

A premarital agreement will not divest a court of authority to award appropriate child support upon separation or divorce or at the termination of a nonmarital relationship. See the Uniform Premarital Agreement Act (UPAA), 9B U.L.A. §3 (b). ("The right of a child to support may not be adversely affected by a premarital agreement.")

Every parent has a common law and statutory duty to provide basic support for his or her minor children. Therefore, a premarital agreement requiring a party to do no more than the law would require will have no effect on the parties' rights, and an agreement requiring less will not preclude the court from ordering a parent to meet his or her threshold obligation.

Expanding rights

By contrast, parties may enter into enforceable premarital agreements that expand the financial rights of children and the financial obligations of one or both parents. Thus, parties may contract to provide material benefits during the marriage, such as private school, summer camp, and other extras. Parents also may contract to pay postmajority periodic support, to pay for college, or to make provisions for a child after a parent's death. To the extent that parties choose to contract beyond the scope of the state-imposed support duty, their obligations will be governed exclusively by the law of contracts.

The law does not preclude parties

from being more generous than the law requires, and the courts will generally uphold agreements for the benefit of children that provide a higher level of support or a longer duration than state law requires, or support for a stepchild for whom the obligor would otherwise have no legal obligation. State courts will protect a child from a parental agreement that provides too little support.

No protection

There is virtually no protection for the payor who contracts for generous support and later regrets it or experiences changed circumstances that render it burdensome. So exercise caution when negotiating and drafting a premarital agreement addressing such issues.

Parties may contract on a variety of material benefits for children that are outside the scope of basic support:

- Payment of periodic support after a divorce to a parent on behalf of a child or directly to the child after a child reaches majority;
- Payment of certain expenses after the child reaches majority, such as medical insurance premiums, uninsured medical expenses, car expenses, or general living expenses;
- Support or other financial provisions for a disabled child;
- College or graduate school expenses for a time or in an amount that exceeds what could otherwise be awarded by a divorce court and that may include a host of related expenses, such as computer equipment, study abroad, transportation

costs, activity fees, and the like;

- Postdivorce minority support that goes beyond what a court would order or allocating a disproportionate share to one parent;
- Obligations to make gifts to children, such as annual gifts to a custodial account;
- In-kind benefits, such as the purchase or lease of a home for a custodial parent or the parent's right to remain in a jointly titled home for a period beyond what a court has the authority to award;
- Material benefits for a child that would be considered discretionary during a marriage, such as payment for private school, study abroad, summer camps, and similar items;
- Support for stepchildren during marriage or after divorce who would otherwise not be entitled to such support;
- Payment of expenses for life-cycle events, such as a bar or bat mitzvah, confirmation, graduation or wedding;
- Postdeath financial support and estate-planning obligations, such as provisions of life insurance or other beneficiary designations, establishment of trusts, or testamentary dispositions for children or stepchildren.

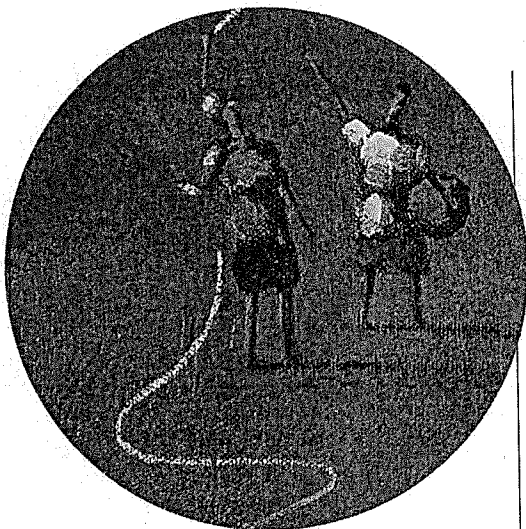
Postmajority support

Absent an enforceable contract, courts have the authority to require parents to support a child only until that child reaches the age of majority or is otherwise emancipated. That age varies but is commonly 18, but most

Prenups to Protect

BY LINDA J. RAVDIN

Children



states extend the age to 19, 19½, or 20 for a child in high school. In a few states, the age of majority is 21 or 22 or 23 for a child in college.

Before a child reaches the age of majority, courts generally have authority to modify contractual child support to make adequate support available or in the event that changed circumstances affect the payor's ability to pay. Once the child reaches the age of majority, the court loses the authority to modify support in either direction. Thus, a change in the payor's ability to pay, for better or for worse, or a change in the child's needs after the child reaches majority, will not provide the basis for a court to increase or decrease the amount.

College expenses

A child's undergraduate college education often is the reason parties enter into contractual agreements for postmajority support. Because of high college costs, mistakes resulting from bad substantive terms or poor drafting of college provisions can be quite costly. A court can do little to relieve a party of the consequences of a bad agreement.

A host of issues arise in negotiating and drafting college expense provisions. Insofar as college expense obligations are a matter of contract and not state child support law, the payor has the power to limit the financial obligation. Failure to set limits by contract cannot be unilaterally corrected later.

- *Defining college expenses.* The agreement should define college expenses. That definition may include just the basics, such as tuition, room and board, and books and fees, or may cover additional expenses, such as medical insurance and expenses, the cost of advance placement tests, study abroad, a car, a computer, cable television, the cost of joining a fraternity or sorority, off-campus housing, clothing, laundry, entertainment, a cash allowance, or other incidentals. Failure to define what is included can lead to litigation.

When one party is bound to pay all or most college expenses, the other party has an incentive to define the obligation expansively. It is especially important in these circumstances that the party with no financial obligation not be in a position to incur the expense and bill the obligor later.

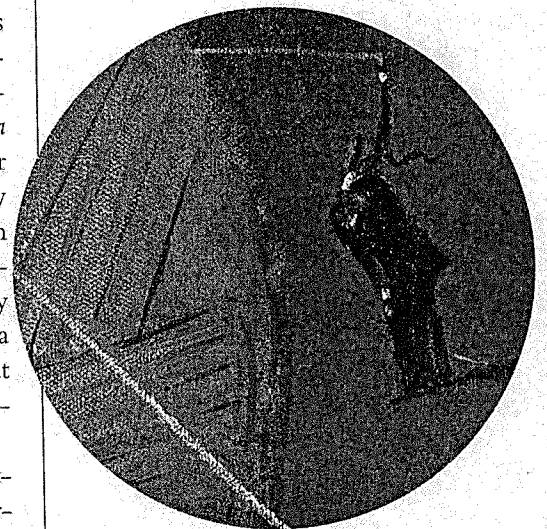
- *Allocation between parties.* Will parties share in college expenses or will one party pay the entire cost? If the parties share expenses, use a formula or terms for allocation of costs between them, which could be as simple as 50/50 or more complicated and require a periodic re-determination based on *pro rata* incomes. A fixed percentage is clear and well-defined, although it may not always provide a fair allocation of financial responsibility. An allocation based on income ratios may produce a fairer result but present a host of potential problems that should be addressed in the agreement.

- *Defining income.* If a pre- or post-marital agreement provides for parties to share financial responsibility for college expenses in proportion to their incomes, the agreement should define income and address what is not to be included in *pro rata* shares. Will all income from all sources be included or only salary from primary employment?

Some parties may find a second job necessary to meet college

expenses because of debts or new family obligations. Will the income from the second job be counted toward determining *pro rata* shares? The agreement should address this question expressly. Will income from investments be included? What if one party pays cash for a house whereas the other party invests his or her capital and produces additional income? If income from investments will be counted, the drafter needs to consider how one party may artificially depress his or her income. Similarly, if the agreement provides for *pro rata* sharing in accordance with salary from primary employment, a party who has the means to do so may opt to be underemployed, thus reducing his or her obligation.

- *Exchange of financial records.* Related to the question of proportional sharing of college expenses is the question of whether and to what extent parties must make periodic financial disclosures to determine their relative costs. Many parties



who make a financial disclosure at the outset will be reluctant to make ongoing disclosures. However, proportional sharing requires ongoing disclosure. Parties may limit disclosure to W-2s, 1099s, and other income reports and may withhold tax returns unless a dispute arises. Appropriate disclosure for any

given agreement will depend on the formulation used in allocating the parties' costs.

- *Financial limits.* Parties may contract for a limit on their financial obligations. Such a limit will give the parent some control over the choice of school as well as reduce the parent's risk that circumstances, such as a reduction in income or a new family, will adversely affect his or her ability to pay. Such limits can be expressed as a cap tied to a particular school's tuition, such as the local university, a school a parent attended, or some other easily ascertainable benchmark, or the parent's obligation can be expressed in terms of funds available from a specified source, such as a custodial account or other savings. In the absence of contractual limits, a court may infer that the parties intended to obligate themselves for a reasonable amount, but a judge, not the parties, will decide what is reasonable.
- *School selection.* What right will the payor parent have to select or veto the child's choice of school? A parent may contract for the right to participate in the selection or reserve a veto right. In those states, such as Virginia, where a court has no authority to award college expenses, a parent's veto need not be reasonable. Failure to reserve the right to participate in the selection will mean that the party has no such right and may not use the child's school choice to avoid his or her obligation.

When one parent will be solely or primarily responsible for paying college expenses, that parent should reserve the right to approve the school or impose some financial limits on his or her obligation.

Failure to contract for any limits means the child may have a blank check.

- *Time limits.* Must education be completed by a certain date? Will the child be required to finish in

four years or be given additional time to complete his or her education? As with so many other issues, silence can be costly for the payor. In the absence of any provision, a court may determine a reasonable time limit, not necessarily four years.

The question of time limits relates to other negotiated decisions. It may be reasonable for a party who agrees to pay for four years of college with no financial limits and no financial aid requirements to compel the child to maintain a "C" average and complete school within four years. On the other hand, when the parent's obligation is limited to in-state tuition at a state university, a child may be given a longer period in which to complete his or her education to accommodate a lighter caseload and/or work-study at a more expensive school.

- *Funds from other sources.* How will funds from other sources be applied, such as savings, trust funds, family members' gifts, custodial accounts, tuition discounts, scholarships, loans, financial aid, and state tuition contracts? Will such funds be applied first to expenses for which the parties are not contractually obligated so that a child who obtains financial aid can attend a more expensive school? Will gifts from one parent's family be credited only to that parent's obligation or *pro rata*? How will custodial funds be treated?

In the absence of a contract specifying how such funds will be credited, some authorities will not allow a parent to use a custodial account to fund a contractual obligation, even when the parent funded the account for that purpose. However, the obligation to apply funds from other sources may be conditioned on a parent's obligation to pay the remaining expenses. The contract should clarify the parties' intent.

- *Savings for future college expenses.* Some parties may wish to set aside monies in anticipation of college expenses, such as in a custodial account or in a state tuition contract. When the agreement will include such an obligation, it also should specify whether the parties' obligations are limited to the funds available as a result of their savings.
- *Child's obligation.* Will the child be required to make any financial contribution to his or her own college expenses, such as by working and applying savings to help defray expenses? Will the child be required to apply for financial aid, including loans? An agreement requiring a parent to fully fund a four-year college education with no financial limits would appear not to require the child to be responsible for student loans. Thus, a party must say in the agreement that he or she wants the child to use available financial aid. Similarly, a parent who wants the child to take advantage of other means of reducing costs, such as qualifying for in-state tuition, must say so in the agreement.
- *Continuation of child support.* Will the payor parent continue to make periodic child support payments to the custodial parent in addition to or in lieu of college payments? Where the age of majority is 21 and a court order for child support will not automatically terminate when an 18 year-old goes to college, the agreement should specify whether a child support obligation may be paid in college costs or whether the parent will be required to pay for college and make periodic support payments. An agreement that provides for periodic support and payment of college expenses arguably requires both; yet many obligors may think only one form of payment is required. Ambiguity is likely to hurt the payor.
- *College expenses after death of obligor.* Will the college obligation survive the death of the obligor? In the

absence of express provisions in the contract, a college expense obligation will not necessarily survive the death of the obligor. The agreement, therefore, should address this issue. Parties may wish to agree on life insurance or other estate-planning vehicles to meet college obligations. In the absence of such obligations, assume that the college obligation will end with the obligor's death.

Support for stepchildren

At common law, a stepparent has no duty to support a stepchild during a marriage or after a divorce. Thus, absent exceptional circumstances, a court has no authority to order support for a stepchild once parties separate or divorce or terminate a non-marital relationship. However, courts have enforced contracts under which

a stepparent agreed to pay support after divorce. An agreement incorporating a stepparent's support of a child should address:

- Whether support will continue after the relationship ends;
- The amount of support to be provided or a formula or set of well-defined criteria by which the amount will be determined;
- The duration of the obligation and whether it will terminate at the age of majority or be extended to a later point;
- Modification of the obligation;
- Enforcement of the obligation;
- What will be included in the obligation and whether it will be limited to a basic support payment or whether additional obligations, such as direct payment of medical insurance, uninsured medical expenses, private school, and the like, will be included.

When the terms of the agreement require support during the marriage or relationship, it may not be neces-

sary to specify the extent of the payor's obligation. Ordinarily a statement expressing the obligor's intent to provide a home and basic necessities in accordance with the family's general standard of living should suffice. Courts do not ordinarily intervene in an intact family; the payor is entitled to exercise discretion in determining the children's lifestyle.

More care is required when the payor will commit to expenditures that are not normally considered a parent's duty of support during an intact relationship or after the termination of the relationship, such as payment for private school, summer camp, postmajority support, or college expenses. A nonparent who contractually commits to such extras is in the same position as a parent who does so.

Estate planning obligations

Absent a contract, a parent's obligation to support a minor child terminates upon the parent's death. An agreement may provide for life insurance, for creation of trusts, or for testamentary dispositions. Such agreements will be enforced. As with other provisions for children, the drafting of such provisions requires great care and caution.

Parties may agree to future modification of financial obligations. Agreements providing for modification will be enforced as contracts. Modification provisions may take the form of determining a process, such as the right to file a motion for modification or for binding arbitration. Alternatively, the agreement may provide a modification formula, such as a periodic review of parties' incomes with a reallocation of financial responsibility pro rata as incomes change.

Enforcement issues

Unless and until a child support contract is incorporated or otherwise made part of a court order, the obligation is enforceable only as a con-

tract. Thus, the parent receiving payments for the child may obtain a money judgment for breach of contract, specific performance, or other contract remedies. Once a contract is incorporated in a court order, some states will enforce it as a court order for child support, so the obligor may be held in contempt for violating the terms of the contract. Other states will enforce such an obligation only as a contract; contempt will not be a remedy.

Conclusion

Negotiating and drafting agreements relating to children is a complex procedure with many pitfalls. This is particularly true for provisions outside the boundaries of statutory support. The time during which the obligation is in force may vary. For children not yet born or very young, the financial obligation of support may be in effect for 20 or more years. If the agreement incorporates estate-planning, the timeline may be even longer. The longer the time, the more difficult it is to predict future events that may affect the needs of the child and the ability of the obligor to meet his or her obligations.

In most circumstances, it will not be in the best interests of the parties to contract regarding long-term financial obligations, such as payment of college expenses for children who are not yet born and whose needs are not yet known. When parties wish to contract for such matters, caution and careful drafting are called for. ■



Linda J. Ravdin is a principal in Ravdin & Wofford, P.C., in Washington, D.C. Contact her at 202-429-5551, email: ljravdin@ravdin-wofford.com.

A longer version of this article will be published in a treatise on negotiation and drafting of premarital, postmarital, and domestic partnership agreements by BNA in early 2002.