Premarital and Marital Agreements and the Migratory (Same-Sex) Couple

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An increasing number and variety of prospective spouses, including same-sex couples, are seeking premarital agreements. The reasons include a desire to avoid the high transactional costs of divorce if the marriage does not work out and a wish to protect exclusive rights to property acquired outside of the marriage, such as inherited assets, or to a business or professional services practice.

A premarital agreement determines spousal property rights when a marriage ends by death or dissolution and may fix or waive spousal support. A premarital agreement generally substitutes for the default spousal rights that would exist when spouses divorce or a spouse dies without a premarital agreement. Spouses not contemplating divorce also may enter into an agreement that predetermines their property rights at death or dissolution and fixes or waives spousal support; such agreements are valid in most states.

Some persons entering marriage want to limit a spousal support claim 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. In blended families, many persons may want to provide for a surviving spouse, but to control the ultimate disposition of their assets so that they can go to children of a prior marriage or relationship. With the advent of marriage equality in all states and the District of Columbia, same-sex couples are seeking premarital agreements for many of the same reasons as straight couples.

A marital agreement is an agreement entered into during marriage, and not incident to an existing or planned separation, to define each spouse's property rights in the event of death or dissolution. In some states, such an agreement also may fix or waive spousal support. This type of agreement often is referred to as a postmarital or postnuptial agreement. However, the drafters of the Uniform Premarital and Marital Agreements Act (UPMAA) chose to use the term marital agreement.

A key concern for persons considering either type of agreement is predictability of enforcement no matter where the couple lives. There are variations among the states about the law of validity and about enforceability of specific terms. Lawyers drafting these agreements need to be concerned not only with the law of their own state, but also with the law of other jurisdictions.

Choice of law

A premarital or marital agreement should 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. 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. The Uniform Premarital Agreement Act (UPAA) and general choice-of-law rules permit parties to contract with respect to the law governing a dispute about their premarital or marital agreement. The requirements for an effective choice of governing law are (1) a substantial relationship between one or both parties or the transaction and the state of chosen law; and (2) that application of the chosen law does not offend the fundamental public policy of the forum state.

Residence of one party in the state of chosen law should readily satisfy the substantial relationship test. It is the second test that bears special attention. When application of the law chosen by the parties is contrary to a fundamental policy of the forum state, and the forum has a greater interest in the dispute than the chosen state, the forum court may choose not to enforce the parties' contractual choice of law. There are few cases involving a dispute over validity of a premarital agreement or enforceability of a specific term where there was a significant difference between the chosen law and the forum's law. The paucity of court decisions creates uncertainty for all migratory couples that sign such an agreement.

Variations in premarital agreement law

There is some variation among the states about both the criteria for validity of premarital agreements and enforceability of certain provisions, especially waivers of spousal support. Some states have adopted the Uniform Premarital Agreement Act (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. Other states reject enforcement of an agreement that was unconscionable at execution. Some states, such as California, by statute, and Washington, by case law, impose higher process standards for validity. To date, two states, Colorado and North Dakota, have adopted the Uniform Premarital and Marital Agreements Act (UPMAA), which prohibits enforcement of an unconscionable agreement and requires a more robust process than does the UPAA.

Fourteen states permit a trial judge to take a "second look" at divorce and to consider whether a premarital agreement has become unfair (in some states) or unconscionable (in others) 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. In another six states, a court may consider whether a spousal support waiver has become unconscionable as of divorce. In four states, a waiver of spousal support in a premarital agreement is unenforceable. 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.

Variations in marital agreement law

The right to enter into a contract not incident to a marital separation regarding property rights and support in the event of dissolution is of considerably more recent vintage than the right to enter into a premarital agreement. Every state permits spouses to contract with each other for some purposes. The right of spouses to contract regarding their rights in each other's estate at death is well established. Many states have statutes expressly authorizing bilateral agreements or unilateral waivers of spousal rights at death. However, the law regarding these agreements is still developing.

In a minority of states, courts or legislatures have expressly authorized postmarital agreements as comprehensive in scope as premarital agreements and governed by the same criteria for validity. In these states, parties may contract to settle property

rights as well as spousal support to the same extent as they could in a premarital agreement. In most other states, a patchwork of statutory and case law combines to permit such agreements to determine disposition of property at death and divorce and, in some of these states, to determine spousal support as well. The modern view of the rights of spouses to enter into comprehensive separation agreements, the universal enforceability of premarital agreements at both death and divorce, and the clear trend toward acceptance of comprehensive postmarital agreements suggest that such agreements will continue to gain acceptance with courts and legislatures. Thus, in most states, spouses can, by agreement after marriage, do the same things they can do by agreement before marriage. However, in a significant minority of states, a marital agreement provision waiving spousal support is not enforceable.

Ohio appears to be a minority of one in prohibiting spouses from entering into a marital agreement not incident to an immediate separation, except to cancel a premarital agreement or confirm an oral premarital agreement. Iowa is the only state that prohibits marital agreements that waive spousal rights at death.

Defining the scope of fundamental public policy

For the migratory same-sex couple, as for the straight couple, there is little guidance as to when a court in a forum state will refuse to apply the law chosen by the parties to a premarital or marital agreement 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) of the agreement as a whole at execution;
- Fairness (or conscionability) of the agreement as a whole at divorce in the second-look states;
- Enforcement of a waiver of postdivorce support;
- Enforcement of a waiver of temporary support while a suit for divorce is pending;
- Enforcement of a waiver of the right to seek an award of legal fees and costs.

The fundamental public policy analysis requires the forum court to determine whether it has a materially greater interest than the state of chosen law. A lawyer at the negotiation stage, looking ahead, should consider that the court of a state which has subject matter and personal jurisdiction to grant a divorce and adjudicate (1) validity and enforcement of a premarital or marital agreement; (2) economic claims not disposed of by agreement, such as child support; or (3) a claim for spousal support or legal fees, may deem itself to have an interest in the welfare of its citizens sufficient to apply its own law.

A mere difference in result is insufficient to invoke fundamental public policy as is a result that is merely inequitable. However, in states whose law rejects enforcement of a premarital or marital agreement that was unconscionable at execution, courts may well consider this a matter of fundamental public policy. An agreement that was fair or not unconscionable at execution, but which leaves a spouse impoverished, may be judged in violation of the fundamental public policy of the forum state. In states whose law does not permit a spousal support waiver, it is reasonable to predict a forum court will apply its own law. Similarly, where courts have more discretion to award postdivorce alimony over a waiver, forum courts may choose their own law.

Best practices to protect reasonable expectations of the parties

Although the UPMAA has to date been adopted in only two states, Colorado and North Dakota, it presents an excellent guide to best practices for lawyers in all states.

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

The lawyer for a party seeking a premarital or marital agreement should consider the following steps to maximize protection of his or her client's interests in getting a valid agreement and minimizing litigation risk in the event of a challenge. A fair process and a fair result are likely to better serve both parties to an agreement, especially when the parties have significantly disparate resources.

- **Timing of Presentation.** Counsel for the proponent should provide a proposed draft of a premarital agreement to the other party well in advance of the planned wedding date. This should give the recipient of the agreement enough time to get legal advice and negotiate the terms. Similarly, when the parties are already married, the recipient of the proposed agreement should have adequate time to review, consider, and negotiate the terms of the agreement and to hire counsel to assist him or her to do so.

- **Access to Counsel.** Each party should have an independent lawyer. 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 legal fees. Counsel for the proponent may assist the weaker party in finding a lawyer, including providing names of competent, experienced lawyers, but should not attempt to handpick the lawyer.

- **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. Of course, when a weaker party has actual legal advice, he or she will have an enhanced opportunity to negotiate for better terms.

- **Financial Disclosure.** Each party should provide adequate financial disclosure. Ideally, such disclosure should take the form of a written statement annexed to the agreement, which identifies major assets, with values where readily available and fair estimates of value where they are not, and includes amounts and sources of income.

- **Substantive Fairness.** Even though substantive fairness at execution or enforcement is not required for validity in most states, an agreement that makes reasonable provisions for an economically weaker party can help to insulate a premarital or marital agreement from a successful attack, especially when there is a big disparity in resources between the parties. To be substantively fair or, at least, not unconscionable, the agreement need not align with the law that would apply at divorce or death in the absence of an agreement.

Conclusion

Premarital agreements are highly enforceable as are marital agreements in most states. A party who obtains such an agreement prior to entering into marriage can have a high degree of confidence that it will be upheld as valid. There is a growing body of law and a clear trend supporting general validity of marital agreements; however, the law regarding standards of validity for this type of agreement is still developing in many states. For the migratory couple, there is a risk that the court of another state may refuse to enforce an agreement in its entirety, or may reject a term, such as a support waiver. This is, and likely will remain, an area of uncertainty for all couples who enter into a premarital agreement or a marital 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, provides access to counsel, and allows 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. **FA**

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