marriage.²² Under the UPAA and the law of most states, only in limited circumstances may a divorce court override the terms of an agreement on substantive fairness grounds.²³

(e) Trend toward Enforceability of Virtually All Premarital Agreements under Virtually All Circumstances

The trend is quite clear. Challenges to validity of premarital agreements are rarely successful. Appellate judges enforce premarital agreements even when the process leading to execution left little opportunity for meaningful

18. See UPAA § 1, *et seq.*

19. See Appendix B, State Law Summary.

20. UPAA § 3.

21. See *In re Estate of Martin*, 938 A.2d 812 (Me. 2008).

22. *Bonds v. Bonds*, *supra* note 9, at 823–24.

23. See Section 3.08 for discussion of substantive fairness.

negotiation or legal advice. The UPAA, with its emphasis on the treatment of premarital agreements as the same as ordinary contracts, has been criticized by many academic commentators and practitioners.²⁴ However, in the majority of states, legislatures and judges have clearly opted for freedom to contract about the financial incidents of marriage and for predictability of enforcement over substantive fairness. In a minority of states, courts review the agreement for substantive fairness at the time of enforcement at divorce.²⁵

§1.05 SCOPE OF PREMARITAL AGREEMENTS

A premarital agreement allows parties who intend to marry to contract regarding their property and financial rights and obligations at the end of the marriage by death or divorce. By fixing their rights and obligations by contract, parties may largely divest a court of discretion in these areas and may decide for themselves how to allocate the financial and property rights they would otherwise acquire by virtue of the marriage. As one court has observed in adjudicating the validity of a premarital agreement at divorce:

A primary purpose of an agreement is to modify or shrink the general discretion of the dissolution of marriage judge in doing equity between the parties. The agreement itself is intended to define the mutual equities, and the trial judge is not free to ignore its provisions or to render them ineffective. As a general matter [statutes providing for spousal rights at divorce] do not exist to displace nuptial agreements; rather the statutes exist to set the principles when there is no agreement. Dissolution of marriage courts should attempt to give effect to nuptial agreements that are, as here, properly made and fully enforceable.²⁶

24. See Ronald S. Ladden, *Why the Uniform Premarital Agreement Act Should Be Repealed or Modified*, FAMILY ADVOCATE, Winter 2011; Judith Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM AND MARY J. OF WOMEN AND L. 349 (Winter 2007); Karen Servidea, *Note: Reviewing Premarital Agreements to Protect the State's Interest in Marriage*, 91 VA. L. REV. 535 (2005); *Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075 (2002–2003).

25. See discussion of states that require substantive fairness in Section 2.08 and an extended discussion of how states have interpreted the requirement for substantive fairness in Section 3.08.

26. *Hannon v. Hannon*, 740 So. 2d 1181, 1187 (Fla. Dist. Ct. App. 1999).

A premarital agreement generally addresses three major bodies of financial rights and claims:

- Property rights at the death of a spouse;
- Property rights at divorce; and
- Support rights upon divorce.

In all states, in the absence of an agreement altering spousal rights, spouses acquire legal or equitable rights in property not dependent solely on which spouse holds legal title. A premarital agreement generally alters these spousal rights in some fashion.

Some parties may also wish to address other issues, including

- Lawyer's fees for the negotiations and at enforcement;
- Allocation of financial responsibility for expenses during the marriage, such as household and common expenses, a party's personal debts and expenses, and transfers for the benefit of an economically disadvantaged spouse;
- The right to control property during the marriage and to transfer and otherwise deal in property without spousal consent;
- Financial provisions for children; and
- Personal, nonfinancial rights and obligations.²⁷

§1.06 SUBJECTS ON WHICH PARTIES' RIGHTS TO CONTRACT ARE LIMITED

There are some subjects on which the parties' ability to enter into a binding contract is limited:

- An agreement cannot divest a court of jurisdiction to determine custody of a minor child or to set basic support for a minor child.²⁸
- In the majority of states, parties may fix spousal support in the event of divorce. Even in these states, however, under some circumstances, a court may refuse to enforce a contractual support

27. Such terms may be unenforceable or of limited enforceability. See Chapter 6 for further discussion.

28. See UPAA § 3(b) and Chapter 6 of this book.

waiver. In a minority of states, an agreement may not divest a court of jurisdiction to award spousal support.²⁹

- In some states, the rights of third parties may not be adversely affected by a premarital agreement. For example, in some community property states a premarital agreement cannot affect the rights of third parties insofar as a spouse has the right to contract debt or alienate, encumber, or lease property.³⁰ The doctrine of necessities, under which a spouse may be liable for debts incurred by the other spouse during the marriage, may preclude a spouse from enforcing a premarital agreement against a claim of a third-party creditor.³¹
- Some authorities suggest that a premarital agreement that facilitates or promotes divorce will be unenforceable on public policy grounds.³² For the most part, cases taking this view predate enactment of the UPAA in more than half the states and cases such as *Posner v. Posner*.³³
- One state, Louisiana, does not permit spouses to completely waive all rights to inheritance in a premarital agreement.³⁴

29. See Appendix B, State Law Summary, and Chapter 4.

30. See La. Civ. Code art. § 2330 (parties to marital contract may not limit rights of third parties in respect to community debt incurred by one party alone).

31. See, e.g., D.C. Code Ann. § 46–601 (both spouses liable for debt for necessities for spouse or dependent children).

32. See *Restatement Second of Contracts* § 190 (1981); Lord, *Williston on Contracts* § 11.7 (4th ed. 1990 & Supp. 2001).

33. *Posner v. Posner*, *supra* note 2, at 381; see also discussion in Section 3.08(d).

34. La. Civ. Code art. § 2330 (spouses may not renounce or alter order of succession through premarital agreement); *Norsworthy v. Succession of Norsworthy*, 704 So.2d 953 (La. Ct. App. 1997).

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