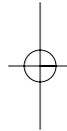
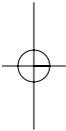


## CHAPTER 1

# Premarital Agreements

*Elizabeth and Joe, both thirty-eight, plan to marry. Elizabeth owns and is the president of her own company, which has profits of more than \$5 million per year. Joe, a consultant, has an income of \$110,000 per year. Elizabeth would like to have a premarital agreement to protect her interest in her company and her income. What are the criteria for a valid premarital agreement?*

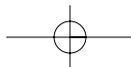
**A** premarital agreement—also referred to as an **antenuptial agreement**—is a contract entered into by two people before they marry. The agreement usually describes what each party's rights will be if they divorce or if one of them dies. Premarital agreements most commonly deal with issues of property and support—for example, describing the property and support, if any, to which each party will be entitled in the event of divorce or death.



### REASONS FOR PREMARITAL AGREEMENTS

People intending to marry use premarital agreements for several reasons, some of which may be interrelated. First and foremost, premarital agreements help to clarify the parties' expectations and rights for the future. Specifically, such agreements may prevent a couple from developing uncertainties and fears about how a divorce court might divide property and decide spousal support if the marriage fails.

In addition, a person who wants a future spouse to sign a premarital agreement often has something he or she wants to protect—usually money. One or both partners may want to avoid the risk of a major loss of assets, income, or a family business in the event of divorce.



People marrying for a second or third time also might wish to ensure that, in the event of their death, certain assets or personal belongings are passed on to the children or grandchildren of prior marriages rather than to a current spouse.

By signing a premarital agreement, the less-wealthy spouse generally is giving something up. Specifically, he or she is agreeing to have his or her property rights determined by the agreement rather than by the usual rules of law that a court would apply in the event of divorce or death. As will be discussed later (see chapter 10), courts have rules for dividing property when a couple divorces. In some states, such as California, courts automatically divide the property acquired by a husband and wife during their marriage equally. In most states, courts divide property in a way that the court deems fair, and the result is less predictable. The split is not necessarily fifty-fifty.

If a spouse dies, courts normally follow the instructions of his or her will. But state laws dictate that the surviving spouse usually is entitled to one-third or one-half of the estate, regardless of the will's instructions. If the husband and wife have signed a valid premarital agreement, however, that agreement will supersede the usual laws governing division of property and income upon death. In many cases, the less-wealthy spouse will receive less under the premarital agreement than he or she would have received under the usual laws governing divorce or wills.

If a less-wealthy spouse will receive less under a premarital agreement than under the general laws governing divorce and death, why would he or she choose to sign such an agreement? The answer to that question depends on the individual.

Some people prefer to control their fiscal relationships rather than leave them to state regulation. They may want to avoid uncertainty about what courts might decide if their marriages end in divorce. For some, the answer may be that "love conquers all"—in other words, the less-wealthy person may simply want to marry the other person, and may not care much about the financial details. For others, a premarital agreement may provide ample security, even if such an agreement might not

prove as generous as a judge when it comes to division of assets. Still others may not like the idea of a premarital agreement, but are willing to take their chances and hope their relationship and financial arrangements will work out for the best.

### CRITERIA FOR A VALID AGREEMENT

The laws governing the validity of premarital agreements vary from state to state. In general, however, such agreements must be in writing and signed by both parties.

Most states require that parties to a premarital agreement disclose their income and assets to one another. However, sometimes it is difficult to determine precisely a party's net worth. For example, if one spouse owns a business that is **closely held**—meaning that shares of the company's stock are not traded on a public stock market—it may be difficult to ascertain the value of the business. In such a circumstance, it usually is best to acknowledge the difficulty of precise valuation in the agreement, and then state the minimum net worth or the range of possible net worths for the party in question.

In order to be valid, a premarital agreement must not be the result of **fraud** or **duress**. An agreement is the result of fraud if, for example, one party—particularly the wealthier

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#### **TELL ALL!**

In most states, the parties to a premarital agreement—particularly the wealthier party—must disclose their income and assets to one another. This way, each person will know more about what he or she might be giving up. In some states, it may be possible to waive one's right to full disclosure of income and assets, but the person waiving that right should do so knowingly—and it is best if each party has at least a general idea of the other's net worth.

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one—deliberately misstates his or her financial condition. Thus, if a man hides assets from his future wife so that she will agree to a lower level of support in the event of divorce, a court would likely declare the resulting agreement invalid. Similarly, if one person exerts excessive emotional pressure on the other to sign an agreement, a court would likely declare that agreement invalid on the grounds of duress.

An agreement might be valid even if both parties were not represented by lawyers, but using lawyers is still a good idea in order to ensure that the agreement is drafted properly and that both parties are making informed decisions.

The lawyer for the wealthier party usually prepares the initial draft of the agreement. The less-wealthy party and his or her attorney, if any, should review the agreement carefully and ask questions about any matters that are uncertain. The likelihood of producing a valid, enforceable agreement increases if the less-wealthy party's interests are well represented and if some back-and-forth negotiations take place.

In order to demonstrate that the parties truly understand the terms to which they are agreeing, some attorneys also favor tak-



## AVOIDING DURESS

In order to avoid the appearance of duress and to give the parties ample time to consider their agreement, a premarital agreement should be reviewed and signed well before the wedding. Most states do not specify a "cutoff" time by which premarital agreements must be signed, but the longer the parties have to consider an agreement, the greater the likelihood that a court will deem it voluntary.

If the wealthier party presents an agreement to his or her prospective spouse for the first time too close to the wedding—say, the day before—a court may later find the agreement invalid on grounds of duress. A last-minute premarital agreement will not automatically be deemed invalid, but timing may nonetheless be a significant factor in the eyes of a court.

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### WHEN AN AGREEMENT IS ENFORCEABLE

Mary and John are in their late forties. They plan to marry in five months. Each has been married before. Before getting married, however, they wish to clarify their financial relationship. Mary has assets of about \$400,000; John has assets of about \$200,000. They both work and are capable of self-support. They each wish to protect the assets that they will bring into the marriage.

After disclosing their assets to each other and consulting with their individual attorneys, Mary and John sign an agreement that provides:

- Each spouse's future earnings will remain his or her separate property, as long as such earnings are kept in accounts bearing only the name of the person who earned them;
- The savings, investments, and retirement accounts that each spouse brings into the marriage, along with any growth in those assets, will remain his or her separate property after the marriage, as long as such assets are held only in that spouse's name;
- Each party waives any right to future alimony or inheritance, although either party is free to include the other in his or her will;
- The parties, if they wish, may make joint investments, such as in a house, condominium, or car, in which case title will be held jointly with a **right of survivorship**—which means that if one of them dies, the other will receive the property that was jointly held; and
- The parties will share common expenses, including housing, utilities, and food, in proportion to their incomes.

Since the agreement appears to be fair and not made under duress, a court would likely deem it valid and enforceable.

ing certain additional steps. For example, in addition to signing the agreement, the parties might place their initials on pages with key provisions, such as those pertaining to disclosures of assets, distribution of property, and support. The parties—particularly the less-wealthy party—might also be asked to prepare handwritten statements, in their own words, reflecting their understanding of and consent to the agreement. Alternatively, the signing of the agreement might be videotaped or audiotaped, with the parties providing oral statements of their understanding and consent to the agreement in addition to their written consent.

### AMOUNT OF SUPPORT

State laws do not specify an amount of support that must be provided by premarital agreements. Thus, after a divorce, if two parties are capable of self-support based on their assets, income, and job skills, a court could uphold an agreement that provided no property or support to the less-wealthy spouse.

However, if the less-wealthy spouse cannot be financially self-sufficient, and the agreement provides him or her with little or no property or support, courts in most states would likely step in and order some distribution of property or support in his or her favor. The amount of such a distribution will vary from state to state. In some states, the amount need only enable a subsistence level of living on the part of the less-wealthy spouse—enough to keep him or her off the welfare rolls—while other courts may apply broader notions of fairness and require a higher level of support.

A standard used by some courts is **unconscionability**. The term refers to agreements that are unusually harsh or unfair; an unconscionable agreement is one that no sensible person would offer and no sensible person—that is, no person not under duress or delusion—would accept. Because the standard is subjective, courts have interpreted the term “unconscionability” in different ways. But the bottom line is that if a court finds an agreement to be unconscionable, the agreement will not be enforced.

Under a law called the Uniform Premarital Agreement Act (UPAA), adopted by approximately half the states, unconscionability alone does not render an agreement unenforceable. Under the UPAA, the party seeking to have an agreement held unenforceable on the basis of unconscionability also must show three things: (1) that he or she was not “provided a fair and reasonable disclosure of the property or financial obligations of the other party”; (2) that he or she did not waive such disclosure in writing; and (3) that he or she “did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.”

Nonetheless, under the UPAA, a court may order support if the elimination or modification of support under a premarital agreement will result in “undue hardship in light of circumstances not reasonably foreseen” at the time the agreement was signed. For example, if a young working woman signed a premarital agreement that left her with no support in the event of divorce, and then suffered a disabling injury after fifteen years of marriage, a court probably would order support in the event of her divorce.

For a discussion of general standards for dividing property and alimony or maintenance in the absence of a valid premarital agreement, see chapters 10 and 11.

If the wealthier spouse is concerned that the value of his or her assets could decrease sharply at a later time, he or she may

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## ► ESCALATOR CLAUSES

To promote fairness and avoid unconscionability, many lawyers drafting premarital agreements favor inclusion of an **escalator clause** or a **phase-in provision** that will increase the amount of assets or support given to the less-wealthy spouse based on the length of the marriage or an increase in the wealthier party’s assets or income after the agreement is made.

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wish to include a provision that provides protection in such a circumstance. For example, if a premarital agreement provides for a fixed dollar amount to the less-wealthy spouse, the wealthier party might add a provision stating that in no event shall the amount of property given to the other spouse exceed, say, half of the wealthier party's assets. Alternatively, the amount of assets to be paid in the event of divorce or death could be calculated as a percentage of the wealthier party's assets at that time.

### NON-BINDING ISSUES

Although premarital agreements can be binding on issues of property division and alimony, they are not binding on issues of child custody or child support. Parties cannot make arrangements before they marry regarding the custody of a child in the event of divorce. Courts remain the ultimate guardians of children's best interests—and, as such, do not want to encourage husbands and wives to bargain away what is best for their children. Thus, while a court may consider what a couple declared to be best for their children in a premarital agreement, it will not be bound by that agreement in making its decision.

Premarital agreements regarding child support are not binding on courts for similar reasons. If such an agreement exists and meets a child's reasonable needs, a court may choose to follow it, but is not required to do so. (This is also the case with agreements regarding the division of household chores.) For a description of applicable standards regarding child custody and child support, see Chapters 12 and 13.

### RELATED DOCUMENTS

When future spouses sign a premarital agreement, they may also sign related documents to help carry out their wishes. For example, one partner to the marriage may sign an agreement creating a **trust**. A trust is a legal device by which the title to property is

held by one party for the benefit of another party. For example, money in a bank account, shares of stock in a company, or deeds to land may all be placed in a trust. A **trustee** will have the power to manage the property in the trust for benefit of the person for whom the trust was created—the **beneficiary**. You may wish to create a trust even if you are unmarried.

A trust created in connection with a premarital agreement might be used to manage and protect the assets of the wealthier party. A trust also might be used to establish a fund for the benefit of the less-wealthy party. For example, in a premarital agreement, the wealthier party may agree to place a certain amount of money each year into a trust for the benefit of the less-wealthy party. Deposits would continue to be made for the length of the marriage, perhaps up to a maximum number of years or a maxi-



### TALKING TO A LAWYER

*Q. I am sixty-two years old and getting married for the second time. I want to be able to leave most of my money to my adult children, my grandchildren, and a charity with which I have worked. I also want to provide financial security to my new spouse, although my spouse has money too. How do I handle this?*

A. A premarital agreement would be helpful. Without a premarital agreement, a surviving spouse can challenge your will and claim a portion of your estate—often as much as one-third to one-half of the estate, depending on the state in which you live. Another option is to set up a trust to provide funds for your children, grandchildren, charities, and surviving spouse. A lawyer can advise you of more specific options and the requirements for each of these approaches. In any case, you and your spouse should discuss the proposed premarital agreement or estate planning and try to devise an approach with which you are both comfortable.

Answer by Professor Jeff Atkinson,  
DePaul University College of Law, Chicago, Illinois

mum dollar amount. In the event of divorce or death, the less-wealthy party's entitlement to assets might be limited to whatever is in the trust.

Another agreement that might be signed at the same time as a premarital agreement is a **contract to make a will**, under which the parties agree in advance to the terms of their wills. For example, the parties may wish to agree that children from prior marriages—or from their own marriage—will receive specified amounts of their estates.

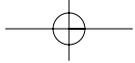
Contracts to make a will have the advantage of clarifying the parties' rights and responsibilities, but have the disadvantage of lessening the parties' flexibility. If circumstances change, a party who has signed a contract to make a will may not be able to change his or her will without the other party's consent. If, for instance, one party wishes to include a new person or charity in his or her will, he or she may no longer be able to do so, depending on how the contract was written.

## POSTMARITAL AGREEMENTS

**Postmarital agreements** or **postnuptial agreements** are agreements entered into after a marriage has taken place, but before the parties seek to end their marriage. As with premarital agreements, one or both of the parties usually is seeking to protect assets or income in the event of divorce or death. A married couple may seek to enter into a postmarital agreement after a significant financial change or a period of marital conflict.

The law regarding the validity and enforcement of postmarital agreements is not well developed. The standard for enforcement of such agreements most likely is similar to the standards discussed earlier for enforcement of premarital agreements. Key criteria for validity of the agreements include: full disclosure of assets and financial obligations, absence of duress, and fairness.

When two people are married, as opposed simply to contemplating marriage, they may be held to a very high standard of



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## ► CLARITY AND FAIRNESS

When entering into a postmarital agreement, it is a good idea for the parties to articulate in writing why they are entering into the agreement and to ensure that the agreement is fair for both parties.

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fairness with respect to financial issues—perhaps an even higher standard than if they were entering into a premarital agreement.

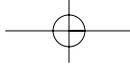
### THE WORLD AT YOUR FINGERTIPS

- Additional information about prenuptial agreements can be obtained in a question-and-answer format from the “Free Advice” website at <http://family-law.freeadvice.com>. Click on “Premarital Agreement” at the top of the page.
- A description of each state’s laws regarding premarital agreements is available at FindLaw: <http://public.findlaw.com/family/>. This site also features frequently asked questions about such agreements.
- The Equality in Marriage Institute provides general information on how people can protect themselves and their finances when they enter into marriage. Information on prenuptial agreements and other issues to consider before marriage is available at [www.equalityinmarriage.org/bm.html](http://www.equalityinmarriage.org/bm.html).

### REMEMBER THIS

Prenuptial agreements are generally legal. In order to ensure validity, it is important that the parties

- disclose their assets and income to each other, or explicitly waive full disclosure;
- clearly understand the agreement and what each person is giving up; and



- have sufficient time to consider the agreement and are not under duress when the agreement is signed.

Having lawyers represent each party is not absolutely essential, but representation of each party makes it more likely that each person's needs will be met and that the agreement will be valid.

