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Premarital Agreements and the Migratory Same-Sex Couple

LINDA J. RAVDIN*

I. Introduction

A premarital agreement is a contract between persons intending to marry and is made in contemplation of marriage.[1] A premarital agreement determines spousal rights when the marriage ends by death or dissolution.[2] When spouses divorce without a premarital agreement, they will have property rights under state law that a court will adjudicate and a spouse may have a claim to support while the suit for divorce is pending and after entry of a judgment.[3] When a spouse dies, the surviving spouse will have statutory rights under state law to a share of the decedent's estate[4] and may also have a right to lump sum death benefits or a survivor annuity under a retirement plan.[5] Prospective spouses may limit or expand these rights by agreement.

* Shareholder in Pasternak & Fidis, P.C., Bethesda, Maryland. She is a member of the Maryland, District of Columbia, and Virginia bars. She is the author of *Premarital Agreements: Drafting and Negotiation* (ABA 2011) and TM849-2d, *Marital Agreements* (2012). From 2010–2012, she was the ABA Family Law Section Advisor to the Uniform Law Commission, Drafting Committee on the Uniform Premarital and Marital Agreements Act.

1. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.01(1)(a) (2002).

2. Uniform Premarital Agreements Act [hereafter UPAA] § 3(a)(3)&(4) (1983) (premarital agreement can determine property rights at death or dissolution; parties can contract regarding spousal support).

3. *See* BRETT TURNER, EQUITABLE DISTRIBUTION OF PROPERTY (3d ed. 2005); GERALD R. TREACY, TM802-2d, COMMUNITY PROPERTY: GENERAL CONSIDERATIONS (Bloomberg BNA 2009).

4. *See, e.g.*, MD. CODE ANN., ESTATES & TRUSTS § 3-203 (West 2003); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.1(a) (ALI 2009); Revised Uniform Probate Code § 2-202(a); TREACY, *supra* note 3, at IIB; 41 C.J.S. Husband and Wife §183.

5. I.R.C. § 401(a)(11)(A) (2014); I.R.C. § 417 (2012); 29 U.S.C. § 1055 (2012) (qualified retirement plan must pay survivor annuity or lump-sum death benefit to surviving spouse).

Older persons with substantial assets and children whose inheritance rights need to be secured have traditionally been candidates for a premarital agreement. There is a long legal history permitting a couple to enter into a premarital agreement contemplating death.[6] Recognition of the right of a couple to enter into a premarital agreement, which provides for the divorce contingency, is of more recent vintage. After the landmark Florida case, *Posner v. Posner*,[7] all states, by case law or statute, began to enforce premarital agreements providing for disposition of property at divorce.[8] In the majority of states, courts also enforce a contractual spousal support waiver, albeit with some room for a court to override a waiver under extreme circumstances.[9]

Premarital agreements are increasingly acceptable and are sought by an increasing number and variety of prospective spouses,[10] including younger persons entering into first marriages. The reasons are varied and include the desire to avoid the high transactional costs of divorce if the marriage does not work out and the wish to protect exclusive rights to property acquired outside of the marriage, such as inherited assets or an interest in a business or professional services practice. Some persons entering marriage want to limit a spousal claim to alimony to a predetermined amount and duration or eliminate such a claim altogether. Some prospective spouses want to retain exclusive rights to all property interests, including property acquired as the fruits of their labor. As one court observed:

> 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

6. Bonds v. Bonds, 5 P.3d 815 (Cal. 2000).

7. Posner v. Posner, 233 So. 2d 381 (Fla. 1970).

8. LINDA J. RAVDIN, PREMARITAL AGREEMENTS: DRAFTING AND NEGOTIATION § 1.04 (ABA 2011) [hereinafter PREMARITAL AGREEMENTS].

9. *Id.* at § 4.02(b).

10. A press release issued by the American Academy of Matrimonial Lawyers on October 16, 2013, cites a survey of its 1,600 members as indicating that 63% of divorce attorneys had seen an increase in these agreements during the previous three years. American Academy of Matrimonial Lawyers, *Increase of Prenuptual Agreements Reflects Improving Economy and Real Estate Market: Survey of Nation's Top Matrimonial Attorneys Also Cites Rise in Women Requesting Prenups* (last visited June 7, 2014), http://www.aaml.org/about-the-academy/press/press-releases/pre-post-nuptial-agreements/increase-prenuptial-agreements-re.

> 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.[11]

Because no one is compelled to marry, and some 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 predetermines their spousal property and support obligations encourages parties, especially those who have been married previously, to take a chance on love.[12]

With the advent of marriage equality in twenty U.S. jurisdictions (nineteen states and the District of Columbia),[13] same-sex couples are seeking premarital agreements for many of the same reasons as straight couples. Same-sex couples have an even more compelling reason to enter into a comprehensive premarital agreement: until marriage equality comes to all states, a couple who marries without a contract and subsequently lives in a jurisdiction that does not recognize their marriage may find themselves without a forum to adjudicate disposition of spousal property rights or a claim to spousal support upon dissolution of their marriage, or a claim of a surviving spouse to an elective share upon the death of a spouse. When the couple has entered into a premarital agreement, the agreement should at least afford them the ability to resolve economic issues arising out of the marriage,[14] even if, in the case of dissolution, they have no forum for

11. Gant v. Gant, 329 S.E.2d 106, 113 (W. Va. 1985).

12. Here I go again.
I hear those trumpets blow again.
All aglow again.
Taking a chance on love.

Vernon Duke, *Taking a Chance on Love*, CABIN IN THE SKY (1940 Broadway musical).

13. At this writing (June 2014), the marriage equality states are California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington. This list comprises the states where same-sex couples are currently able to get marriage licenses by statute or because of a final court ruling. It does not include the growing number of states where a judge has ruled that a state ban on same-sex marriage is unconstitutional, but where the ruling has been stayed pending appeal. This number changes from day to day as new rulings come down, rejecting same-sex marriage prohibitions.

14. A premarital agreement cannot predetermine custody of a child in the event of dissolution. *See* RESTATEMENT (SECOND) OF CONTRACTS § 191 (2012) [hereinafter RESTATEMENT (2D)]; MD. CODE ANN., FAM. LAW § 8-103(a) (court may modify provision of marital agreement relating to custody of minor child); *see also In re* Marriage of Best, 901 N.E. 2d 967 (Ill. App. Ct. 2009); Kessler v. Kessler, 818 N.Y.S.2d 571 (App. Div. 2006) slip op.; R.R. v. M.H, 689 N.E.2d 790 (Mass. 1998); *In re* Marriage of Littlefield, 940 P.2d 1362 (Wash. 1997). Such an agreement cannot limit a child's right to support during minority. Uniform Premarital Agreement Act § 3(b) (1987). Courts can and do understand the distinction between the rights and obligations of adults that are created by legal status—marriage—and the rights and obligations of parents that arise from the parent-child relationship. *See* Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013) (finding court had subject matter jurisdiction to determine enforceability of coparenting agreement after

dissolution of their legal status.[15]

This article assumes the couple's premarital agreement includes a choice-of-law clause that identifies the law that will govern a dispute about validity of the agreement or enforceability of a specific provision. It examines the treatment the couple can expect to receive for their agreement in the event of dissolution in the courts of a state other than the state whose law the agreement provides will govern their contract.[16] For example:

1. The couple may sign a premarital agreement and marry in a marriage equality state of which they are both residents, and upon dissolution:
   a. They are both living in another marriage equality state, and that state:
      i. Has higher standards for validity of premarital agreements;
      ii. Permits a second-look at divorce as to disposition of property and spousal support;
      iii. Permits a second-look at divorce but only as to spousal support;
      iv. Does not enforce a premarital spousal support waiver;
      v. Does not enforce a premarital waiver of spousal support or legal fees payable while suit is pending and the parties remain married.
   b. One spouse has moved to another marriage equality state and files a suit for dissolution in his or her state, and that state:[17]
      i. Has higher standards for validity of premarital agreements;
      ii. Permits a second-look at divorce as to disposition of property and alimony;

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breakup of a same-sex cohabitation relationship); Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. Ct. App. 2006) (noting jurisdiction to determine custody of child of same-sex partners is not affected by whether Virginia recognizes same-sex civil union).

15. *See* Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. Miami L. Rev. 1 (Fall 2012), for a discussion of the problems presented by state Defense of Marriage Acts that courts have held preclude the granting of a divorce to a same-sex couple. These courts have held either that they lack subject matter jurisdiction or that same-sex divorce is not a claim for which courts can grant relief. The authors argue that most state laws do not, in fact, preclude granting a same-sex divorce and that barring same-sex couples from access to the courts for divorce violates their due process and equal protection rights.

16. The same-sex couple seeking to dissolve their marriage faces a number of other issues not addressed in this article. For example, when one spouse is entitled to a qualified domestic relations order (QDRO) to get a distribution of retirement plan benefits, the lack of a forum for divorce may prevent him or her from doing so. *See* I.R.C. § 414(p) (2014) (court may enter order to transfer qualified retirement benefits to nonemployee-spouse upon granting a divorce).

17. In this scenario, the plaintiff will need to establish personal jurisdiction over the nonresident spouse to seek an adjudication that the agreement is not valid, to enforce the agreement, or for an award of property or spousal support at variance with the agreement's terms. Griffin v. Griffin, 327 U.S. 220 (1946). A general discussion of long-arm jurisdiction and divisible divorce is beyond the scope of this article.

iii. Permits a second-look at divorce but only as to spousal support;
iv. Does not enforce a spousal support waiver;
v. Does not enforce a waiver of spousal support or legal fees payable while suit is pending and the parties remain married.

2. The parties marry in a marriage equality state, but their collective contacts with that state are less extensive than in (1), above, for example:
   a. They are residents of different marriage equality states when they marry;
   b. They are residents of a nonrecognition state, they travel to a marriage equality state solely to get married and sign a premarital agreement, and then return to their state of residence.

In the above scenarios, the parties could be living in a marriage equality state other than the one governing their premarital agreement with the same array of possibilities as described in (1)(a) and (b).

3. The parties could marry and move to a nonrecognition state where one party files suit to enforce his or her property or support rights under the agreement.

II. Choice of Law and Enforcement of Premarital Agreements in a State Other Than That Chosen by the Parties in Their Contract

A. Importance of Including an Express Choice-of-Law Clause in Premarital Agreements

A premarital agreement may include a provision stating the law that will govern a dispute about validity of the agreement as a whole, construction of a term, or enforceability of specific provisions, such as a support waiver. It is good practice to include a choice-of-law clause in every premarital agreement. Among other things, a party who seeks a premarital agreement as a condition of marriage generally wants a predictable outcome as to both his or her economic rights and obligations and any future dispute about the validity of the agreement.[18] A choice-of-law clause can afford a high degree of predictability as to a dispute about validity by determining in advance what criteria for validity will govern such a dispute.

18. RESTATEMENT (2D) § 187 cmt. e ("Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy their rights and liabilities under the contract.").

An effective choice of governing law can determine the resolution of a future dispute about validity of a premarital agreement in favor of validity, even when application of the law of the forum would have required a different result.[19] Failure to select governing law can result in a court finding that an agreement is invalid when parties move to a state with stricter validity standards than would have governed the agreement had they stayed put.[20] Failure to select governing law can also create an opportunity for otherwise unnecessary litigation over what law a court should apply to resolve a dispute about validity.[21]

A premarital agreement could include a selection of the law governing validity and construction, but fail to determine the law governing issues not otherwise resolved by the agreement. For example, a premarital agreement may define marital or community property, but fail to predetermine disposition of such property at divorce, leaving that decision to be made by a court. In that circumstance, will the forum court apply its own property disposition law or that of the state of execution?[22] Application of forum law could be disadvantageous to one party in a marriage equality state, but could be devastating to a party if there is no forum where he or she can obtain an adjudication of property rights under state laws applicable only to spouses.

B. Choice-of-Law Rules Permitting Selection of Law Governing Validity of Premarital Agreements

The Uniform Premarital Agreement Act (UPAA) permits parties to contract as to the choice of law governing interpretation of their premarital agreement but does not expressly permit selection of the law to govern validity.[23] However, generally applicable choice-of-law rules permit

19. *See* Elgar v. Elgar, 679 A.2d. 937 (Conn. 1996) (upholding New York choice-of-law provision permitting validity to be determined under less strict law of New York); DeLorean v. DeLorean, 511 A.2d 1257 (N.J. Super. Ct. Ch. Div. 1986) (finding husband's disclosure was inadequate under New Jersey law, but court gave effect to parties' choice of California law in a premarital agreement and held disclosure adequate under less strict California standards).

20. *See* Rivers v. Rivers, 21 S.W.3d 117 (Mo. Ct. App. 2000) (finding premarital agreement executed in Louisiana invalid for lack of financial disclosure required by Missouri law, though would have been valid under Louisiana law).

21. *See* Black v. Powers, 628 S.E.2d 546 (Va. Ct. App. 2006) (Virginia residents traveled to U.S. Virgin Islands, signed premarital agreement with no choice-of-law clause, and got married; dispute about applicable law resolved in favor of Virgin Islands law, the place of execution and performance; resolution of dispute about applicable law made no difference to outcome as agreement was valid under law of the Virgin Islands).

22. *See In re* Marriage of Proctor, 125 P.3d 801 (Or. Ct. App. 2005) (trial court erred in applying substantive law of California to disposition of community property not otherwise disposed of in premarital agreement that provided for California law to govern construction but was silent on law governing disposition of property).

23. Uniform Premarital Agreement Act § 3(a)(7) (1983). By contrast, the Uniform Premar-

parties to contract with respect to the law governing validity of their premarital agreement.[24]

Restatement (Second) provides in relevant part:

§ 187. Law of the State Chosen by the Parties.

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[25]

The *Restatement* explains that subsection (1) "is a rule providing for incorporation by reference and is not a rule of choice of law."[26] Under Section (1) parties may, for example, choose, and incorporate by reference, a statue of a specific state to determine an issue. Parties to a premarital agreement could, for example, define martial or community property, but provide that the decision about how to divide such property will be made by a judge in accordance with the criteria of a specific state's equitable distribution statute.

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ital and Marital Agreements Act (2012) [hereinafter UPMAA] expressly permits parties to choose the law governing both construction and validity of their agreement. UPMAA § 4 (2013). To date, according to the website of the Uniform Law Commission, the UPMAA has been adopted in Colorado and North Dakota and has been introduced in Mississippi and the District of Columbia. Uniform Law Commission, Uniform Premarital and Marital Agreements Act, http://www.uniformlaws.org/Act.aspx?title=Premarital+and+Marital+Agreements+Act.

24. Estate of Hogg, 510 A.2d 1323 (Vt. 1986); *see also* Franzen v. Franzen, 520 S.E.2d 74 (N.C. Ct. App. 1999) (finding court must give effect to valid choice-of-law provision in premarital agreement).

25. RESTATEMENT (2D), *supra* note 14; *see also* State National Bank v. Academia, Inc., 802 S.W.2d 282 (Tex. App. 1990) (parties' express choice of law will govern dispute if there is nexus between parties and state and not contrary to fundamental policy of forum state); Rogers v. Rogers, 373 A.2d 507 (Vt. 1977) (contract valid where made is interpreted according to law of state of making unless its application is contrary to fundamental policy of forum state).

26. RESTATEMENT (2D), *supra* note 14, at § 187, cmt. c.

Subsection (2) is the key to enforceability of a premarital agreement choice-of-law clause.[27] It permits parties to choose the law governing validity of the contract even when the issue is one the parties could not have resolved by agreement, unless one of the conditions in subsection (2)(a) or (b) applies. Examples of issues the parties could not have determined by explicit agreement are "capacity, formalities and substantial validity."[28] Thus, parties may select the state whose law will govern any future dispute about their agreement, including a dispute about whether the agreement is valid,[29] so long as (1) there is a nexus between one or both parties or the transaction and the state of chosen law—*i.e.* a substantial relationship—and (2) application of the chosen law does not offend the public policy of the forum state.[30]

C. Substantial Relationship

The first requirement is a substantial relationship between the state of chosen law and the parties or the transaction. One obvious connection to the state of chosen law that should readily satisfy the "substantial relationship" test is residence of both parties in that state.[31] Other factors, such as the residence of one party, location of real estate, a business or other substantial property interests, the place of execution, and the place of marriage, can also be sufficient. For example, in *Elgar v. Elgar*,[32] the parties executed a premarital agreement with a New York choice-of-law provision. The wife was a resident of New York and she conducted her

27. The majority of states apply the conflict rules expressed in RESTATEMENT (2D). A minority uses other conflict rules such as RESTATEMENT (FIRST) CONFLICT OF LAWS (1934) under which the law of the place where the last act necessary to complete the transaction is the applicable law. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP L. 223 (Spr. 2014). Courts in these jurisdictions may nevertheless honor a contractual choice-of-law. *See* Black v. Powers, 628 S.E.2d 546, 555 (Va. Ct. App. 2006).

28. RESTATEMENT (2D), *supra* note 14, at § 187, cmt. a.

29. The court may apply the contractual choice of governing law without first determining validity of the agreement as a whole. *See* Elgar v. Elgar, 679 A.2d 937 (Conn. 1996); RESTATEMENT (2D) § 201.

30. *See In re* Marriage of Cobb, 741 N.W.2d 821 (Iowa Ct. App. 2007) (interpretation of premarital agreement properly governed by law of Texas where executed in Texas with Texas choice-of-law provision); Montoya v. Montoya, 909 A.2d 947 (Conn. 2006) (finding premarital agreement valid under New York law where no fraud underlying choice-of-law provision); Gamache v. Smurro, 904 A.2d 91 (Vt. 2006) (finding premarital agreement valid under California law); *see also* Rhyne-Morris v. Morris, 671 So. 2d 748 (Ala. Civ. App. 1995); *In re* Marriage of Connet, 804 P.2d 1036 (Kan. Ct. App. 1991).

31. *See* Lupien v. Lupien, 891 N.Y.S.2d. 785 (App. Div. 2009) (enforcing Massachusetts choice-of-law where both parties were residents and agreement signed there); Nanini v. Nanini, 802 P.2d 438 (Ariz. Ct. App. 1990) (using Illinois law where parties lived in Illinois and executed agreement in Illinois).

32. 679 A.2d at 937.

business and educated her daughter in New York. The husband was a resident of Connecticut, but he had business in New York and spent weekdays there with the wife. The parties executed the premarital agreement at the offices of the husband's lawyer in New York and got married in Connecticut. The husband died a resident of Connecticut, and his will was admitted to probate there. The Connecticut court upheld the contractual choice-of-law provision and therefore applied New York law to the wife's challenge to the validity of the agreement. New York law was more deferential to enforcement than the law of Connecticut.

When a couple signs a premarital agreement and marries in the same state, those two key factors should be a sufficient nexus to satisfy the substantial relationship test.[33] For example, in *DeLorean v. DeLorean*,[34] the parties' premarital agreement included a California choice-of-law clause, and the parties signed the agreement and got married in California. The New Jersey court honored the selection of California law. Under New Jersey law, the financial disclosure would have been inadequate, but it was sufficient under the law of California.

With the increasing number of same-sex couples who are traveling from a home in a nonrecognition state to a marriage equality state to get married, the question of the place of marriage or the place of execution as the sole nexus for the selection of the latter state's law may become increasingly important. There appear to be few reported cases where a court of a forum state had to decide whether to enforce a choice-of-law clause in a premarital agreement and where the only nexus between the state of chosen law and the agreement was that it was the place of marriage or it was the place of execution of the agreement, but not both.[35] Executing the agreement and getting married in the marriage equality state, thus creating two nexus factors, would appear to be the more cautious approach.

D. Conflict with Fundamental Policy of Forum State

The second requirement is that application of the law chosen by the parties not be contrary to a "fundamental policy" of the forum state. In such an event, the forum court may choose not to enforce the contractual choice-of-law where the forum has a greater interest than the chosen state and the law of the forum would be the applicable law under section 188

33. *See* Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).

34. DeLorean v. DeLorean, 511 A.2d 1257 (N.J. Super. Ct. Ch. Div. 1986).

35. *See* Norris v. Norris, 419 A.2d 982 (D.C. 1980) (noting parties had sufficient connection to Florida where they resided in Washington, D.C., but the agreement was prepared and signed while parties were vacationing at husband's second home in Florida).

in the absence of the parties' choice.[36]

Courts have generally been willing to apply the chosen law, without fundamental public policy concerns, if the only defect in the agreement is in the formalities of execution mandated by the law of the forum.[37] Even issues of more importance, such as basic procedural fairness standards for validity, the degree of disclosure required, or allocation of the burden of proof, have generally not been deemed so fundamental that a court of the forum state will deny application of the chosen law, even though the result under the law of the forum state would be different. The fundamental policy exception is not a license for a forum state to reject the parties' contractual choice of law merely because the result would be different by application of the forum's law.[38] Where the law of the chosen state imposes stricter standards for validity, a court of the forum state is unlikely to apply its own law over that of the law of the chosen state on fundamental policy grounds.[39]

There are few cases involving a dispute over validity of a premarital agreement where there was a significant difference between the chosen law and the forum's law regarding whether substantive fairness is required, and to what degree, at either execution or enforcement at dissolution. The paucity of court decisions resolving a dispute over enforcement of a contractual choice-of-law clause in a premarital agreement when the forum state's law might be more favorable to the party seeking to void the agreement, or avoid a term of the agreement, creates uncertainty for all migratory couples who sign such an agreement.[40]

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36. RESTATEMENT (2D), *supra* note 14, at § 187.

37. *See* Hill v. Hill, 262 A.2d 661 (Del. Ch. 1970), *aff'd,* 269 A.2d 212 (Del. 1970) (agreement that complied with Maryland law as to formalities enforceable in Delaware although not in compliance with Delaware formalities); *see also* RESTATEMENT (2D), *supra* note 14, at § 199 (1) (formalities required for validity determined by sections 187 and 188).

38. RESTATEMENT (2D), *supra* note 14, at § 187, cmt. g; *In re* Marriage of Jundt, Nos. A05-693, A05-955, 2006 WL 917592 (Apr. 11, 2006) (citing longstanding tradition of respecting valid choice-of-law provisions in premarital agreements); Stalb v. Stalb, 719 A.2d 421 (Vt. 1998) (upholding application of New York law of validity of premarital agreement, although New York law did not require finding of conscionability of property disposition provisions at divorce, and Vermont law did); *Chaudry*, 388 A.2d at 1000 (finding public policy of New Jersey not offended by enforcement of voluntarily executed premarital agreement under law of Pakistan, where marriage took place, although it gave wife only a small cash payment and no support); Elgar v. Elgar, 679 A.2d 937 (Conn. 1996) (upholding New York choice-of-law provision; therefore, wife bore burden of showing fraud, and court need not consider validity under Connecticut law).

39. Kolflat v. Kolflat, 636 So. 2d 87 (Fla. Dist. Ct. App. 1994) (finding premarital agreement providing for application of Illinois law was invalid because it failed Illinois' stricter test for validity than that of Florida law).

40. The fact of this uncertainty counsels persons seeking an agreement to employ best practices in the process leading to execution and not to drive too hard a bargain. *See* discussion of best practices and the Uniform Premarital and Marital Agreements Act in section III.E.

III. Fundamental Public Policy and Application of Contractual Choice-of-Law Clauses in Marriage Equality States

A. Overview

A same-sex couple can expect the same treatment for their premarital agreement in a marriage equality state other than the one whose law they chose to govern their agreement as a straight couple. There is some variation among the marriage equality states about the criteria for validity.[41] Some marriage equality states have adopted the UPAA, or by case law employ the same validity criteria, under which a premarital agreement is highly enforceable even if it was unconscionable at execution.[42] Other states reject enforcement of an agreement that was unconscionable at execution.[43] Some states, such as California by statute and Washington by case law, impose higher process standards for validity.[44]

Several marriage equality states permit a trial judge at divorce, but not death,[45] to take a "second look" and to consider whether a premarital agreement has become unfair, or unconscionable, at the time of divorce as a result of changed circumstances. In these states, a court can refuse enforcement of the agreement in its entirety, or can make provisions for a property or support award to the economically weaker party at variance with the agreement.[46] In another group of states, a court may consider only

41. Appendix 1, State Law Summary, summarizes the laws of the marriage equality states as to criteria for validity and enforceability of spousal support waivers.

42. UPAA § 6(a); Simeone v. Simeone, 581 A.2d 162 (Pa. 1990); *see also* Appendix 1, State Law Summary.

43. *See* Cannon v. Cannon, 865 A.2d 563 (Md. 2005).

44. CAL. FAM. CODE § 1615(c) (party must be represented by counsel or be advised of right and expressly waive; no less than seven days between receipt of advice and agreement and execution; unrepresented party must be fully informed in writing of terms, must be proficient in language of agreement and explanation of rights, and must sign acknowledgment); *In re* Marriage of Matson, 730 P.2d 668 (Wash. 1986) (parties can contract regarding disposition of property at divorce; premarital agreement must either be substantively fair or must be executed voluntarily with financial disclosure, competent advice, and full knowledge of marital rights).

45. Among the second-look states, there is little support for consideration of fairness as of the death of a spouse. Of the marriage equality states, only Connecticut's statute appears to authorize a probate court to consider whether an agreement is fair as of a spouse's death. In its version of the UPAA, a court may refuse enforcement of a premarital agreement that is unconscionable at enforcement without making a distinction between enforcement at death and at dissolution. CONN. GEN. STAT. § 46b-36g (a)(2) (1995). There appear to be no cases that shed any light on this distinction or that provide guidance as to how a judge is to adjudicate a post-death claim that a premarital agreement has become unconscionable.

46. The current second-look marriage equality states (as of June 2014) are (i) UPAA state: Connecticut; (ii) non-UPAA states: Massachusetts; Minnesota; New Hampshire; Vermont. *See* Appendix 1, State Law Summary. The other second-look states are Alaska, Georgia, Kentucky, Michigan, Mississippi, North Dakota, South Carolina, West Virginia, and Wisconsin. LINDA J. RAVDIN, TM849-2d, MARITAL AGREEMENTS (Bloomberg BNA 2012) [hereinafter RAVDIN,

whether a spousal support waiver has become unconscionable as of divorce.[47] In two marriage equality states, Iowa and New Mexico, a waiver of spousal support in a premarital agreement is unenforceable.[48] In some states, courts may refuse to enforce a waiver of temporary support payable while a suit for divorce is pending or a waiver of legal fees at divorce.[49] For example, an Iowa court observed that "the interspousal support obligation [. . .] imposed by law [. . .] cannot be contracted away."[50] In the majority of marriage equality states, there is no definitive case law resolving this issue, creating uncertainty for all parties to a premarital agreement, not just same-sex couples.

B. Defining the Scope of Fundamental Public Policy

For the migratory same-sex couple, as for the straight couple, there is little guidance about when a court in a forum state will refuse to apply the law chosen by the parties in favor of the law of the forum on fundamental public policy grounds. Any of these issues are susceptible to a public policy analysis:

- Fairness (or conscionability) at execution;
- Fairness (or conscionability) at divorce;
- Enforcement of a waiver of post-divorce support;
- Enforcement of a waiver of support payable during the marriage, which can include a waiver of temporary support while a suit for divorce is pending, the right to support while the parties are married and living together,[51] and the right to seek an award of legal fees and costs.

The fundamental public policy analysis requires the forum court to determine: (i) whether it has a "materially greater interest" than the state of chosen law, and (ii) whether it would be the state of applicable law under section 188 in the absence of the parties' choice.[52] In practice, courts seem to collapse both questions into a single analysis of the forum

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MARITAL AGREEMENTS], Worksheet 9.

47. The marriage equality states where a court at divorce can consider whether to enforce a spousal support waiver in an otherwise valid premarital agreement are (i) UPAA states: California; Illinois; (ii) non-UPAA state: New York. *See* Appendix 1, State Law Summary.

48. *See* Appendix 1, State Law Summary.

49. *Id.*

50. *In re* Marriage of Gudenkauf, 204 N.W.2d 586, 587 (Iowa 1973).

51. Apart from the question of enforceability of a waiver of temporary support, as between the parties, the common law necessaries rule, codified in some states, may provide a remedy for a third-party creditor, such as a health-care provider, against both spouses. The scope and application of the necessaries doctrine is beyond the scope of this article. *See* RAVDIN, *supra* note 46, at Section II.G.4 for a more extended discussion of this problem.

52. RESTATEMENT (2D), *supra* note 14, § 187 (2)(b).

court's interest in enforcement when the party seeking relief from the agreement, or a term thereof, is a resident of the state.[53] It is reasonable to assume that the court of a state that has subject matter and personal jurisdiction to grant a divorce and adjudicate validity and enforcement of a premarital agreement, economic claims not disposed of by agreement, such as child support, or spousal claims, such as a claim for spousal support, which may be revived if the agreement is invalid, will deem itself to have a material interest in the welfare of its citizens sufficient to apply its own law if the court determines the matter to be one of fundamental public policy.

The key question is therefore what policies are fundamental. *Restatement Second* says such a policy must be substantial.[54] Moreover, a fundamental policy may be expressed in a statute that makes certain contracts illegal.[55] A mere difference in result is insufficient to invoke fundamental public policy,[56] as is a result that is merely inequitable.[57] In states where a premarital agreement that was unconscionable at execution is unenforceable,[58] courts are likely to consider this a matter of public policy.[59] For example, a Michigan court observed that a premarital agreement with an Illinois choice-of-law clause would have been unenforceable because it was unconscionable and therefore its enforcement would have violated Michigan public policy that requires fairness at execution and at

53. *See, e.g.,* Lakin v. Lakin, No. FA 970327718S, 1999 WL 1320464 (Conn. Super. Ct. Dec. 6, 1999) (Connecticut has materially greater interest in the welfare of parties divorcing in Connecticut); Lewis v. Lewis, 748 P.2d 1362 (Haw. 1988) (Hawaii has materially greater interest than New York in amount of support payable under a premarital agreement; public policy mandates against enforcement of unconscionable support payments); *see also In re* Estate of J.D. Davis, 184 S.W.3d 231 (Tenn. Ct. App. 2004) (requirement for full financial disclosure for valid premarital agreement reflects strong public policy of Tennessee; agreement executed in Florida during residence there, which would be valid under Florida law, unenforceable under Tennessee law); Scherer v. Scherer, 292 S.E.2d 662 (Ga. 1982) (noting enforceability of premarital agreement is matter of public policy and therefore determined under Georgia law, but both parties sought application of Georgia law, notwithstanding Michigan choice of law provision); Osborn v. Osborn, 226 N.E.2d 814 (1966), *rev'd on other grounds*, 248 N.E.2d 191 (Ohio 1969) (marital property rights and marital status exclusively regulated by state of matrimonial domicile and Ohio therefore has paramount interest in validity of agreement to be enforced in Ohio).

54. RESTATEMENT (2D), *supra* note 14, at § 187, cmt. g.

55. *Id. See, e.g.*, N.J. STAT. ANN. § 2C: 24-5 (West 1978) (willful nonsupport is a crime); and *see* Appendix 1, State Law Summary.

56. DeLorean v. DeLorean, 511 A.2d 1257 (N.J. Super. Ct. Ch. Div. 1986).

57. Lewis v. Lewis, 748 P.2d 1362 (Haw. 1988).

58. Under the UPAA, a premarital agreement that was unconscionable at execution is nevertheless enforceable if executed voluntarily and with financial disclosure or an effective waiver.

59. *See* Bassler v. Bassler, 593 A.2d 82, 87 (Vt. 1991) ("Public policy bars enforcement of an antenuptial agreement that is unconscionable at the time it is executed.").

divorce.[60] A premarital agreement that was fair at execution, but leaves a spouse a public charge, is also likely to be judged in violation of the fundamental public policy of the forum state.[61] Indeed, the UPAA recognizes as much in its provision authorizing a court to make a support award to keep a spouse off of public assistance.[62]

Consider, for example, Dean and Jerry who live in Newport, Rhode Island. They are both in their early forties. They decide to get married in Newport. Dean owns a business that generates a substantial income for him and allows him to maintain a lavish standard of living and to save and invest. Jerry works as a personal trainer at a local gym. In addition to his business, Dean owns a large home, a vacation home, investment real estate, a 401(k), cash and securities. His estate is worth at least $25 million. Jerry owns a car and a small bank account. His income is modest. Dean wants a premarital agreement that gives him exclusive rights to all property he owns or acquires at any time and he does not want to pay spousal support if he and Jerry divorce. Jerry wants to get married and he is willing to sign whatever Dean requires. Both parties have lawyers. Dean pays for Jerry's lawyer. Dean's lawyer provides the first draft of the agreement to Jerry's lawyer five days before the wedding. Jerry's lawyer proposes some changes to the agreement, but Dean rejects them and Jerry signs. The agreement includes a spousal support waiver and a cash payout to Jerry if they divorce based on the duration of the marriage. It also includes a clause stating the law of Rhode Island will govern a dispute about validity of the agreement or enforcement of any of its provisions. After the marriage, the parties live in Dean's home. Because they like to travel, Jerry quits his job. Dean is very generous while the parties are living together. He pays all of Jerry's living expenses, and Jerry gets used to a standard of living far better than he could afford before the marriage. Dean keeps all his property interests titled in his name alone. During the marriage, they move to Massachusetts. Dean keeps the Newport home as a vacation home. Under the agreement, Jerry is entitled to whatever he owns—his clothing and personal effects; cash and securities worth $500,000; a car Dean bought for him—and $100,000 in cash. Dean's net worth has grown to $50 million, and his annual income is over one million.

What can Dean expect when he seeks to enforce the premarital agreement over Jerry's challenge to validity on the ground that it was unconscionable when executed; is unfair at enforcement; and, even if valid as a

60. Forrester v. Graham, No. 199330, 1998 WL 1989805 (Mich. Ct. App. Sept. 25, 1998), was a malpractice case against the husband's divorce lawyer, dismissed as frivolous. The validity of the agreement was never adjudicated in the divorce as the parties settled.

61. *Id.*

62. Uniform Premarital Agreement Act § 6(b) (1983).

whole, should not be enforced as to the alimony waiver? Will the Massachusetts court apply its law or the law of Rhode Island as provided in the agreement? Importantly, Rhode Island's version of the UPAA permits enforcement of a premarital agreement that was unconscionable at execution. By contract, Massachusetts is one of the states where a judge can consider whether an agreement has become unfair as a result of changed circumstances.

Cases from Vermont, which permit a second-look at divorce, seem to support enforcement of parties' contractual choice of law even when the forum's law would otherwise demand more substantive fairness (or less unconscionability) at execution. In *Stalb v. Stalb*,[63] the Vermont court held that application of New York law did not contravene its public policy, although under New York law the disposition of property did not have to be conscionable at divorce, and under Vermont law it did. Similarly, in *Chaudry v. Chaudry*,[64] the court held that the public policy of New Jersey was not offended by enforcement of a premarital agreement made under the law of Pakistan, although it gave the wife only a small cash payment and no support. However, Dean cannot rest easy. A Massachusetts court might well decide that the extreme disparity in the parties' resources at the beginning of the marriage made the agreement unconscionable at execution. It could also decide that the continued extreme disparity at the end of the marriage is a sufficient reason to invoke its public policy to apply its own law and, after taking a second look, void the agreement in its entirety, thus exposing Dean's assets to a potentially substantial property award or spousal support claim.[65]

C. Best Practices to Protect the Reasonable Expectations of the Parties

A successful challenge to the validity of a premarital agreement is a rare event, even when the process leading to execution was sloppy and the substantive terms were unfair at execution and remain so at death or divorce.[66] However, in the many published cases where the proponent prevailed, he or she incurred the risk and expense of litigation through at least one appeal. The lawyer for the proponent can reduce these risks. The lawyer for a party seeking a premarital agreement should consider the steps discussed below to maximize the protection of his or her client's interests in getting a valid agreement and minimizing litigation risk in the

63. Stalb v. Stalb, 719 A.2d 421 (Vt. 1998).
64. Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).
65. *See* DeMatteo v. DeMatteo, 762 N.E.2d 797 (Mass. 2002).
66. *See* RAVDIN, PREMARITAL AGREEMENTS, *supra* note 8, at ch. 3.

event of a challenge.[67] A fair process and a fair result is likely to better serve both parties to a premarital agreement, especially when there is a significant disparity in resources.

1. Timing of Presentation

Counsel for the proponent should provide a proposed draft of the premarital agreement to the other party well in advance of the planned wedding date**,** preferably at least ninety days before. This should give the recipient of the agreement enough time to get legal advice and negotiate the terms. For parties who are planning a big, elaborate wedding, more time is better. Less time can be adequate**,** even though not ideal**,** if the proponent warns the other party an agreement is coming and discusses what he or she can expect**,** or the ceremony can be postponed if the parties are unable to conclude the process before the initial date.

2. Access to Counsel

Ideally both parties will have lawyers. Counsel for the proponent should do everything within reason to encourage the weaker party to get legal advice, including writing and encouraging him or her to do so, and in appropriate cases recommending that the stronger party pay the weaker party's fees.[68] Counsel for the proponent may assist the weaker party to find a lawyer, including providing names of lawyers, but should not attempt to handpick the lawyer for the other party.

3. Actual Negotiation

The fact that the parties engaged in an actual negotiation is powerful evidence that the challenging party executed the agreement voluntarily, especially when the stronger party accepts some changes proposed by the weaker party.

4. Financial Disclosure

The proponent should make a written statement that identifies major assets with values where readily available, and with fair estimates of value where they are not, and including amounts and sources of income.[69]

67. This discussion does not describe a standard of care below which the lawyer is guilty of malpractice.

68. The Uniform Premarital and Marital Agreements Act (UPMAA) (2012) provides expressly that the party receiving a proposed premarital agreement have access to independent legal representation before execution. UPMAA § 9(a). Access to legal representation necessarily means both the money to hire a lawyer and the time to find one, get advice, and consider that advice. UPMAA § 9(b).

69. The case law is not consistent about whether financial disclosure must include amounts and sources of income along with the disclosure of assets and liabilities. The UPMAA would

Statements of value should be qualified to the extent the value of a given asset is not readily ascertainable. The disclosure should be attached to the agreement as an exhibit, and both parties should initial the disclosure.

5. Substantive Fairness

Even though substantive fairness at execution or enforcement is not a requirement for validity in the majority of marriage equality states, an agreement that makes reasonable provisions for an economically weaker party can help to insulate a premarital agreement from a successful attack. To be substantively fair or, at least, not unconscionable, the agreement need not align with the law that would apply at divorce in the absence of a premarital agreement.

6. Execution

Because parties often wait until the last minute to begin the process of obtaining a premarital agreement, execution can often be a hasty process. It is important that financial disclosure schedules referenced in the agreement not be forgotten in haste. It also is a good idea for counsel to retain a signed original or a signed copy of the agreement and the financial disclosure in case the client loses it or it is destroyed.

IV. Enforceability of Premarital Agreements in Nonrecognition States

A. Overview

A same-sex couple, or one member of the couple, may seek enforcement of a premarital agreement in a court of a state that does not recognize the validity of the marriage. Could a judge of the forum state, *sua sponte,* refuse enforcement of the agreement on a theory that the consideration for a premarital agreement is the marriage,[70] and because the marriage is void, there was no consideration for the agreement; and the agreement is therefore also void? Could a party seeking to avoid his or her obligations under a premarital agreement successfully resist enforcement using the same voidness-of-the-marriage-is-tantamount-to-voidness-of-the-agreement theory? In the reported cases, this seems to happen most often when a spouse has come to regret his or her generosity with assets that would have remained separate property and off-limits to the other

eliminate this inconsistency as it is clear that the disclosure must include amounts and source of income. UPMAA § 9(a)(4).

70. Harlee v. Harlee, 565 S.E. 2d 678 (N.C. Ct. App. 2002).

spouse at divorce.[71] It could also happen when a premarital agreement provides for the parties to share the fruits of their labor and the spouse who accumulated more assets would prefer not to share. Could a court reject enforcement of a same-sex premarital agreement because the marriage is deemed offensive to the public policy of the state, without analyzing the validity of the agreement as a contract? In other words, would homophobia prevail over basic contract law?

This article argues that such agreements are enforceable as contracts and that state courts will enforce them as such. It further posits that under the Fourteenth Amendment due process clause, courts cannot refuse to enforce such an agreement as a contract if otherwise valid. Thus, the party seeking enforcement, and his or her counsel, already have ample legal means to insist on the sanctity of the contract, even if the court does not honor the sanctity of the couple's marriage.

B. Enforcement of Premarital Agreement as a Cohabitation Agreement

A premarital agreement is a species of contract.[72] A cohabitation agreement is merely another species of contract.[73] Thus, whether a court in a nonrecognition state treats the agreement as a premarital agreement, or not, it should be acknowledged as a binding contract. A court could treat a same-sex premarital agreement as a valid cohabitation agreement, without regard to the label the parties chose. Such an agreement is governed by the law of contracts.

In addition to the law governing contracts in general, there is an ample body of law that is specific to cohabitants and that makes it clear they are free to enter into a contract governing their economic rights.[74] Case law that has developed over more than forty years recognizes the right of

71. *See* Hawxhurst v. Hawxhurst, 723 A.2d 58 (N.J. Sup. Ct. App. Div. 1998) (finding premarital agreement drafted by husband's attorney, giving wife fifty percent of husband's net worth if divorced after five years, was enforceable); Penhallow v. Penhallow, 649 A.2d 1016 (R.I. 1994) (transfer of all of husband's property into tenancy by the entireties while wife retained all her property as separate was not unconscionable where agreement was executed voluntarily, adequate disclosure made, and no evidence of overreaching); *see also* Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997), discussion to follow in text.

72. Simeone v. Simeone, 551 A.2d 219 (Pa. Super. Ct. 1988), *aff'd*, 581 A.2d 162 (Pa. 1990).

73. *See* Cook v. Cook, 691 P.2d 664 (Ariz. 1984). In this article, I have deliberately chosen to use the term "cohabitation agreement" rather than "domestic partnership agreement" in order to distinguish the former from an agreement that a couple might execute incident to entering into a registered domestic partnership under a statute that provides for registration and recognizes a legal status for domestic partners that may include property and support rights comparable to those of marriage. *See* COLO. REV. STAT. ANN. § 14-15-107, *and* COLO. REV. STAT. ANN. § 14-15-117.

74. Boot v. Beelen, 480 S.E.2d 267, 269 (Ga. Ct. App. 1997); *see also* Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

unmarried adults to enter into a contract to define their economic rights. Courts in the majority of states have held that a contract between cohabitants is generally enforceable. *Marvin v. Marvin*[75] began the modern trend in which courts have recognized the right of unmarried cohabitants to enter into an express contract to pool resources and acquire property interests not determined solely by title and in which nonmonetary contributions can be part of the consideration for the acquisition of property rights.

Case law in many nonrecognition states has dealt with claims arising out of a cohabitation relationship after the death of a partner or the dissolution of the relationship. Most of the reported cases involve a claim of an oral express or implied contract or other quasi-contract claims. Courts have recognized the validity of these types of claims if adequately proven. These same courts would therefore enforce an express, written cohabitation agreement that otherwise complies with the requirements for a valid contract.[76] "Unmarried persons who are living together have the same rights to lawfully contract with each other regarding their property as do other unmarried individuals."[77] All that is required is the same essential elements of the contractual relationship as would be required for any other contract between adults.[78] Courts have included same-sex couples in recognizing the right of cohabitants to enter into express contracts governing their economic relationship.[79]

A same-sex premarital agreement under which parties' property rights are determined solely by title and in which each party waives any monetary claims each would otherwise have by virtue of the marriage relationship should be generally enforceable in a nonrecognition state. In the majority of states cohabitants do not acquire financial rights solely by

75. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

76. *See* Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000); O'Farrill v. Gonzalez, 974 S.W. 2d 237 (Tex. App. 1998); *Boot*, 480 S.E.2d at 267; Poe v. Levy's Estate, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982); *see also* Appendix 2, which summarizes the case law from the nonrecognition states supporting enforcement of written cohabitation agreement that meets the requirements for a valid contract.

77. Hay v. Hay, 678 P.2d 672, 674 (Nev. 1984).

78. Two states, Texas by statute, TEX. BUS. & COM. CODE ANN. § 26.01; Zaremba v. Cliburn, 949 S.W.2d 822 (Tex. App. 1997); and Florida by case law, Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997) (finding cohabitation agreement is analogous to contract on consideration of marriage, therefore, must be in writing), require that a cohabitation agreement be in writing.

79. *See Posik*, 695 So. 2d at 759; Small v. Harper, 638 S.W.2d 24 (Tex. App. 1982) (finding no public policy of Texas prevents same-sex former paramour from recovering on economic claims, if proven); Weekes v. Gay, 256 S.E.2d 901 (Ga. 1979); *see also Op. Va. Att'y Gen.* (2006) (unmarried persons can enter into valid contract regarding property rights; constitutional amendment prohibiting recognition of legal status other than heterosexual marriage does not alter right to enter into contract).

virtue of living together;[80] therefore, an agreement that merely confirms each cohabiting person's exclusive rights to his or her solely owned property should be readily enforceable.

A premarital agreement that provides for pooling of economic resources or for transfers of cash or property from one spouse to another has the potential to be more troublesome if a party seeks enforcement in a nonrecognition state. Historically, courts were hostile to enforcement of such agreements on the premise that the consideration for the contract was necessarily sexual services. Thus, courts held "that neither law nor equity will enforce a contract founded on immoral consideration such as sexual relations."[81] Nevertheless, there is an ample body of law supporting enforcement. *Posik v. Layton,*[82] expresses the contemporary approach. An unmarried couple, two women, entered into a written contract. Layton sought to avoid the contract, having come to regret her generosity. The court upheld the right of unmarried couples to enter into such an agreement, rejecting any suggestion that the sexual relationship somehow precluded enforcement of an otherwise valid contract. The court observed:

> It was a nuptial agreement entered into by two parties that the state prohibits from marrying. But even though the state has prohibited same-sex marriages [. . .], it has not prohibited this type of agreement. By prohibiting same-sex marriages, the state has merely denied homosexuals the rights granted to married partners that flow naturally from the marital relationship [. . .] This lack of recognition of the rights which flow naturally from the break-up of marital relationships applies to unmarried heterosexuals as well as homosexuals. But the State has not denied these individuals their right to either will their property as they see fit nor to privately commit by contract to spend their money as they choose. The state is not thusly condoning the lifestyles of homosexuals or unmarried live-ins; it is merely recognizing their constitutional private property and contract rights. Even though no legal rights or obligations flow as a matter of law from a non-marital relationship, we see no impediment to the parties to such a relationship agreeing between themselves to provide certain rights and obligations.[83]

Many cases before and after *Marvin v. Marvin*[84] speak of the importance of a party who claims property rights upon dissolution of a nonmarital relationship proving the relationship was not meretricious.[85] In

80. Oregon and Washington are the exceptions. In both, courts have created equitable property rights for cohabitants based on the relationship, without requiring an express or implied contract. Vasquez v. Hawthorne, 33 P.3d 735 (Wash. 2001); Wilber v. DeLapp, 850 P.2d 1151 (Or. Ct. App. 1993).

81. Boot v. Beelan, 480 S.E. 2d 267, 269 (Ga. Ct. App. 1997).

82. *Posik*, 695 So. 2d at 759.

83. *Id.* at 761.

84. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

85. *See, e.g.,* Suggs v. Norris, 364 S.E. 2d 159 (N.C. Ct. App. 1988); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

holding as it did, the Florida court in *Posik v. Layton* swept aside this rather antiquated approach to validity of this type of contract.

Case law in two nonrecognition states, Louisiana and Georgia, appears to reject enforceability of oral cohabitation agreements, seemingly clinging to the out-of-date focus on the immorality of the relationship, but even in these states, courts may enforce a written contract. Most of the Georgia cases involved a claim founded on oral contract, or another legal theory, such as implied contract or unjust enrichment.[86] Georgia courts have enforced written agreements between cohabitants and have recognized claims independent of the so-called meretricious relationship.[87] Louisiana courts have rejected oral contracts between cohabitants to "live together and while doing so, combine their skills, efforts, labor and earnings and to share equally any and all assets and property acquired and accumulated as a result. . . ."[88] Such an agreement, even if proven, is void as meretricious.[89] Whether a written cohabitation agreement will be enforced as a valid contract in Louisiana is uncertain.[90]

In sum, a written cohabitation agreement, otherwise valid as a contract, should be enforceable in every state. At best, courts in some nonrecognition states may begin to enforce same-sex premarital agreements for what they are, in effect, honoring the parties' contractual choice of governing law. At worst, courts in these states should enforce them as valid cohabitation agreements.

In addition to general contract principles requiring recognition of the contractual rights of same-sex partners, such persons have a due process right to enter into a contract governing their financial affairs. *Lawrence v. Texas*[91] held that the state may not criminalize private, adult consensual sexual conduct. The Fourteenth Amendment due process liberty interest

86. *See* Rehak v. Mathis, 238 S.E.2d 81 (Ga. 1977) (trial court properly denied relief, based on immoral consideration, to woman who sought interest in home on which she paid all of mortgage for two years and half for sixteen years, and where she claimed a male companion told her they were joint owners); Liles v. Still, 335 S.E.2d 168 (Ga. Ct. App. 1985) (upholding jury instruction that contract founded on immoral consideration is unenforceable in a woman's suit against former boyfriend for reimbursement of half of rent on apartment).

87. Croake v. Gilden, 414 S.E.2d 645 (Ga. 1992) (granting specific performance of contract in writing to contribute to improvement of real estate and share expenses and assets over claim that immoral relationship was consideration, noting nothing in contract itself required illegal activity); Weekes v. Gay, 256 S.E.2d 901 (Ga. 1979) (finding implied contract after death of cohabitant in same-sex relationship based on decedent's contribution of money to buy real estate).

88. Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983).

89. *Id.* at 320.

90. As discussed later in this article, recent Supreme Court cases call into question whether a state can refuse enforcement of a written cohabitation agreement simply because the parties also have a sexual relationship

91. Lawrence v. Texas, 539 U.S. 558 (2003).

vindicated in *Lawrence* does not appear limited to the right to be free from criminal prosecution. Thus, the court observed:

> When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty interest protected by the Constitution allows homosexual persons the right to make this choice.[92]

Other courts have recognized that *Lawrence* has narrowed the scope of permissible state regulation of consensual adult nonmarital relationships. For example, in *Martin v. Ziherl*,[93] the Virginia Supreme Court, relying on *Lawrence*, held unconstitutional a Virginia statute criminalizing nonmarital sexual intercourse. The Virginia court understood *Lawrence* to mean that "decisions by married or unmarried persons regarding their intimate physical relationship are elements of their personal relationship that are entitled to due process protection."[94] In consequence of the court's decision, the woman could maintain a personal injury suit against her former male paramour for giving her herpes; the man could not defend based on a statute that disallowed a tort recovery for an injury resulting from criminal activity in which the plaintiff was a willing participant. The scope of the protected liberty interest should be broad enough to encompass the right to enter into a contract governing the financial incidents of a consensual adult relationship.[95]

C. Contract Terms to Enhance Enforceability of Same-Sex Premarital Agreements in Nonrecognition States

Notwithstanding the foregoing discussion, lawyers drafting agreements for same-sex couples may wish to consider including the following terms in their agreements:

1. Waiver of Other Rights and Claims

The parties intend and agree that this Agreement, and any amendment thereto, or supplemental or additional contract they may enter into with each other, shall completely define their property and support rights upon death or dissolution, whether or not their marriage is recognized as valid. They acknowledge that courts have recognized various legal claims that may arise from a nonmarital cohabitation relationship upon the death of a party, or the dissolution of the relationship, including, but not limit-

92. *Id.* at 567.

93. Martin v. Ziherl, 607 S.E. 2d 367 (Va. 2005).

94. *Id.* at 370.

95. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (finding when facts giving rise to lawsuit justify application of the law of more than one jurisdiction, forum court must make the choice-of-law in conformity with principles of the Fourteenth Amendment due process clause).

ed to, oral contract, implied contract, business partnership, restitution, unjust enrichment, and constructive trust. They agree and intend to waive all such claims and that their property and support rights shall be governed only by this Agreement, and any other or additional written agreement they may subsequently enter into with each other, or other instrument, such as a property deed or title.

2. Consideration

The consideration for this Agreement includes, but is not limited to, the marriage of the parties and their mutual waivers set forth herein.

3. Governing Law

The validity, enforceability and interpretation of this Agreement shall be determined and governed by the law of the District of Columbia regardless of the location of any property that may be owned by either party, where the parties may live, or whether their marriage is recognized as valid.

4. Consent to Personal Jurisdiction

The parties recognize that if they separate, it is in their mutual best interests to be able to obtain a divorce from the bond of matrimony with a minimum of expense and inconvenience. Accordingly, in the event of a separation where the parties are living in a state whose courts will not grant a divorce, and in the further event that one party moves to a state or jurisdiction that will grant a divorce, the other spouse hereby consents to the personal jurisdiction of the courts of such state, subject to the following:

i. such consent is limited to personal jurisdiction for the sole purpose of granting a divorce and enforcing the terms of this Agreement;
ii. the spouse who is not a resident in the dissolution state shall have no obligation to appear in person and shall be permitted to appear by telephone, video, or other remote means, or by deposition;
iii. such consent shall neither extend to an adjudication of validity of this Agreement, nor to enforceability of any provision herein, unless the nonresident spouse expressly consents to such jurisdiction.

V. Conclusion

Premarital agreements are highly enforceable. A party who obtains such an agreement prior to entering into a same-sex marriage can have a high degree of confidence that it will be upheld as valid in the marriage equality states. Among the twenty current marriage equality jurisdictions, eight allow for some kind of second-look at divorce, either with respect to both property and spousal support or only as to spousal support. Three

marriage equality jurisdictions do not enforce spousal support waivers. At least one marriage equality state, Maryland, will not enforce a premarital agreement that was unconscionable at execution. Both California and Washington have more demanding process requirements than is the norm. Moreover, the law could evolve to require more fairness, both procedural and substantive insofar as marriage equality states adopt the UPMAA. At the present time in more than half of the current marriage equality states, the standards for validity of the agreement as a whole, or for enforceability of a spousal support waiver, are such as to create a basis for a court of that state to invoke fundamental public policy to reject a choice-of-law clause more favorable to the proponent. This is, and likely will remain, an area of uncertainty for all couples who enter into a premarital agreement and then go to live in another state whose laws may demand more procedural or substantive fairness than that of the chosen law.

The interests of parties to an agreement will be better protected when the process leading to execution is fair, with access to counsel and sufficient time to consider the terms and negotiate for changes. Moreover, parties will be better served by an agreement that makes reasonable provisions for an economically weaker party when there is a significant disparity in resources at the outset.

The same-sex couple who enters into a premarital agreement and lives in a nonrecognition state when they separate can expect a court in such a state to enforce their agreement as a contract, even if the forum state does not recognize the marriage.

Appendix 1

State Law Summary: Premarital Agreement Law in the Marriage Equality States

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
California	Cal. Fam. Code §§ 1610–1617 (UPAA, eff. 1.1.86; amended, eff. 1.1.02); Cal. Fam. Code § 1615(c) (party must be represented by counsel or be advised of right and expressly waive; no less than 7 days between receipt of advice and agreement and execution; unrepresented party must be fully informed in writing of terms, must be proficient in language of agreement and explanation of rights, and must sign acknowledgment); Cal. Prob. Code § 147 (parties may waive rights at death in premarital agreement) Cal. Prob. Code §§ 141, 143, 146, 16040.	Cal. Fam. Code § 1612 (support waiver enforceable only (1) with advice of independent counsel and (2) if not unconscionable at divorce); *In re Marriage of Pendleton and Fireman*, 99 Cal. Rptr. 2d 278, 5 P.3d 839 (2000) (legislature intended courts to develop case law regarding enforceability; waiver not per se unenforceable)	Cal. Fam. Code § 1620 (agreement cannot alter legal relationship except for property provisions); Cal. Civ. Code § 5100 (spouses contract obligation of each other's support) Cal. Civ. Code § 5132 (married person shall support spouse while living together); *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993).	

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
Connecticut	Conn. Gen. Stat. §§ 46b-36a to 46b-36j (UPAA, eff. 10.1.95) (premarital agreement must be voluntary, made after full disclosure with opportunity to consult independent counsel, and not unconscionable at execution or enforcement); Conn. Gen. Stat. § 45a-494 (rule against perpetuities does not apply to premarital agreement).	Conn. Gen. Stat. §§ 46b-36a–46b-36j (criteria for award is welfare eligibility).	Conn. Gen. Stat. § 46b-37 (spouses have mutual duty of support during marriage; both spouses liable for necessaries; spouse who abandons liable for reasonable support of other spouse); *McHugh v. McHugh*, 181 Conn. 482, 436 A.2d 8, 12–13 (1980) (provision waiving right to support during ongoing marriage violates public policy) (*dicta*); *Scharer v. Scharer*, 2001 Conn. Super. Lexis 2140 (2001) (unpub.) (premarital agreement waiving post-divorce alimony does not preclude award payable while validity of agreement is litigated).	*Montoya v. Montoya*, 91 Conn. App. 407, 881 A.2d 319 (2005), *rev'd in part on other grounds*, 280 Conn. 605, 909 A.2d 947 (2006) (premarital agreement fee waiver and prevailing party provisions were enforceable where agreement valid)
Delaware	Del. Code Ann. tit. 13, §§ 321–328 (UPAA, eff. 9.1.96).	Del. Code Ann. tit. 13, § 326 (no exception for welfare eligibility; statute silent on criteria for award).	Del. Code tit. 13, § 502 (duty to support spouse rests on other spouse).	
District of Columbia	D.C. Code Ann. §§ 46-501–46-510 (UPAA, eff. 2.9.96).	D.C. Code Ann. §§ 46-501–46-510 (criteria for award is welfare eligibility).	D.C. Code Ann. § 46-601 (both spouses liable for necessaries; section does not affect law re obligations for marital support except as to necessaries); D.C. Code § 16-916 (party can be ordered to support needy spouse).	

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
Hawaii	Haw. Rev. Stat. §§ 572D-1–572D-10 (UPAA, eff. 7.1.87) *Labayog v. Labayog*, 927 P.2d 420 (Haw. Ct. App. 1996) (married persons may enter into premarital agreement, marital agreement (agreement during marriage not incident to divorce), or divorce agreement; court must enforce agreement insofar as it references property transfers at death or divorce); *Hussey v. Hussey*, 77 Haw. 202, 881 P.2d 1270 (Ct. App. 1994) (parties may exclude property from marital estate by valid premarital agreement).	Haw. Rev. Stat. §§ 572D-1–572D-10 (criteria for award is welfare eligibility).		
Illinois	750 Ill. Comp. Stat. §§ 10/1–10/11 (UPAA, eff. 1.1.90); Ill. Comp. Stat. § 5/15-1 (widow's award not barred by agreement if there are minor children); 751 Ill. Comp. Stat. § 503 (marital property at divorce does not include property excluded by valid agreement); *Phelps v. Phelps*, 72 Ill. 545 (1874); *Allen v. Allen*, 222 Ill. App. 438 (1921).	750 Ill. Comp. Stat. § 10/7(b) (court may award support over waiver if waiver causes undue hardship not reasonably foreseeable at execution to extent necessary to avoid such hardship); *Barnes v. Barnes*, 324 Ill. App. 3d 514, 755 N.E.2d 522 (2001) (wife's hardship at end of marriage was foreseeable where parties had gross disparity in income at execution; wife's hardship was not undue where she was employed at divorce).	750 Ill. Comp. Stat. § 65/15 (parties jointly liable to third-party creditors for necessaries); 750 Ill. Comp. Stat. § 16/15 (failure to support willfully and without excuse is punishable by fine or imprisonment); *Eule v. Eule*, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974) (spouse cannot avoid support obligation during marriage by premarital agreement); *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972) (*pendente lite* support denied because premarital agreement made generous provision for W).	*Marriage of Rosenbaum-Golden*, 381 Ill. App.3d 65, 884 N.E. 2d. 1272 (2008) (trial court properly awarded fees to wife to litigate her rights under premarital agreement where fee award was advance against her share of marital assets); *Warren v. Warren*, 169 Ill. App. 3d 226, 523 N.E.2d 680 (1988) (fee waiver unenforceable where support waiver not fair at divorce); *In re Marriage of Cullman*, 185 Ill. App. 3d 1029, 541 N.E.2d 1274 (1989) (waiver must be express)

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
Iowa	Iowa Code §§ 596.1–596.12 (UPAA, eff. 1.1.92) (premarital agreement not enforceable if (1) executed involuntarily; *or* (2) unconscionable at execution; *or* (3) challenger lacked financial disclosure and did not or could not have had knowledge of other party's financial situation at execution); Iowa Code § 633.236 (elective share); *Matter of Estate of Spurgeon*, 572 N.W.2d 595 (Iowa 1998) (spouse can waive elective share; court can award spousal support after death for twelve months as part of administration under probate code; award is discretionary).	Iowa Code §§ 596.1–596.12 (right to spousal support not waivable); *In re Marriage of Horn*, 2002 Iowa. App. Lexis 705 (2002) (unpub.).	Iowa Code § 597.10 (abandoned party can sell property for support or family expenses); Iowa Code § 597.14 (liens for family expenses can be levied against property of both parties).	
Maine	Me. Rev. Stat. Ann. (UPAA, eff. 6.15.87) tit. 19-A, §§ 601–611; *Estate of Martin*, 938 A.2d 812 (Me. 2008); Me. Rev. Stat. Ann. tit. 18-A, § 2-204 (can waive rights as surviving spouse by premarital agreement).	Me. Rev. Stat. Ann. tit. 19-A, §§ 601–611 (criteria for award is welfare eligibility).	Me. Rev. Stat. Ann. tit. 22, § 4319 (liability for support of spouse and child); Me. Rev. Stat. Ann. tit. 19-A, § 1652 (spouses are obligated to support one another if able).	

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
Maryland	Md. Code Ann., Est. & Trusts § 3-205 (right of election can be waived before or after marriage by written agreement); *Cannon v. Cannon*, 384 Md. 537, 865 A.2d 563 (2005) (premarital agreement must either be fair to disadvantaged party or executed voluntarily with fair financial disclosure); *Hartz v. Hartz*, 248 Md. 47, 234 A.2d 865 (1967) (same); *Frey v. Frey*, 298 Md. 552, 471 A.2d 705 (1984) (parties can contract in premarital agreement re property at divorce).	*Frey v. Frey*, 298 Md. 552, 471 A.2d 705 (1984) (parties can contract re post-divorce alimony); Md. Code Ann., Fam. Law. § 11-101(c) (court bound by agreement of parties regarding alimony).	*Frey v. Frey*, 298 Md. 552, 471 A.2d 705 (1984) (validity of pendente lite waiver turns on validity of premarital agreement).	
Massachusetts	Mass. Gen. Laws Ann. ch. 184 A, § 4 (rule against perpetuities does not apply to premarital agreement); Mass. Gen. Laws Ann. ch. 259, § 1 (Statute of Frauds); Mass. Gen. Laws Ann. ch. 209, §§ 25, 26 (force and effect of prenuptial agreements); *DeMatteo v. DeMatteo*, 436 Mass. 18, 762 N.E.2d 797 (2002) (premarital agreement must be executed voluntarily after adequate disclosure and result must be fair and reasonable); *Upham v. Upham*, 36 Mass. App. Ct. 295, 630 N.E.2d 307 (1994).	*Osborne v. Osborne*, 384 Mass. 591, 428 N.E.2d 810 (1981) (premarital agreement settling alimony at divorce may be modified if spouse will become public charge).	Mass. Gen. Laws Ann. ch. 209, § 32F (court may order support to abandoned spouse); *Osborne v. Osborne*, 384 Mass. 591, 428 N.E.2d 810 (1981) (court declined to express opinion on premarital agreements that purport to limit duty of spouses to support each other during marriage).	

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
Minnesota	Minn. Stat. Ann. § 519.11 (parties can contract regarding property rights at death); Minn. Stat. Ann. § 518.54(5) (parties can contract re interests in nonmarital property at divorce; parties can contract re marital property at divorce if agreement otherwise valid without regard to this section); *Marriage of Mazzitelli,* 2005 Minn. App. Lexis 125 (2/1/05) (property disposition terms of premarital agreement unfair at divorce where wife stayed home with children for ten years); *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989) (proponent of agreement has burden of proving procedural and substantive fairness); *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984) (validity of premarital agreement governing marital property at divorce determined by common law principles).	*Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984) (premarital agreement re support generally enforceable but subject to revision if unconscionable at divorce); Minn. Stat. Ann. § 518.553 (when ordering support, court must take into account: (1) ability to pay, (2) amount of current support order, and (3) earnings, etc.).		*Hill v. Hill*, 356 N.W. 2d 49 (Minn. Ct. App. 1984) (trial court may award fees if necessary for substantial justice despite wavier of fees in premarital agreement).

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
New Hampshire	N.H. Rev. Stat. Ann. §§ 460:2-a (man and woman in contemplation of marriage may enter into written interspousal contract); 458:52 (nothing in chapter abrogates right of persons to enter into enforceable prenuptial agreement concerning property rights); 458:16-a (parties can determine rights at death or divorce by premarital agreement); *MacFarlane v. Rich*, 132 N.H. 608, 567 A.2d 585 (1989) (premarital agreement must be voluntary with full disclosure and result must not be unconscionable); *In re Estate of Hollett*, 150 N.H. 39, 834 A.2d 348 (2003); *Yannalfo v. Yannalfo*, 147 N.H. 597, 794 A.2d 795 (2002) (provisions may become unenforceable if circumstances at divorce so far beyond contemplation of parties that enforcement unconscionable).	*MacFarlane v. Rich*, 132 N.H. 608, 567 A.2d 585 (1989).		
New Jersey	N.J. Stat. Ann. §§ 37:2-31 to 37:2-41 (UPAA, eff. 11.3.88) (premarital agreement unenforceable if (1) executed involuntarily or (2) unconscionable when executed because it lacked (a) disclosure, or (b) waiver of disclosure, or (c) adequate knowledge, or (d) counsel or waiver of counsel; N.J. Stat. Ann. § 3B:8-10 (spouse or domestic partner can waive elective share in signed agreement before or after marriage with fair disclosure).	N.J. Stat. Ann. §§ 37:2-31–37:2-41 (waiver effective unless spouse would (1) be without reasonable support, or (2) become public charge, or (3) have standard of living far below premarriage standard); *Rogers v. Gordon*, 404 N.J. Super. 213, 961 A.2d 11(2008) (applying pre-UPAA law to set aside alimony waiver as unconscionable).	N.J. Stat. Ann. § 2C:62-1 (court can order temporary support after spouse charged with willful nonsupport); N.J. Stat. Ann. § 2C:24-5 (willful nonsupport is crime); N.J. Stat. Ann. § 30:4-66 (spouses liable to state for institution costs whether living together or separated); *Marschall v. Marschall*, 195 N.J. Super. 16, 477 A.2d 833 (1984) (court can award pendente lite support pending proponent's meeting burden of proof of validity; court can award recoupment to payor support after validity of agreement established).	*Marschall v. Marschall*, 195 N.J. Super. 16, 477 A.2d 833 (1984) (court can award pendente lite fees subject to setoff if premarital agreement validity upheld).

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
New Mexico	N.M. Stat. Ann. §§ 40-3A-1–40-3A-10 (UPAA, eff. 7.1.95); N.M. Stat. Ann. § 45-2-407 (spouse may waive statutory surviving spouse rights by agreement).	N.M. Stat. Ann. §§ 40-3A-1–40-3A-10 (premarital agreement may not adversely affect right to spousal support).	N.M. Stat. Ann. § 30-6-2 (failure to support or abandonment of spouse or child is fourth degree felony); N.M. Stat. Ann. § 40-2-1 (marriage contract is obligation of support, fidelity, and respect).	*Lebeck v. Lebeck*, 118 N.M. 367, 881 P.2d 727 (Ct. App. 1994) (no waiver in premarital agreement; trial court award of fees for meritorious claims and denial of fees for nonmeritorious claims upheld).
New York	N.Y. Dom. Rel. Law § 236(B)(3) (premarital agreement valid in absence of fraud; financial disclosure not prerequisite; must be in writing subscribed & acknowledged in manner required for recordation of deed; parties can contract re disposition of property at death or divorce). N.Y. Est. Powers & Trusts Law § 5-1.1 (spouse can waive elective share). N.Y. Gen. Oblig. Law § 3-303 (contract in contemplation of marriage in full force after marriage). N.Y. Est. Powers & Trusts Law § 5-1.2 (spouse disqualified from spousal share after abandonment, separation agreement, divorce, or void marriage).	N.Y. Dom. Rel. Law § 236(B)(3) (parties can contract re support; must be fair at execution and not unconscionable at divorce); *Panossian v. Panossian* 172 A.D.2d 811, 569 N.Y.S.2d 182 (1991) (criteria for award).	N.Y. Fam. Ct. Act § 412 (spouses have duty to support); N.Y. Soc. Serv. Law § 101 (spouse liable to state for support); *Arizin v. Covello*, 175 Misc. 2d 453, 669 N.Y.S.2d 189 (Sup. Ct. 1998) (pendente lite support may be waived; waiver must be express); *Medical Business Associates v. Steiner*, 183 A.D.2d 86, 588 N.Y.S.2d 890 (1992) (recipient has primary liability for necessaries); *Tregellas v. Tregellas*, 169 A.D.2d 553, 564 N.Y.S.2d 406 (1991) (pendente lite waiver must be express)	*Arizin v. Covello*, 175 Misc. 2d 453, 669 N.Y.S.2d 189 (Sup. Ct. 1998) (pendente lite fees waivable if premarital agreement waiver express and specific); *Koons v. Koons*, 212 A.D.2d 370, 622 N.Y.S.2d 242 (1995) (pendente lite fees not barred by premarital agreement waiver of fees in event of divorce); *Kessler v. Kessler* 33 A.D.3d 42, 818 N.Y.S. 2d 571 (2006) (court can award fees to litigate property rights under a premarital agreement where waiver was unconscionable due to vast disparity in resources).

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
Oregon	Or. Rev. Stat. §§ 108.700–108.739 (UPAA, eff. 1.1.88); Or. Rev. Stat. § 114.115 (agreement can bar election by surviving spouse); *Marriage of Rudder*, 230 Ore. App. 437, 217 P.3d 183 (2009) (Oregon UPAA codifies common law of validity).	Or. Rev. Stat. §§ 108.700–108.739 (criteria for award is welfare eligibility).	*Unander v. Unander*, 265 Or. 102, 506 P.2d 719 (1973) (state has interest in support of citizens; spousal support obligation cannot be nullified by previous contract; premarital agreement re alimony enforced unless deprives spouse of needed support).	Or. Rev. Stat. § 107.105(1)(i) (statutory provision for attorneys' fee award); *Marriage of Purcell*, 99 Or. App. 668, 783 P.2d 1038 (1989) (absent express waiver of statutory right to fees, court may award although premarital agreement waived fees); *Marriage of Bowers*, 143 Or. App. 24, 922 P.2d 722 (1996) (premarital agreement provision to shift fees to loser enforceable; court can award fees to winner per premarital agreement and make statutory award to loser based on need and such awards could cancel each other out).
Pennsylvania	20 Pa. Cons. Stat. § 2207 (right of election of surviving spouse can be waived before or after marriage); 20 Pa. Cons. Stat. § 2507 (if testator divorces, will provisions for spouse generally become ineffective); 23 Pa. Cons. Stat. § 3501 (marital property does not include property excluded by valid agreement entered into before, during, or after marriage); *Simeone v. Simeone*, 380 Pa. Super. 37, 551 A.2d 219 (1988), *aff'd*, 525 Pa. 392, 581 A.2d 162 (1990) (premarital agreement must be voluntary and either (1) not unconscionable or (2) there must have been fair financial disclosure); *Karkaria v. Karkaria*, 405 Pa. Super. 176, 592 A.2d 64 (1991) (premarital agreement re property disposition at divorce presumed valid if adequate provisions or full disclosure).	*Karkaria v. Karkaria*, 405 Pa. Super. 176, 592 A.2d 64 (1991) (court cannot enforce premarital agreement selectively; if valid, provisions re property, alimony and attorney fees enforceable).	23 Pa. Cons. Stat. § 4321 (married persons liable for support of each other); 62 Pa. Cons. Stat. § 1973 (family must support indigent members if financially able); 23 Pa. Cons. Stat. § 4102 (both spouses liable to creditors for debts for necessaries); *Karkaria v. Karkaria*, 405 Pa. Super. 176, 592 A.2d 64 (1991) (court must enforce valid premarital agreement re pendente lite alimony).	*Karkaria v. Karkaria*, 405 Pa. Super. 176, 592 A.2d 64 (1991) (court must enforce valid premarital agreement re attorneys' fees).

State	Criteria for Validity, Right to Dispose of Property at Death and Divorce	Provisions re Spouse Support after Divorce/Criteria for Award of Support Over Waiver	Waiver of Support During Ongoing Marriage (*Pendente Lite*, Separate Maintenance, Necessaries)	Waiver of Attorney Fees/ Fee-Shifting to Loser
Rhode Island	R.I. Gen. Laws §§ 15-17-1 to 15-17-11 (UPAA, eff. 7.1.87) (premarital agreement not enforceable if (1) involuntary *and* (2) unconscionable *and* no financial disclosure or waiver of disclosure).	R.I. Gen. Laws §§ 15-17-1–15-17-11 (criteria for award is welfare eligibility).	R.I. Gen. Laws § 11-2-1 (nonsupport or abandonment that puts spouse in danger of needing public assistance is crime); *Landmark Medical Center v. Gauthier*, 635 A.2d 1145 (R.I. 1994) (nonrecipient has secondary liability for necessaries).	
Vermont	Vt. Stat. Ann. tit. 12, § 181 (Statute of Frauds); *Stalb v. Stalb*, 168 Vt. 235, 719 A.2d 421 (1998); *Bassler v. Bassler*, 156 Vt. 353, 593 A.2d 82 (1991) (premarital agreement must be executed voluntarily after adequate disclosures and result must be fair or not unconscionable); *Borofsky v. Cardill*, 957 A.2d 404 (Vt. 2008).	*Stearns v. Stearns*, 66 Vt. 187, 28 A. 875 (1894) (premarital agreement may not waive spousal support).	Vt. Stat. Ann. tit. 15, § 202 (penalty for desertion or nonsupport of family is up to two years in jail and/or $300 fine).	
Washington	Wash. Rev. Code 19.36.010 (Statute of Frauds); Wash. Rev. Code Ann. § 26.16.120 (H and W can agree re disposition of community property at death); Wash. Rev. Code Ann. §26.16.250 (H/W can dispose of quasi-community property at death by premarital agreement); *Marriage of Matson*, 107 Wash. 2d 479, 730 P.2d 668 (1986) (parties can contract regarding disposition of property at divorce; premarital agreement must either be substantively fair or must be executed voluntarily with financial disclosure, competent advice, and full knowledge of marital rights); *Marriage of Bernard*, 165 Wn.2d 895, 204 P.3d 907 (2009) (reaffirming two-prong Matson test).	*In re Marriage of Burke*, 96 Wash. App. 474, 980 P.2d 265 (1999) (parties can contract re rights affecting themselves and property).	Wash. Rev. Code Ann. § 26.20.035 (nonsupport is gross misdemeanor); Wash. Rev. Code Ann. § 26.20.030 (abandonment is class C felony); Wash. Rev. Code. Ann. § 26.20.080 (proof of nonsupport does not require court order).	*Marriage of Ressa,* 2001 Wash. App. Lexis 2709 (attorney's fees generally waivable); *In re Marriage of Burke*, 96 Wash. App. 474, 980 P.2d 265 (1999) (parties cannot divest court of jurisdiction to award fees to litigate issues as to which premarital agreement could not bind court, i.e., custody and child support).

Appendix 2

Enforceability of Cohabitation Agreements in States Rejecting Marriage Equality

State	Case/Statutory Authority
Alabama	*Livingston v. Tapscott*, 585 So. 2d 839 (Ala. 1991) (public policy against adultery does not preclude enforcement of oral contract between cohabitants).
Alaska	*Bishop v. Clark*, 54 P.3d 804 (Alaska 2002) (evidence supported cohabiting couple impliedly agreed to live together and share fruits of relationship as though married; equal division of assets upheld); *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980) (express contract to provide for cohabitant for life is enforceable); *see also Reed v. Parrish,* 286 P.3d 1054 (Alaska 2012); *Tolan v. Kimball*, 33 P.3d 1152 (Alaska 2001); *Wood v. Collins*, 812 P.2d 951 (Alaska 1991).
Arizona	*Carroll v. Lee*, 148 Ariz. 10, 712 P.2d 923 (1986) (express oral contract to share property is enforceable); *Cook v. Cook*, 142 Ariz. 573, 691 P.2d 664 (1984) (express oral agreement to pool income and share assets is enforceable).
Arkansas	*Bramlett v. Selman*, 597 S.W.2d 80 (Ark. 1980) (same-sex couple can enter into valid agreement regarding ownership of real estate); *Mitchell v. Fish*, 97 Ark. 444, 134 S.W.940 (1911) (oral agreement whereby man and woman agreed to live together, contribute labor and property to joint enterprise, and share profits was enforceable).
Colorado	*Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000) (cohabitants can contract regarding property rights; cohabitation alone does not create property rights).
Florida	*Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997) (express written agreement between same-sex couple providing for property rights and post-termination support for life was enforceable); *see also Hoffman v. Boyd*, 698 So. 2d 346 (Fla. Dist. Ct. App. 1997); *Stevens v. Muse*, 562 So. 2d 852 (Fla. 1990); *Poe v. Levy's Estate*, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982).
Georgia	*Boot v. Beelen*, 224 Ga. App. 384, 480 S.E.2d 267 (1997) (written contract at end of cohabitation to repay party all funds contributed to household is enforceable); *Long v. Marino*, 212 Ga. App. 113, 441 S.E.2d 475 (1994) (implied contract between woman and Catholic priest to live with and provide sex in return for financial support is not enforceable); *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992) (written agreement regarding real estate enforceable despite immoral relationship); *Weekes v. Gay*, 243 Ga. 784, 256 S.E.2d 901 (1979) (surviving member of same-sex relationship entitled to implied trust on real estate held in name of decedent where survivor proved he paid for it).
Indiana	*Turner v. Freed,* 792 N.E. 2d 947 (Ind. Ct. App. 2003) (domestic services can constitute adequate consideration to support cohabitation contract); *Bright v. Kuehl*, 650 N.E. 2d 311, *reh'g denied* (Ind. Ct. App. 1995) (cohabitants may enter into express contract regarding property); *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. Ct. App. 1980) (same).

State	Case/Statutory Authority
Kansas	*Ellis v. Berry*, 19 Kan. App. 2d 105, 867 P.2d 1063 (1993) (cohabiting couple can enter into express oral contract regarding property; implied contract claim arises from facts showing intent to contract); *Eaton v. Johnston*, 235 Kan. 323, 681 P.2d 606 (1984) (court has authority to equitably divide property acquired jointly or by one cohabitant with intent both have an interest).
Kentucky	*Murphy v. Bowen,* 756 S.W.2d 149 (Ky. Ct. App. 1988) (performance of domestic chores does not give rise to implied contract to share property acquired during cohabitation; dissent observes: "Only those farsighted enough to enter into an express contract for the disposition of property with his or her spouse-equivalent will have, according to the majority's treatment of the issue, the opportunity to obtain a share of the fruits of their joint labor."); *Akers v. Stamper*, 410 S.W.2d 710 (Ky. Ct. App. 1966) (cohabitants can enter into contract for joint business venture and equal interests based on contributions of money and labor).
Louisiana	*Schwegmann v. Schwegmann,* 441 So.2d 316 (La. Ct. App. 1983) (purported oral contract to live together, combine skills, labor, effort and earnings, and share equally all property so acquired was void as meretricious); *Chambers v. Crawford,* 150 So.2d 61 (La. Ct. App. 1963) (cohabitant may assert claim arising out of business transaction); *Broadway v. Broadway*, 417 So. 2d 1272 (La. Ct. App. 1982) (concubine who contributes capital and labor to acquisition of specific property is entitled to share on equitable grounds; no written contract at issue); *Succession of Washington*, 140 So. 2d 906 (La. Ct. App. 1962) (joint title creates presumption of equal financial contribution; implication that absent actual financial contribution, person living in cohabitation cannot acquire interest in property; no written contract at issue); *see also Lacour v. Theard*, 439 So. 2d 1127 (La. Ct. App.), *cert. denied*, 443 So. 2d 588 (La. 1983).
Michigan	*Estate of Bunde*, 2002 Mich. App. Lexis 636 (cohabitant's promise to provide for other cohabitant for life and for a home in return for work in a business was contract to make a will; such agreement required by statute to be in writing); *Carnes v. Sheldon*, 109 Mich. App. 204, 311 N.W.2d 747 (1981) (contract implied-in-law from cohabitation is unenforceable as a result of legislative rejection of common law marriage); *Tyranski v. Piggins*, 44 Mich. App. 570, 205 N.W.2d 595 (1973) (express agreement re money or property with consideration in money or services is enforceable); *see also Featherstone v. Steinhoff*, 226 Mich. App. 584, 575 N.W.2d 6 (1997).
Mississippi	*Davis v. Davis*, 643 So. 2d 931 (Miss. 1994) (property rights arising from nonmarital relationship are contractual, not equitable); *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986) (court of equity can order division of property acquired in nonmarital relationship in accordance with parties' economic contributions to acquisition, including domestic services). *Estate of Alexander,* 445 So. 2d 836 (Miss. 1984) (absent a contract, property accumulated during nonmarital relationship belongs to titleholder).
Missouri	*Hudson v. DeLonjay*, 732 S.W.2d. 922, (Mo. Ct. App. 1987) (express agreement to pool resources and share assets during nonmarital relationship is enforceable).

State	Case/Statutory Authority
Montana	*Kulstad v. Maniaic*, 352 Mont. 513 220 P. 3d 595 (Mont. 2009) (trial court properly applied equitable principles to divide real and personal property of two women upon dissolution); *Lekeber v. Johnson*, 351 Mont. 75, 209 P.3d 254 (2009) (equitable principles determined rights of unmarried couple to real estate at end of lengthy relationship); *Flood v. Kalinyaprak*, 319 Mont. 280, 84 P.3d 27 (2004) (in partition action between unmarried couple, court can consider relationship of parties as factor in determining intent to share equally or unequally and overall contributions to assets and is not limited to direct monetary contribution to specific real estate); *Kynett v. Whitney*, 1994 Mont. Dist. Lexis 224 (case of first impression, citing cases from other states, no law precludes cohabiting couple from entering into agreement regarding property; cause of action exists for implied contract and unjust enrichment based on long-term relationship and mutual acts of financial nature, creating inference parties intended to share property equally).
Nebraska	*Kinkenon v. Hue*, 207 Neb. 698, 301 N.W.2d 77 (1981) (contract under which one party agreed to provide homemaker services and other party agreed to take care of her for rest of her life was enforceable); *Taylor v. Frost*, 202 Neb. 652, 276 N.W.2d 656 (1979) (contract not illegal because parties have sexual relationship.
Nevada	*Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984) (unmarried parties may contract with each other regarding property rights; parties may agree to hold property as if married; community property laws apply by analogy); *Western States v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992) (agreement to hold property as if married; community property law will apply by analogy).
North Carolina	*Suggs v. Norris*, 88 N.C. App. 539, 364 S.E.2d 159 (1988) (express or implied contract regarding finances and property of unmarried couple is enforceable).
North Dakota	*Kohler v. Flynn*, 493 N.W.2d 647, 648 (N.D. 1992) ("If live-in companions intend to share property, they should express that intention in writing.").
Ohio	*Seward v. Mentrup*, 87 Ohio App. 3d 601, 622 N.E.2d 756 (1993) (mere cohabitation confers no rights to property; court has no authority to divide property acquired by same-sex couple absent marriage contract or similar agreement).
South Carolina	*Doe v. Roe*, 323 S.C. 445, 475 S.E.2d 783 (1996) (former same-sex cohabitant entitled to partition of joint real estate, notwithstanding unequal monetary contribution).
South Dakota	*Benck v. Benck*, 71 S.D. 288, 23 N.W.2d 744 (1946) (cohabitants may acquire property rights where property acquired through joint efforts or contributions with intent to share); *Bracken v. Bracken*, 52 S.D. 252, 217 N.W.192 (1927) (cohabiting parties do not acquire property rights by virtue of status; but when they engage in a joint enterprise with each contributing implied contract may be found).

State	Case/Statutory Authority
Tennessee	*Smith v. Riley*, 2002 Tenn. App. Lexis 65 (2001) (unpublished) (consideration of $1 adequate to support written contract of unmarried couple to share property 50-50); *Martin v. Coleman*, 19 S.W.3d 757 (Tenn. 2000) (no implied partnership to share retirement benefits based on cohabitation; but partnership implied when parties entered into business relationship for profit); *Bass v. Bass*, 814 S.W.2d 38 (Tenn. 1991) (cohabiting parties can have implied business partnership where they agree to pool assets, labor, or skill in commercial enterprise).
Texas	Tex. Bus. & Com. Code Ann. § 26.01 (agreement on consideration of nonmarital conjugal cohabitation not enforceable unless in writing); *Zaremba v. Cliburn*, 949 S.W.2d 822 (Tex. App. 1997); *Small v. Harper*, 638 S.W.2d 24 (Tex. App. 1982) (express contract to pool income and resources and share results is enforceable).
Utah	*Layton v. Layton*, 777 P.2d 504 (Utah Ct. App. 1989); Utah Code § 30-1-4.5 (marriage not solemnized still valid if arises out of contract between man and woman who have legal capacity, have cohabited, who assume marital duties and obligations, and hold themselves out as husband and wife).
Virginia	*Op. of Va Atty. Gen.*, 2006 Va. AG Lexis 34 (Sept. 14, 2006) (unmarried persons can enter into valid contract relating to property rights under general principles of contract law, notwithstanding constitutional amendment prohibiting recognition of legal status other than marriage); *Cooper v. Spencer,* 238 S.E.2d 805 (Va. 1977) (parties in a nonmarital relationship can enter into express or implied contract for partnership to join together money, goods, labor, or skill in a venture or business).
West Virginia	*Goode v. Goode*, 183 W. Va. 468, 396 S.E.2d 430 (1990); *Thomas v. LaRosa*, 400 S.E.2d 809 (W. Va. 1990).
Wisconsin	*Ward v. Jahnke,* 220 Wis. 2d 539, 583 N.W.2d 656 (1998); *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987) (contract between cohabitants to share property and engage in joint enterprise is enforceable); *see also Steffes v. Steffes*, 95 Wis. 2d 490, 290 N.W.2d 697 (1980).
Wyoming	*Shaw v. Smith*, 964 P.2d 428 (Wyo. 1998) (cohabiting couple can enter into binding contract regarding property rights; elements of validity the same as for any contract); *Bereman v. Bereman*, 645 P.2d 1155 (Wyo. 1982) (cohabiting couple can enter into binding contract; but oral contract was unenforceable under statute of frauds); *Kinnison v. Kinnison*, 627 P.2d 594 (Wyo. 1981) (express oral contract to settle claim to property at end of nonmarital relationship was enforceable; consideration was settlement of claim; past cohabitation did not render contract void).