

CHAPTER 2

PREMARITAL, POSTNUPTIAL, AND COHABITATION AGREEMENTS

Contents

Abolish Marriage?
Assignment 2.1
Assignment 2.2
Contract Cohabitation: Some Introductory Questions
Assignment 2.3
Religious Divorces
Ethics in a Family Law Practice
Review Questions

Abolish Marriage?

Here's a question you may want to ask the class: Should society abolish marriage? Should all relationships be handled through premarital agreements and cohabitation contracts? Thus, there would be no need for divorce. All disputes would be resolved through breach-of-contract (breach of premarital agreement and breach of cohabitation contract) actions. Except for these court actions, get the government out of the business of marriage—total privatization. Does the class think this is a good idea? (For more on this theme, run this search in Google, Bing, or Yahoo: "abolish marriage.")

Assignment 2.1

- a. The question is whether Jim waived his right to disclosure of Mary's assets. She said she would arrange for him to learn about her financial condition via a meeting with her tax preparer, probably an accountant. Jim said no. He was insulted by the suggestion. Apparently, at that stage of their relationship, he did not want to mix love and money. Was it an intelligent or knowing waiver? Did he know what he was giving up? Probably, although her phrase "complete understanding" of her assets is somewhat vague. Does a complete understanding include market values of what she owned? Caution would suggest that Mary should have gotten a written statement from Jim acknowledging that she invited him to go to her tax preparer to obtain a "complete understanding of her assets" but that he declined the invitation.
- b. There should be good opportunities for class debate on this part of the assignment. What do the male students think? What would be the feminist position?

Assignment 2.2

Consider photocopying one of the agreements that the students draft. Give a copy to each student. Go over it line by line in class. Collectively edit it. In effect, do Assignment 2.2 in class for one of the agreements.

Contract Cohabitation: Some Introductory Questions

It is often said that you cannot legislate morality. Ask the class if this is true. If it is, does it make sense to prohibit cohabitation contracts, including the sexual dimension of such contracts? But does the government not “legislate” morality all the time? Are antidiscrimination laws not based on morality? What about the laws against stealing? Does the law follow morality or does morality dictate what the law should be? Can there be any doubt that legalizing all aspects of cohabitation contracts would be an assault on the traditional family? If so, what should the response of the law be?

Assignment 2.3

- a. A same-sex couple can enter nonsexual contracts (e.g., a contract to paint a house, a contract to buy a car). The contract between Tom and George makes no express mention of sex. Whether they had a sexual relationship is irrelevant, so long as such a relationship was not a condition of their mutual support agreement.

There might be a damages problem here. If the contract is enforced, how are damages calculated? How long does the support last—three years? What if George needs more than three years? What does support mean—all expenses including school expenses such as law school tuition? Does George receive the damages (once calculated) in a lump sum, or, must the figure be reduced to present value? (See the discussion of pension valuation in Chapter 6.)

- b. Diane should win. It’s irrelevant that Rich was married when he made the agreement with Diane. The agreement simply was to take care of Rich until he died. Diane did that. It is true that testators are always free to change their mind about whom they want to benefit with a gift in their will, but this was not a gift. It was the equivalent of a business transaction that must now be honored by Rich’s estate.

Religious Divorces

In Chapter 5, we will cover the impact of religious tradition on divorce law and procedure. For example, Jewish men sometimes will withhold the *get* as a bargaining chip in obtaining something they want, such as more property division or less alimony. You may want to tell the class about a counterstrategy used by some Jewish women to ask their grooms-to-be to sign premarital agreements in which they agree that in the event of a civil divorce, they will pay the wife \$150 a day after they separate for every day that they have not obtained a religious divorce. This, of course, requires the husband to give the wife a *get*. Mark Oppenheimer, *Where Divorce Can Be Denied, Orthodox Jews Look to Prenuptial Contracts*, N.Y. Times, March 17, 2012, at A16 (www.nytimes.com/2012/03/17/us/orthodox-jews-look-to-prenuptial-contracts-to-address-divorce-refusals.html?pagewanted=all).

Ethics in a Family Law Practice

Paul Smith, Esq., is representing both sides in the drafting of the agreement. This is a conflict of interest. In most states, however, the parties can waive the conflict of interest in the

absence of adverse interests between them, but only after the attorney explains the conflict and recommends that each obtain his or her own attorney.

Review Questions

1. What are the four main categories of agreements that persons in an intimate relationship can enter?

Answer:

1. cohabitation agreements
2. premarital agreements
3. postnuptial agreements
4. separation agreements

2. What is a premarital agreement?

Answer:

A contract by persons about to be married that can cover (1) financial and related matters once the marriage occurs and (2) spousal support, property division, and related matters in the event of death, separation, divorce, or annulment.

3. Why do couples enter premarital agreements?

Answer:

- To protect their separate businesses
- To protect their independent finances
- To protect children from a prior marriage

4. What does the Uniform Premarital Agreement Act say about what can be included in a premarital agreement?

Answer:

(a) Parties to a premarital agreement may contract with respect to:

- (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
- (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- (3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
- (4) the modification or elimination of spousal support;
- (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
- (6) the ownership rights in and disposition of the death benefit from a life-insurance policy;
- (7) the choice of law governing the construction of the agreement; and

- (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
- (b) The right of a child to support may not be adversely affected by a premarital agreement.
5. What is meant by public policy?
- Answer:**
The principles inherent in the customs, morals, and notions of justice that prevail in a state; the foundation of public laws; the principles that are naturally and inherently right and just.
6. Why did the law once forbid spousal-support clauses?
- Answer:**
Such clauses facilitated (encouraged) divorce because of the financial incentive that the divorce would provide.
7. When will a court refuse to enforce a spousal-support clause?
- Answer:**
When the spouse would be left destitute because of the absence of alimony. Also, if there was inadequate financial disclosure when the agreement was signed, the signing was under duress, or was tainted by fraud.
8. What is an elective share, and can it be waived?
- Answer:**
An elective share is the percentage of a deceased spouse's estate that the surviving spouse can choose (elect) to receive despite what the will of the deceased spouse provided for the surviving spouse. It can be waived in the premarital agreement.
9. What difficulty might exist when parties waive retirement benefits in a premarital agreement, and how can this difficulty be resolved?
- Answer:**
Premarital agreements can provide that each party waives any rights that either has in the retirement benefits of the other (e.g., a 401(k) plan). There is some doubt as to the legality of such clauses under federal law. A *married* person (a "spouse") may be able to waive such rights, but it is not clear that someone contemplating marriage (a fiancée or fiancé) can do so. In light of this uncertainty, the premarital agreement can have a clause requiring both parties within a short time *after* they are married to sign waiver forms approved by the administrator of the pension or retirement plan.
10. Can child support be waived?
- Answer:**
No.
11. Can the parties decide who will have custody of the children?
- Answer:**
Courts must make the final decision on child custody based on what is in the best interests of the child. The desires of both parents are taken into consideration, but what they want is never controlling. A clause in a premarital agreement on child custody is never binding on a court.

12. How are debts sometimes handled?

Answer:

The premarital agreement might include a clause that specifies what debts are being brought into the marriage and who is responsible for them. To protect the nondebtor, the clause could say that "any assistance on the other's debt does not constitute an agreement to assume joint responsibility for the debt."

13. What are lifestyle clauses, and do courts enforce them?

Answer:

They are clauses that cover normally sensitive aspects of the marital relationship, such as who will perform specific household chores. Although such clauses are not illegal, their practical effect is questionable, as it is unlikely that a court would become involved in enforcing terms of this nature.

14. Can the agreement commit the parties to remain childless?

Answer:

There is considerable doubt about the legality of remaining-childless clauses because one of the purposes of marriage is to have children. Furthermore, if the clause is violated and a child is born, the violation would have no effect on the obligation of both parents to support the child. Yet an attorney might want to include the clause, again to clarify expectations while candidly acknowledging to the client that a court is unlikely to enforce it.

15. What is a confidentiality clause?

Answer:

A clause that requires the parties to maintain confidentiality about what occurs in the marriage they are about to enter.

16. What is the effect of a sunset clause?

Answer:

The clause provides that some or all of the agreement will automatically terminate or expire as of a certain date.

17. What is the function of a severability clause?

Answer:

It states that if any single portion of the agreement is found to be invalid, the remaining valid provisions of the agreement should still be carried out.

18. What is a contract? When is a contract executory?

Answer:

A contract is a legally enforceable agreement. It is executory if it is not yet fully completed or performed.

19. What are the requirements for a valid contract?

Answer:

The traditional requirements or elements of most contracts are offer, acceptance, and consideration. The parties must have legal capacity to contract. The statute of frauds may require it to be in writing.

20. In what ways are commercial contracts and premarital agreements treated differently in the law?

Answer:

In most commercial contracts, the parties are allowed to treat each other at arm's length, as if they are strangers, both looking out solely for their own self-interests. This is not entirely true of couples engaged to be married. Both parties must make a full financial disclosure to each other before signing the premarital agreement and both must be given the opportunity to consult with their own attorneys or other advisers on whether to sign it. Most states do not say that an engaged couple is in a fiduciary relationship, requiring loyalty and fair treatment. Yet they cannot treat each other as strangers; overreaching (taking unfair advantage of another's naiveté or other vulnerability, especially by deceptive means) is frowned upon.

21. When is an agreement voluntary?

Answer:

It proceeds from a free and unconstrained will.

22. What is duress?

Answer:

The unlawful use of force or threats that overcomes the will so that a person does something he or she does not want to do. Illegal coercion.

23. What is fraud?

Answer:

An intentionally false statement of fact that is material and is made to induce reliance by the plaintiff and that results in harm because of the reliance.

24. What is the obligation to provide financial disclosure?

Answer:

Financial disclosure must be fair and reasonable. States differ on how much disclosure is fair and reasonable. Some insist on a full and frank disclosure. In other states, it is enough to provide a general picture of one's financial worth. Once the general picture is provided, the other party has a duty to make inquiries or to consult with experts in order to obtain more financial details.

25. What is the distinction between procedural fairness and substantive fairness?

Answer:

- Procedural fairness: Fair and reasonable financial disclosure, adequate opportunity to consult with others, voluntariness, and the absence of duress and fraud.
- Substantive fairness: Equitable in the sense that the terms are satisfactory and reasonable.

26. Do courts require substantive fairness in premarital agreements?

Answer:

In most states, procedural fairness is all that is required. An agreement will not be struck down simply because there is an inequality in what each party receives. A wife cannot undo the agreement because of "buyer's remorse" or a wish that a better deal had been agreed to. The same is true of males of modest means who later regret signing premarital agreements

with relatively wealthy women. In a few states, however, if the terms of the agreement are not fair (substantive fairness), the court will presume that the other party concealed assets and failed to make a complete financial disclosure (procedural fairness), requiring this party to overcome the presumption by proving that the disclosure was adequate. This gives the disadvantaged party a procedural advantage. He or she does not have to prove that the disclosure was inadequate; the other party has the burden of proving that it was adequate.

27. When is an agreement unconscionable?

Answer:

When its terms shock the conscience by heavily favoring one side due to the absence of meaningful choice and the highly unequal bargaining positions of the parties.

28. What is the second-glance doctrine?

Answer:

To help determine the validity of a document that a party wants to enforce, a court will examine changed circumstances since the time the document was entered (executed).

29. Is each party required to have independent counsel?

Answer:

Independent counsel for each party is not required, although each must be given the opportunity to consult such counsel.

30. What dilemma does an attorney face when representing the less well-to-do party who is being asked to sign (and is willing to sign) a premarital agreement that substantially favors the better-off party?

Answer:

Attorneys need to protect themselves from malpractice suits if their clients insist on signing agreements that are very disadvantageous to the clients. In such situations, some attorneys feel that they need to advise their clients in writing *not* to sign the agreement. Unfortunately, this weakens clients' ability to claim at a later date that they did not understand the agreements.

31. What are some of the major drafting guidelines that will help ensure the enforceability of the premarital agreement?

Answer:

- advise the client to schedule the signing well before the wedding
- urge the other side to obtain independent counsel
- have the other side sign an acknowledgement that independent counsel was recommended
- prepare a detailed financial statement to be disclosed
- etc.

32. What is a postnuptial agreement?

Answer:

A contract between married persons that covers financial and related matters. The spouses may have no intention of separating. If they have this intention, the contract is commonly called a separation agreement.

33. Why were postnuptial agreements once illegal?

Answer:

There was a time when a wife could not enter a valid contract with her husband. Under the common-law rule of unity of person, the legal identity of a wife was subsumed into the legal identity of the husband. The husband and wife was one person and that person was the husband. Hence for a wife to enter a contract with her husband was the equivalent of the husband contracting with himself.

34. What are some of the reasons couples enter postnuptial agreements?

Answer:

- to update or change the premarital agreement
- to revoke the premarital agreement entirely
- to ratify the premarital agreement after a child is born to help rebut a potential claim that the pregnant spouse-to-be acted under undue pressure or duress because of the pregnancy when she signed the premarital agreement
- to change (or take out) a life-insurance policy with a commitment to keep it funded and to designate one of them as the beneficiary
- to clarify what will be done with a large inheritance given to one of the spouses during the marriage
- to specify the terms of a reconciliation after the parties begin living together after a separation
- to set the terms of a financial transaction between the spouses such as a plan to form a business partnership together or a loan to one spouse from the personal (separate) funds of the other spouse
- to specify how the funds will be distributed from the sale of a business that one spouse began before the marriage and that both spouses ran during the marriage

35. When are postnuptial agreements valid?

Answer:

They must be entered voluntarily by both spouses without duress or undue influence. Full financial disclosure is essential. Some postnuptial agreements, however, are not enforceable even if they are entered voluntarily and with informed consent. For example, one spouse cannot enter a contract to support the other spouse. Spouses already have a duty of mutual support.

36. What is cohabitation?

Answer:

Living together in an intimate (usually sexual) relationship in the manner of a husband and wife; a de facto husband-and-wife relationship. Although a married couple cohabits, the word “cohabitation” is more often used in reference to unmarried couples.

37. What is a cohabitation agreement?

Answer:

A contract by persons in an intimate relationship who are not married to each other (and who intend to stay unmarried indefinitely) that covers financial and related matters while living together and upon the end of the relationship by death or separation.

38. What consideration for the cohabitation agreement would be invalid?

Answer:

The consideration cannot be meretricious (pertaining to prostitution or unlawful sexual relations). The sexual aspect of the relationship, if any, must be severable from the rest of the agreement.

39. What did the *Marvin* case hold?

Answer:

A financial support agreement between unmarried persons can be valid and enforced if sex is not an express or explicit condition of the relationship.

40. What is palimony?

Answer:

Support payments ordered after the end of a nonmarital relationship (a) if the party seeking support was induced to initiate or stay in the relationship by a promise of support or (b) if ordering support is otherwise equitable.

41. What remedies did the *Marvin* court say were possible?

Answer:

- express contract
- implied-in-fact contract
- implied-in-law contract (quasi contract)
- implied trust; constructive trust
- partnership
- joint venture

42. Why do most courts disfavor remedies other than an action for breach of an express contract?

Answer:

States are very reluctant to grant rights to unmarried couples in a way that would undermine the strong preference for *ceremonial marriage*. Many states will agree with the express-contract theory but not the implied-contract theories. The fear is that opening the door to allow implied-contract theories can present huge problems of proof, encourage litigation, and create substantial uncertainty that could have been avoided if the parties had entered an express contract, or, indeed, a marriage. It is too easy for a cohabitant to fabricate or exaggerate a claim after the cohabitation has ended, particularly after one of the cohabitants dies and the claim is made against his or her estate.

43. What is an implied-in-fact contract?

Answer:

A contract that is not created by an express agreement between the parties but is inferred as a matter of reason and justice from their conduct and the surrounding circumstances. A contract that is manifested by conduct and circumstances rather than by words of agreement. A contract that a reasonable person would infer exists, even though there is no express agreement.

44. What is an implied-in-law contract?

Answer:

An obligation created by the law to avoid unjust enrichment in the absence of an express or implied contract creating this obligation. Also called quasi contract.

45. What is quantum meruit?

Answer:

“As much as he deserves.” An award of the reasonable value of services provided despite the absence of an express or implied agreement to pay for the services.

46. What is a trust?

Answer:

A device or arrangement by which its creator (the *settlor* or *trustor*) transfers property (the *corpus*) to a person (the *trustee*) who holds legal title for the benefit of another (the *beneficiary* or *cestui que trust*).

47. When does something happen by operation of law?

Answer:

The means by which legal consequences are imposed by law, regardless of (or even despite) the intent of the parties involved.

48. What is an equitable remedy?

Answer:

A form of relief (e.g., injunction, specific performance, or constructive trust) that may be available when remedies at law (e.g., damages) are not adequate.

49. What is the distinction between a constructive trust and a resulting trust?

Answer:

Constructive trust: A trust created by operation of law to prevent unjust enrichment by someone who has improperly obtained property through fraud, duress, abuse of confidence, or other wrongful conduct.

Resulting trust: A trust created by operation of law to prevent unjust enrichment when a person transfers property under circumstances that raise the inference that he or she did not intend to transfer a beneficial interest to the person taking or holding the property. In a resulting trust, the transferee did not obtain the property wrongfully.

50. When could a partnership be a remedy for a cohabitant?

Answer:

A partnership is a voluntary association of two or more persons to place their resources in a jointly owned business or enterprise, with a proportional sharing of profits and losses. A court might find that an unmarried couple entered the equivalent of a partnership and thereby acquired rights and obligations in the property involved in the partnership.

51. What is a joint venture?

Answer:

A business or profit-seeking activity of two or more persons who each participate and control the activity (or who have the right of participation and control).