

chapter **two**

PREMARITAL AGREEMENTS



Richard, 72, a retired engineer with five adult children, has been married and divorced three times. He believes he has finally met the ONE true love for him, Elaine, 32, a widow and mother of three children. He wants very much to marry her but not without a premarital agreement, given his past experiences with divorce. Elaine has said, "Whatever you want is fine with me."

IN THIS CHAPTER YOU WILL LEARN

- What a premarital agreement is and the primary purpose it serves
- How the treatment of premarital agreements has evolved in society and the law
- How premarital agreements differ from other kinds of agreements made by married and unmarried partners
- In what circumstances premarital agreements may be appropriate
- The legal requirements for a valid premarital agreement
- What a basic premarital agreement covers
- The current trends regarding enforceability of premarital agreements
- The paralegal's potential role with respect to premarital agreements

WHAT IS A PREMARITAL AGREEMENT AND WHAT IS ITS PURPOSE?

Premarital agreement

an agreement made by two persons about to be married defining for themselves their respective rights, duties, and responsibilities in the event their marriage terminates by death, annulment, separation, or divorce

A **premarital agreement** (sometimes called a premarital contract, prenuptial agreement, or antenuptial agreement) is an agreement made by two persons about to be married. The agreement is an effort by the parties to define for themselves rights, duties, and responsibilities that flow from the marital relationship and that otherwise would be regulated and determined by state law upon death, annulment, separation, or divorce. What usually happens in a premarital agreement is that one or both of the parties agree to give up spousal support, an equal or equitable division of property, or other rights they might be entitled to under state law. Despite past fears that premarital agreements encourage divorce, they may actually promote marriage. People may choose to marry who might not do so without the personalized “safety net” or “insurance policy” the premarital agreement provides in the event the marriage does not last.

PREMARITAL AGREEMENTS IN PERSPECTIVE

Public policy

an idea or principle that is considered right and fair and in the best interest of the general public

In an effort to maintain social order and protect the general public interest, state and federal legislatures regulate various dimensions of our lives. For example, we have laws and regulations about education and employment, about finances and business transactions, about children and families, about marriage and death. Statutes and judicial rulings are designed to balance individual freedom and protection of the larger society and are based on **public policies**. Public policies are ideas or principles that are considered right and fair and in the best interest of the general public. They reflect current morals and established customs. For example, mandatory education laws requiring children to attend school until a certain age are based on the broad public policy that children are vulnerable and need to be protected and provided the foundation they need to become healthy, productive adults. In response, the state establishes and manages a public education system to ensure that children receive the education required by law. In addition, however, we have private and “charter” schools, parochial schools, and “home schooling” of children as educational alternatives for parents who want to create their own vehicles for complying with the law, vehicles tailored to their unique goals and needs. The state still monitors these alternatives to an extent but at the same time recognizes the right of parents to raise their children as they see fit as long as they do not break the law or violate an overriding public policy. Public policies that impact various other family law issues are referenced throughout this text.

One of the primary public policies that legislatures and courts in the United States historically have supported is one favoring the marital relationship as the fundamental structural unit of society. In support of that policy they have legislated and decreed regulations designed to protect the institution of marriage and the members of the family in the event of death or divorce. These regulations have been influenced by prevailing societal views about sexual morality, the vulnerability of children, and gender-related issues including the respective roles and relative power of men and women in society. In this context, the states were initially unwilling to permit couples to design their own agreements determining what would happen to their property upon divorce.

Although courts had, for many years, enforced premarital agreements that addressed property distribution upon death,¹ agreements made in contemplation of marriage that anticipated the possibility of divorce were viewed as **per se invalid** until the 1970s. The basic concern was that the party who would benefit most from the agreement (usually the male partner) would be motivated to terminate the marriage and the female partner would be left destitute. This perception has gradually changed

Per se invalid

invalid in and of itself, standing alone, without reference to any additional facts or circumstances

over the past four decades along with views about men and women, fault-based divorce, and the institution of marriage generally. We now live in a society in which the rate of divorce has risen and few presume that marriage is a permanent union. As a result, we have an increasing number of individuals, both male and female, taking steps to develop their own approaches to distribution of property upon divorce or death. A premarital agreement is one vehicle for accomplishing this end.

The opinion in the landmark *Posner* case (see Case 2.1) describes the shift in public policy from one that presumes the permanence of marriage to one that acknowledges and enforces, under certain conditions, agreements regulating rights upon the dissolution of marriage. In *Posner*, the wife appealed the portion of the divorce decree that awarded the divorce to her husband and alimony to her in the amount of \$600 a month pursuant to the terms of a premarital agreement between the parties. The wife's position was that, consistent with prior case law, the agreement should not be enforced. The court held that such agreements should no longer be considered **void** as contrary to public policy when the divorce is pursued in good faith on proper grounds.

Void
invalid and of no legal effect

CASE 2.1 *Posner v. Posner*, 233 So.2d 381 (Fla. 1970)

FROM THE OPINION

At the outset, we must recognize that there is a vast difference between a contract made in the market place and one relating to the institution of marriage.

It has long been the rule in a majority of the courts of this country and in this state that contracts intended to facilitate or promote the procurement of a divorce will be declared illegal as contrary to public policy. . . .

The state's interest in the preservation of the marriage is the basis of the rule that . . . an antenuptial agreement by which a prospective wife waives or limits her right to alimony or to the property of her husband in the event of a divorce or separation, regardless of who is at fault, has been in some states held to be invalid. . . .

There can be no doubt that the institution of marriage is the foundation of the familial and social structure of our nation and, as such, continues to be of vital interest to the State; but we cannot blind ourselves to the fact that the concept of the "sanctity" of a marriage—as being practically indissoluble, once entered into—held by our ancestors only a few generations ago, has been greatly eroded in the last several decades. . . .

With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss also—and agree upon, if possible—the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail. . . .

We know of no community or society in which the public policy that condemned a husband and wife to a lifetime of misery as an alternative to the opprobrium of divorce still exists. And a tendency to recognize this change in public policy and to give effect to the antenuptial agreements of the parties relating to divorce is clearly discernible. . . .

SIDEBAR

The full opinion in this case is available on the companion website. What are the major reasons for not recognizing premarital agreements? What are the major reasons for enforcing them? If you were presently contemplating getting married, would you want to have such an agreement? Why?

HOW IS A PREMARITAL AGREEMENT DIFFERENT FROM OTHER KINDS OF AGREEMENTS MADE BY MARRIED AND UNMARRIED PARTNERS?

A premarital agreement is one of several kinds of agreements made by adults entering into, presently in, or exiting from a relationship with another adult. Others include, for example, cohabitation agreements, postmarital agreements, and separation agreements.

Cohabitation agreement

an agreement between two unmarried individuals who live or intend to live together, defining their intentions, rights, and obligations with respect to one another while living together and upon termination of their relationship

Postmarital agreement

an agreement made by two people already married to each other who want both to continue their marriage and also to define their respective rights upon separation, divorce, or death of one of the spouses

Separation agreement

an agreement made between spouses in anticipation of divorce or a legal separation concerning the terms of the divorce or separation and any continuing obligations of the parties to each other

- A **cohabitation agreement** is an agreement between two unmarried individuals who live or intend to live together, defining their intentions, rights, and obligations with respect to one another while living together and upon termination of their relationship.
- A **postmarital or postnuptial agreement**² is an agreement made by two people already married to each other who want both to continue their marriage and also to define their respective rights upon separation, divorce, or death of one of the spouses. Some states, such as Ohio, prohibit postmarital agreements by statute.
- A **separation agreement** is an agreement made between spouses in anticipation of divorce or a legal separation concerning the terms of the divorce or separation and any continuing obligations of the parties to one another. Customarily the parties ask that the court approve the agreement and make it part of the court's judgment.

WHAT KINDS OF INDIVIDUALS AND COUPLES MIGHT WANT TO EXECUTE A PREMARITAL AGREEMENT?

Once thought of as appropriate only for the rich and famous, premarital agreements are becoming increasingly more common. This is not all that surprising when one considers that about half of first marriages end in divorce. Although premarital agreement statistics are scarce, according to one source, some twenty percent of remarried couples use premarital agreements, and they have quintupled in overall frequency over the past twenty years.³ The New York-based nonprofit organization the Equality in Marriage Institute reported that over the two-year period between 2003 and 2005, calls about premarital agreements tripled in number.⁴

With shifts in demographics and expanding life spans, the growing senior population has become an audience for whom premarital agreements provide an especially useful vehicle for addressing the challenges and fears this segment of the population faces with respect to marriage and remarriage late in life. "Various deterrents to marriage are of particular concern to seniors, including problems of wealth preservation from the significant other, avoidance of the other's financial obligations related to health care and other debts, protection of pension benefits from previous marriages, protection against intestate succession, and interactions with adult children,"⁵ who may not be as enthusiastic about the impending marriage as are the parties! To protect the children's interests, a premarital agreement can work in tandem with a will to achieve desired ends.

Premarital agreements are also particularly appropriate for parties in circumstances such as the following:

- There is a significant age difference between the parties.
- One or both of the parties have substantial property of their own including real estate, investments, businesses, and retirement accounts.

- A party has an interest in a family business that he or she wants to “keep in the family.”
- A party is responsible for taking care of third parties such as elderly parents or siblings with disabilities.
- One of the parties is pursuing a degree or license in a potentially lucrative field such as medicine, and the other party will be supporting the couple through an extended education program.
- The parties have been out of high school for several years, remained single, and had an opportunity to accumulate significant property.
- One of the parties is giving up a successful career in order to be a “stay-at-home” parent.
- One or both of the parties have children or grandchildren from a previous marriage.
- One of the parties is involved in a speculative business venture that may result in a significant increase or loss in wealth.
- One or both of the parties want to ensure a new spouse’s inheritance, especially if that spouse will lose his or her right to a social security benefit or alimony from a prior spouse upon marriage.
- One or both of the parties suffered through a prior divorce that was emotionally and financially devastating, and they do not want to repeat the experience.

The more common premarital contracts become, the less sensitive a topic they are for couples approaching marriage. The usual approach to creating an agreement is that the parties first discuss the possibility of executing an agreement and their reasons for doing so. Then one of the parties (customarily the one with the greater incentive and the most to gain) selects an attorney to draft an agreement. The other party ideally retains a second attorney to review the agreement, recommend revisions, and advise him or her before signing. Occasionally the parties will utilize traditional *mediation* to resolve their differences concerning the proposed terms of their agreement. A neutral third party, the mediator, helps the parties clarify their differences, consider options for addressing them, and structure an agreement acceptable to both parties.

An additional alternative approach to reaching consensus involves use of the less adversarial *collaborative law* process. It affords an effective method for developing premarital agreements tailored to the unique circumstances of the two people about to be married. When the collaborative law process is used, “the written agreement is prepared last and only after the partners have discussed the issues and concerns important to them and their shared life, and have reached shared agreements about those concerns. The collaborative agreement becomes a mutually developed blueprint for the marriage.”⁶ Although the parties still have to address challenging questions and require the assistance of specially trained counsel during the process, the “difference is that the collaborative process provides a safe and supportive setting. . . and. . . enhances the couple’s togetherness rather than emphasizing their separateness.”⁷

Mediation

approach to resolving differences in which a neutral third person helps the parties identify their differences, consider their options, and structure an agreement acceptable to both parties

Collaborative law

an approach to reaching agreements and resolving differences that stresses cooperation, joint problem solving, and the avoidance of litigation

WHAT ARE THE LEGAL REQUIREMENTS FOR A VALID PREMARITAL AGREEMENT?

A premarital agreement is both a contract and an agreement between two parties who bear a special relationship to each other. Unlike contracts negotiated in the business world involving strangers who deal at arm’s length, a premarital agreement is a contract between two individuals presumably engaged in a relationship of mutual trust and confidence. Given the couple’s special relationship, courts

Fiduciary

a person who owes another a duty of good faith, trust, loyalty, and candor

Procedural fairness

fairness in the negotiation and execution of an agreement

Substantive fairness

fairness in the specific terms of an agreement

Consideration

a bargained-for exchange or mutual promise underlying the formation of a contract

often impose additional requirements and a higher standard of care on the parties, whom the courts view as having a *fiduciary* duty to one another, a special duty of fairness in dealing.

Although states vary with respect to specific requirements for validity, generally a premarital agreement must satisfy the following three requirements:

1. the basic requirements applicable to all contracts
2. the requirement of *procedural fairness*, meaning fairness in the negotiation and execution of the agreement
3. the requirement of *substantive fairness*, which means fairness in the actual terms of the agreement

The Basic Requirements Applicable to All Contracts

1. There must be an offer and acceptance (generally evidenced by the parties' signatures on the agreement).
2. The parties must have the capacity to contract in terms of age and mental competence (although a failure to understand the legal effect of the terms of the agreement will not necessarily render it invalid).
3. The subject matter of the contract must not be illegal (i.e., the parties cannot agree to commit an illegal act).
4. The contract must be supported by *consideration*, a bargained-for exchange of something of value (usually the mutual promise to marry in the case of premarital agreements, although courts may look for additional consideration when one party appears to gain everything and give up nothing).

The Requirement of Procedural Fairness

The focus of procedural fairness is on fairness during the negotiation and execution of the agreement. In assessing procedural fairness, the courts usually will look at the surrounding circumstances to answer such questions as the following:

- Was each party represented by independent counsel?
- Was there adequate disclosure by each of the parties of the nature and value of their assets and liabilities?
- Was there sufficient time to discuss, negotiate, and reflect on the agreement prior to execution?
- Was there any fraud, duress, or undue influence in the negotiation or execution of the agreement?

Was each party represented by independent counsel? Even though the parties are generally not antagonistic as they look forward to their forthcoming marriage, they do have “adverse” interests. Each of them is being asked to waive or vary certain rights to which they would otherwise be entitled upon divorce, separation, or death. For example, a husband residing in a community property state such as California, Arizona, Texas, or Idaho has a right to 50% of his spouse’s earnings from the date of marriage. If a man is going to enter a premarital agreement in one of those states, he needs to understand how his rights and responsibilities under state law may be altered by that agreement. He should have a reasonable opportunity to consult with independent counsel of his own choosing. This is an especially important consideration when the parties are of unequal bargaining power, such as when one party is much more highly educated and financially sophisticated than the other. (See Paralegal Application 2.1.)

PARALEGAL APPLICATION 2.1

REPRESENTATION BY INDEPENDENT COUNSEL

It is difficult, if not impossible, for one attorney to represent the interests of both parties to a premarital agreement. The conflict of interest inherent in such a multiple representation leaves the attorney open to allegations of ethical misconduct. In an effort to protect against such a result, the following steps may be taken:

1. If one party declines to seek counsel, it is wise for the attorney representing the other party to confirm in writing to both parties which of them he or she represents and to strongly advise and explain why it is important that the other party seek independent counsel. This should be done in the best interests of the client *and* the attorney. The paralegal may be asked to draft such a letter.
2. Many agreements now contain statements to be signed by counsel and/or by the parties under oath confirming that each has been instructed to seek legal counsel to advise them of their respective statutory rights in the property of the other and the effect that execution of the agreement will have on those rights. The paralegal should keep this option in mind when assisting in the drafting of an agreement, particularly one involving an unrepresented party.
3. In some states, the prohibitions against multiple representation require that the non-represented individual provide a written statement acknowledging the fact that the sole attorney is not protecting his or her interests. This requirement affords additional protection against a later malpractice claim for the attorney representing the other party.

Was there adequate disclosure by each of the parties of the nature and value of their assets and liabilities? Virtually all states require some degree of financial disclosure but vary with respect to how much is necessary. Some states require full disclosure, while others provide that a general picture of one's financial worth is enough. Many states allow a party to waive his or her right to seek or receive disclosure. Ideally financial disclosure should accurately and adequately reveal a party's assets, liabilities, and net worth to protect against later claims of fraud or misrepresentation. The preferred form of disclosure is a separate schedule of income, assets, and liabilities for each of the parties that is referenced in the body of the agreement and appended as an exhibit. Completed financial affidavits, tax returns, and other documents such as deeds and appraisals may also be attached. The paralegal is often involved in the collection, review, and/or preparation of these materials.

In assessing adequacy of disclosure, a court is likely to ask: Given the surrounding circumstances, did each party have, or should they have had, sufficient knowledge of the other's worth such that each of them could make an informed decision with respect to the terms of the agreement? Generally, there is no "*meeting of the minds*" with respect to the contract if one party was provided inadequate information regarding the other's assets and the value of the rights waived.

Was there sufficient time to discuss, negotiate, and reflect on the agreement prior to execution? Although the time period between execution of the agreement and the marriage ceremony is not necessarily determinative, it is a factor the courts will consider in evaluating the validity of an agreement. The best advice is to allow reasonable time for negotiation and review. Some states automatically invalidate any premarital agreement that is signed on the day of the wedding. In general, the longer the time period (within limits) between when a party was presented with the

Meeting of the minds

a shared understanding with respect to the terms and conditions of a contract

agreement and when it was executed, the greater the likelihood the execution will be deemed voluntary, but the states go both ways. In a 1991 case in Alabama, a court held that a premarital agreement was valid despite the husband's threat to call off the wedding if the wife did not sign the agreement.⁸ An Ohio court took the opposite position in a 1994 case and held "...the presentation of an agreement a very short time before the wedding ceremony will create a presumption of overreaching or coercion... the postponement of the wedding would cause significant hardship, embarrassment or emotional stress."⁹

Generally, timing will be considered in the context of the nature, scope, and complexity of the agreement. A simple agreement the parties discussed for months addressing one bank account of modest value may well be considered valid even if presented for review and signature on the wedding eve. On the other hand, a complex agreement covering millions of dollars of diverse assets between a party with significant bargaining power and an individual with little power, few assets, and much to lose warrants ample time for review and deliberation with the assistance of competent, independent counsel. Although many courts will consider whether each of the parties had the background, experience, and time necessary to evaluate options and the consequences of choices to be made, there is not always a requirement that a party actually understand the legal effect of the terms of the agreement.¹⁰ **Ignorantia legis non excusat!** (See Case 2.2 later in this chapter.)

Ignorantia legis non excusat
Ignorance of the law is not an
excuse

Was there any fraud, duress, or undue influence in the negotiation or execution of the agreement? Because the parties to a premarital agreement are involved in a special, confidential relationship with each other, they tend to be more vulnerable making agreements than strangers would be negotiating in the business world. They may be eager to please each other. One partner may dominate and perhaps even abuse the other emotionally or physically. One of the parties may have limited English skills and/or may rely on the other, blindly trusting that individual's superior knowledge and skill. Ideally, the parties should be equals in the process.

One of the ways in which some attorneys try to protect against a later claim that an agreement was executed under undue influence or duress is to have the parties and their respective attorneys all present at the execution and to videotape the event. A paralegal may be asked to schedule this taping and should be certain the necessary equipment is available and in good working order. A series of questions such as the following can be asked of the parties on this occasion:

1. Have you had an opportunity to review the agreement?
2. Have you had an opportunity to consult with counsel of your own choosing regarding the agreement?
3. Do you understand its terms?
4. Are you satisfied with those terms?
5. Have you disclosed all of your assets and liabilities and is a summary of them attached to the agreement?
6. What other documents are attached to the agreement?
7. Have you had an opportunity to review and ask questions about the attached documents?
8. Has anyone made any promises to you other than what is contained in the agreement?
9. Do you understand that this is the whole agreement and that no promises made outside of the agreement will be enforced?
10. Are you presently under the influence of any drug or condition that might impair your ability to understand what you are signing?
11. Do you have any questions?
12. Are you prepared to sign the agreement at this time?

PARALEGAL APPLICATION 2.2

ELDERLY CLIENTS

Agreements involving elderly clients or other clients whose competency may be questioned require special consideration. Many attorneys require elderly clients to obtain an **Affidavit of Competency** from a physician prior to execution of legal documents such as wills, powers of attorney, or premarital agreements to help protect against later claims that the documents were executed under undue influence. Paralegals may be asked to work with clients to facilitate this task.

Affidavit of Competency

an affidavit from a physician that an individual is competent to perform a particular act

The Requirement of Substantive Fairness

Substantive fairness refers to fairness in the actual terms of the agreement. A few states require the agreement to be fair to both parties. Some take the position that people are free to make “bad bargains,” but most courts will not enforce an agreement if its terms are so unfair to one of the parties that they “shock the conscience of the court.” Generally, the scope of the inquiry with respect to substantive fairness is whether the terms of the agreement are fair and not **unconscionable**. Under normal contract review, (U.C.C. §2–302), unconscionability is determined at the time of execution. States vary with respect to whether the determination of fairness is made only as of the date of execution or also at the time of performance.

Unconscionable

so substantially unfair in terms or result as to shock the conscience

Substantive Fairness at the Time of Execution. Fairness at the time of execution involves a review of the agreement as written, and the court will consider such matters as the following:

Is the division of property *per se* unfair or unconscionable at the time of execution? Given that the purpose of a premarital agreement is to allow the parties to alter the usual division of property at divorce and/or death, it is likely that the agreement will result in an unequal division of property. The court will consider fairness under the parties’ circumstances. An agreement that calls for one party to receive everything while the other receives nothing and will end up a public charge on welfare is likely to be scrutinized closely and not enforced.

Is an agreement to waive alimony or spousal support fair at the time of execution? An agreement that limits or waives spousal support is likely to be deemed valid if it is entered into freely, with knowledge of the rights waived, after adequate disclosure by both parties, and without undue influence. This is especially likely to be the case if the **waiver** is made by a party with ample assets at the time the agreement is signed. A waiver providing for the allowance of alimony under certain extreme and unforeseen circumstances (serious illness, etc.) or a waiver that is effective only if the marriage lasts less than a certain number of years is likely to be enforceable. Increasingly, agreements provide that the amount of alimony to be received, if any, will be based on the length of the marriage.

Waiver

the giving up of a right or privilege

Substantive Fairness at the Time of Performance. A consideration of fairness at the time of performance (upon divorce or death) allows a court to consider whether terms that were fair at the time of execution are still fair at the time of enforcement. Generally the focus is on whether, due to unforeseen circumstances, an agreement that was once fair and reasonable has become so unfair that its enforcement would be

unconscionable. There is no precise definition of “unconscionable” that binds all courts. Rather the assessment is made on a case-by-case basis. A New Hampshire court has described unconscionability in terms of “circumstances so changed since execution that enforcement would shock the conscience of the court,” and “changed circumstances so far beyond the contemplation of the parties at the time of execution that enforcement would work an unconscionable hardship.”¹¹

PREPARATION FOR DRAFTING A PREMARITAL AGREEMENT

Paralegal Application 2.3 identifies several of the tasks that should be performed prior to the actual drafting of a premarital agreement.

Paralegal Practice Tip

Parties in both common law and community property jurisdictions may execute valid premarital agreements.

Paralegal Practice Tip

Clients often ask paralegals questions concerning the law as it applies to their cases. Even if the paralegal knows the answer, he or she must resist the temptation to engage in the unauthorized practice of law by responding with legal advice or analysis. The safest response is to indicate that he or she will bring the question to the attention of the attorney and get back to the client with a response. Many firms prepare in-house publications covering “most frequently asked questions” on a variety of topics or obtain them from professional organizations, such as the American Bar Association. The availability of such publications allows the paralegal to avoid an ethical problem and yet meet the client’s need by giving him or her the handout and saying, “Perhaps this material will be helpful in answering your question.”

PARALEGAL APPLICATION 2.3

IN ANTICIPATION OF AN AGREEMENT—TASKS FOR THE ATTORNEY AND THE PARALEGAL

- The attorney should advise the client of the basic law governing rights and responsibilities upon separation, divorce, annulment, or death.
- The attorney should advise the client of the law regarding premarital agreements and their enforceability.
- The attorney should discuss the importance of independent representation for the prospective spouses.
- The attorney should learn what the client’s motivations and goals are so that a decision can be made as to whether or not a premarital agreement is the most appropriate means for accomplishing the client’s objectives. This may involve an assessment of any federal income tax, gift tax, and estate tax consequences of various options.
- Necessary background information and copies of documents need to be gathered including the following, a task often accomplished by or at least with the assistance of the paralegal:
 - the names, addresses, ages, and social security numbers of the parties
 - the date of the intended marriage and the flexibility with respect to that date
 - information regarding prior marriages and children/grandchildren of both parties
 - information regarding all forms of income and assets of the parties. A threshold value may be set for assets that should be identified, e.g., any property valued at over \$5,000 or \$25,000 based on the size of the parties’ estates. A paralegal or the attorney will often work with the client to be certain that all kinds of assets of value are included (collections, stock portfolios, antiques, etc.).
 - copies of potentially relevant documents, including, for example, trusts, deeds, retirement plans, insurance policies, and appraisals of real estate, artwork, jewelry, and the like
 - information regarding debts/liabilities of each of the parties
 - information about any unique and/or foreseeable circumstances (such as one party already having been diagnosed with a debilitating or terminal disease or special needs of any children of a party, such as severe physical or mental impairments)
- The paralegal should confirm current requirements for premarital agreements in the state of execution, such as whether the agreement must be witnessed, notarized, and recorded.

WHAT KINDS OF PROVISIONS DOES A PREMARITAL AGREEMENT CONTAIN?

Each premarital agreement is unique because it reflects the intentions of two specific people, each with their own goals and needs. However, there are some provisions that are present in virtually all premarital agreements:

1. A preamble (introductory segment) that identifies the parties and describes their intentions
2. Schedules of each party's assets and liabilities, which may include anticipated gifts and inheritances that are reasonably certain and of known value
3. A definition of "separate property" and a description of how each party's "separate property" and its appreciation and proceeds, if sold, will be treated in the event of death or divorce
4. A definition of marital or "joint property" and a description of how marital property of various kinds (real estate, jewelry, other personal property) will be treated and what role, if any, contribution will play
5. A statement of the rights each party will have to alimony or spousal support if the marriage ends in a legal separation or divorce, or a waiver of those rights
6. A provision relating to death benefits or waivers thereof

The Uniform Premarital Agreement Act (UPAA) provides that the parties may also contract with respect to personal rights and obligations during their marriage, provided the terms do not violate public policy or existing statutes. The parties are generally free to contract, and may want to include provisions relating to several aspects of their life together. One or more of these terms may taint the entire agreement and render it void and unenforceable. An attorney may want to confirm with the client in writing that there is no guarantee that a particular provision will be enforced by the courts. Paralegal Application 2.4 identifies some potentially problematic terms.

PARALEGAL APPLICATION 2.4

POTENTIAL RED FLAGS

- The parties cannot agree to engage in criminal activity.
- The parties may include provisions relating to child custody and support but they cannot bargain away the rights of third persons (their children). Such provisions will be subject to approval by the court that retains jurisdiction over child-related issues. An agreement that children from a party's prior marriage may not live with the parties may be held unenforceable as a violation of public policy and not in the best interests of the children.
- Terms that tread on constitutional rights may not be enforceable, such as:
 - An agreement to raise children in a particular religion may be viewed as violating a party's (or a child's) right to freedom of religion,¹² although a court may enforce a provision that a party be required to participate cooperatively in obtaining a religious separation or annulment.¹³ In some countries where the civil law is based on the teachings of Islam, agreements contain both religious and secular provisions. If a party seeks enforcement of the agree-

continued

ment at the time of a divorce action in the United States, the court may make an effort to separate out provisions that are secular and enforceable and those that are religious in nature and not enforceable.

- An agreement to work or render certain services may be deemed a form of involuntary servitude if enforced by the court.
- Terms that invade a “right to privacy” are unlikely to be enforced, such as:
 - A promise to perform certain sexual acts or to engage in sexual relations according to a particular schedule.¹⁴
 - A promise to use contraception or to not have an abortion.
 - A promise to not have children.¹⁵
- Courts may not enforce a promise to prosecute or not prosecute a divorce action.
- Certain “spousal” waivers of retirement benefits may not be valid and enforceable if made prior to marriage under the requirements of the Employee Retirement Income Security Act (ERISA) and the Retirement Equity Act (REA) (See 29 U.S.C. Section 1055.)¹⁶

EXHIBIT 2.1 Sample Premarital Agreement

PREMARITAL AGREEMENT

PREAMBLE

THIS AGREEMENT, is made this _____ day of _____, 2008, by and between _____ Name of prospective spouse A _____ of _____ address, _____ (“first name”) _____ and _____ Name of prospective spouse B _____ of _____ address _____ (“first name”), _____ collectively referred to as “the parties.”

Drafting Tip

The preamble establishes the identity of the parties. Some practitioners include social security numbers, a step that can be helpful if a party later needs to be located. Others do not include them in an effort to prevent identity theft as premarital agreements eventually may become public documents if recorded in Registries of Deeds or as part of the pleadings in a divorce action or estate administration.

RECITALS

WHEREAS,

- A. The parties plan to be married in _____ city, state _____ on or about _____ date _____, 2008. Neither of the parties has been married previously.

Drafting Tip

Reference should be made in this part of the agreement to any prior marriages and existing children or grandchildren of either or both of the parties, if applicable.

- B. Each recognizes that the other is gainfully employed and possesses property and assets independently acquired prior to their intended marriage such that each is able to provide for his or her own individual needs. Each desires to enter this agreement realizing that either or both of the parties’ financial, health, or other circumstances may change substantially in the future.

continued

Drafting Tip

Paragraph B lays the basis for a determination that the agreement is fair at the time of execution. It also makes clear that the parties intend their agreement to take effect with full knowledge of the uncertainties of life such as early retirement, fluctuations in income, health problems, or pursuit of a new career.

-
- C. The parties intend by this Agreement to define and fix their respective rights and obligations to each other with regard to spousal support and to any property now owned or hereafter acquired before or after the date of their marriage, in the event of the termination of their marriage by death or legal process.

Drafting Tip

Paragraph C addresses the basic purpose of the agreement.

-
- D. A owns certain property, both real and personal, as listed on Exhibit 1 attached hereto and incorporated herein, the nature and approximate value of which has been fully disclosed to B prior to execution of this Agreement. Also listed on Exhibit 1 and previously disclosed to B is A's indebtedness exclusive of his personal expenses.
- E. B owns certain property, both real and personal, as listed on Exhibit 2 attached hereto and incorporated herein, the nature and approximate value of which has been fully disclosed to A prior to execution of this Agreement. Also listed on Exhibit 2 and previously disclosed to A is B's indebtedness exclusive of her personal expenses.

Drafting Tip

Paragraphs D and E and the Schedules that will be attached to the agreement as Exhibit 1 and 2 address the requirement of disclosure of assets and liabilities. Some agreements provide that these schedules will be updated on a periodic basis without affecting the nature, validity, or effect of the underlying agreement.

Drafting Tip

Sometimes the agreement will include a paragraph that provides that disclosures of property will be kept confidential absent consent or legal necessity. This is particularly appropriate when a party's business interests are listed and he or she would be disadvantaged if a competitor were aware of the information.

Drafting Tip

Other related exhibits may also be attached such as copies of trusts, tax returns, appraisals, etc.

-
- F. The parties acknowledge that each has had an adequate opportunity to negotiate, review, and consider the terms of this Agreement prior to execution; that each has been advised by independent counsel of his or her individual choice as to their rights as a spouse under the law and the legal effect of the Agreement on those rights; that each believes the provisions of the Agreement are fair, just, and reasonable; that each understands, assents to, and intends to be bound by its provisions; and that each enters the Agreement freely, voluntarily, and without any duress, undue influence, or illegal consideration.

Drafting Tip

Paragraph F addresses procedural fairness in the negotiation and execution of the agreement including the requirement that it be freely and voluntarily executed. The reference to counsel of individual choice makes clear that each party chose and retained his or her own independent attorney and not one chosen by the other party. The content presumes that counsel has described the state's approach to allocation of property upon divorce and death so each party appreciates what they are gaining and/or giving up in the agreement.

continued

- G. This Agreement shall become effective only upon the marriage of the parties within a period of one (1) year from the date hereof, and, if such marriage is not solemnized within said period, then this Agreement shall be null and void.

Drafting Tip

The one-year time frame is intended to protect against such a long period passing that the nature of the assets and liabilities of the parties may have changed in some significant manner.

NOW THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties mutually agree as follows:

Drafting Tip

This paragraph identifies the consideration that supports the agreement.

AGREEMENTS

1. Definition of Separate Property

For purposes of this Agreement, "separate property" shall be defined as:

- a. all assets in which each presently has an interest exclusive of the other as shown on the Schedules contained in Exhibit 1 and 2;
- b. any inheritances, gifts, bequests, or devises received by either of them after the date of the parties' marriage;
- c. all appreciation, reinvestments, and proceeds of sale or redemption of any of the above property after the date of the parties' marriage;
- d. any property designated as separate property by both parties in writing after the date of their marriage; and
- e. any income earned by either party during the marriage including salaries and bonuses.

Drafting Tip

"Separate property" must be carefully defined because each party is giving up an interest he or she might otherwise have in that property. The definition of separate property provided here is broad. For example, some agreements do not designate income earned during the marriage as separate property.

Drafting Tip

This definition does not include as separate property retirement benefits (pension, profit sharing, or deferred compensation, etc.) because potential rights in certain retirement plans cannot be waived by a non-spouse under ERISA. However, the agreement could include a provision that the other party will agree to execute a waiver after an appropriate period post marriage.

Drafting Tip

Sometimes the agreement will specify whether ownership of property will be exclusively determined by title or whether one party's contributions (financial or nonfinancial) to appreciation in the value of the other party's property will be considered in some manner. The agreement may also address the effect of commingling of assets and income or future increases in the value of separate property. For example, what happens if the parties purchase a boat together and each contributes to its purchase and maintenance but not equally?

2. Separate Property During Marriage

Each party agrees to keep and retain the sole ownership and control of any property held as his or her separate property as herein defined without interference from the other and in the same manner as if the marriage had not occurred.

continued

Drafting Tip

Given the broad definition of separate property in this agreement, each party may be in a position to transfer significant assets by will, trust, gift, or otherwise to children from a prior marriage, other parties or charities, or the spouse if he or she chooses to do so.

3. Separate Obligations of the Parties

Obligations of a party incurred prior to the marriage shall remain the separate obligations of that party. The other party shall not be liable for those obligations, and shall be indemnified and held harmless from them by the responsible party. Such existing obligations shall be paid from the separate property of the responsible party.

Drafting Tip

It is important to address liabilities as well as assets in premarital agreements. This provision could be expanded to address liabilities incurred during marriage by either or both of the parties.

4. Definition of Marital Property

For purposes of this Agreement, with the exception of either party's separate property as herein defined, marital property ("Marital Property") shall be defined as all property accumulated by the parties during the marriage until the date of the death of either party or the date on which any legal action for separation, annulment, or divorce is commenced. Marital property shall also include any property designated as marital property by both parties in writing after the date of the marriage.

Drafting Tip

This paragraph sets the date of the filing of an action as a key date. Other options might be the date of separation, the date of divorce, etc.

Drafting Tip

In the case of annulment, if the marriage was *void ab initio* (invalid from the outset), no valid marriage will ever have occurred and the agreement will never have taken effect, absent a provision that addresses that circumstance.

Drafting Tip

Most often agreements address income and asset issues. At this point in the agreement, however, the parties may choose to include provisions regarding various aspects of their life together. Some agreements will address how various responsibilities will be managed during the marriage. How will bank accounts be set up? How will payment of bills be handled? Who will perform various household responsibilities? What are the parties' intentions with respect to childrearing roles and responsibilities? Provisions that pertain to medical, disability, life insurance, and long-term care expenses and insurance are especially appropriate in agreements involving elderly and/or disabled parties. Occasionally an agreement will address a behavioral issue such as excess spending, gambling, drinking, drug abuse, or infidelity during the marriage. Although such provisions may clarify expectations of the parties, some of them may be unenforceable.

5. Marital Property Upon Termination of the Marriage

- a. In the event of termination of the marriage by legal proceedings, all assets then jointly owned by the parties as joint tenants, tenants by the entirety, or otherwise and not herein defined as separate property shall be divided equally between the parties.
-

Drafting Tip

This particular agreement provides for an equal rather than an equitable division of marital property regardless of the jurisdiction in which legal process is commenced and whether it is a community property or equitable distribution state. Parties to other agreements may elect different options.

continued

Drafting Tip

This agreement adopts what some call a “three-pot” approach to property: “his,” “hers,” and “theirs.” Some parties will set forth further provisions requiring the transfer of an asset of one party to the other party or creation of an asset for the other party’s benefit. This is particularly likely if the agreement contains a waiver of spousal support or estate claim and/or a party is giving up employment or an alimony payment from a prior spouse as a result of the upcoming marriage. Additional provisions might include, for example, a lump sum payment; a health, disability, or life insurance policy for the other’s benefit; or transfer of an asset to the other party such as a vacation home. Such provisions are sometimes tied to the length of the marriage.

- b. In the event of the termination of the marriage by the death of a party, all assets defined as marital property shall become the sole property of the surviving party to the exclusion of the decedent’s estate. The surviving party shall own said property subject to any liens, mortgages, or encumbrances secured by the property.

Drafting Tip

It is important to specify if the marital property will be transferred subject to encumbrances pursuant to the agreement (by contract rather than by inheritance). Otherwise, the decedent’s estate would not receive the asset but would be liable for the decedent’s share of the encumbrances.

6. Mutual Waivers

- a. **Waiver of Rights to Property:** In the event of termination of the marriage by divorce or annulment, the parties agree not to assert any claim of any kind to the separate property of the other as herein defined. This waiver shall not apply to marital property.
- b. **Waiver of Rights to Maintenance and Support:** In the event of a legal separation, divorce, or annulment, the parties agree to waive any rights to spousal support or maintenance of any kind to which either might otherwise be entitled. The parties agree that this provision may be entered as a complete defense by either party in response to an action for alimony. The parties further agree that nothing herein shall be deemed a waiver of either party’s right to claim child support for support of any minor children born to or legally adopted during their marriage.

Drafting Tip

The parties cannot waive rights or obligations pertaining to child custody and support that remain subject to the jurisdiction of the court.

Drafting Tip

This model sets forth a waiver of spousal support. If, in the alternative, it provided for support, the agreement could spell out a method for determining the appropriate amount. For example, the amount could be tied to a certain event (e.g., disability, reduction in income) or the length of the marriage (i.e., the longer the marriage, the greater the amount of support). Some agreements provide for reductions or elimination of support if there is proof of adultery by the recipient spouse during the marriage.

Drafting Tip

The enforceability of spousal support waivers in premarital agreements varies from state to state and they may not be effective if enforcement would bring about an “unconscionable” result.

- c. **Waiver of Estate Claims:** In the event of the death of one of the parties, each party hereby relinquishes and waives all rights, claims, and interests that he or she may have or acquire as surviving spouse, heir at law, or otherwise in the estate of the other party.

continued

Drafting Tip

Paragraphs a and b are waivers of statutory rights upon divorce, and c is a waiver of rights upon death. It is common to specifically list the scope of the rights being waived upon death of a party (the right to inherit under the state's laws of descent and distribution, the right to claim a distributive or forced share as a surviving spouse, the right to petition to serve as administrator of the deceased spouse's estate, etc.).

7. Wills/Trusts

Nothing contained herein shall preclude or prevent either party from freely executing a will or settling a trust that confers benefits on the other party, or from nominating the other party as executor or trustee, or from exercising any power of appointment in favor of the other party.

Drafting Tip

Generally, a premarital agreement is not a replacement for a will, although if the agreement is executed with all the formalities of a will, a party may assert that it serves as a will "substitute." Clients should consider their agreement and wills in tandem. Even though the parties may waive statutory rights in the agreement, they are still free to voluntarily make provisions for each other as is provided in this model.

8. General Provisions**a. Entire Agreement**

The parties agree that this Agreement contains their entire understanding and that there have been no additional promises, representations, or agreements made to either party by the other, oral or written, except as set forth herein.

Drafting Tip

Under contract law, judges look to "the four corners" of the agreement (the "face" of the written instrument) to determine what the parties intended at the time the agreement was executed. Sometimes, however, if an agreement is ambiguous, the court will go outside the contract and hear testimony ("parol evidence") from witnesses, not to create terms but rather to clarify the parties' intentions with respect to specific existing terms.

Drafting Tip

A paralegal should maintain a complete file including successive drafts, revisions suggested by the other party, and written confirmations of telephone exchanges, etc. Even though an agreement may never be challenged, if it is, the contents of a complete file can be very valuable as forensic evidence for use in court.

b. Modification

This Agreement may be modified, amended, or rescinded at any time after the solemnization of the marriage, only by a subsequent written agreement between and signed by the parties.

Drafting Tip

This paragraph leaves the door open for the parties to alter or rescind their agreement at a later date if their circumstances alter. However, modification provisions should not be included in a jurisdiction where postmarital agreements are prohibited. In such jurisdictions, inclusion of a modification provision may cause rescission of the entire agreement.

c. Waiver of Breach or Default

No waiver of breach or default with respect to a provision of this Agreement shall be deemed a waiver of any subsequent breach or default.

continued

Drafting Tip

This provision means that if a party allows the other party to default on a particular obligation under the agreement, he or she is not waiving the right to object to a subsequent default on that or any other provision.

d. Binding Effect

This Agreement shall be binding on the parties hereto and their respective legal representatives, heirs, successors, and assigns.

Drafting Tip

The agreement binds the parties with respect to each other but is not necessarily binding on third parties such as creditors or bona fide purchasers of property without notice. To ensure that the agreement will be enforceable against a purchaser of a piece of real estate, for example, a copy of the agreement should be recorded in the appropriate Registry of Deeds. Some states have statutes that specifically address this issue.¹⁷

e. Severability

In the event any provision of this Agreement shall be held illegal, invalid, or otherwise unenforceable, such holding shall not invalidate or render unenforceable any other provisions hereof, and the offending provision shall be severed from this Agreement and be null and void and of no force and effect.

Drafting Tip

Severability clauses are common in most contracts. They are especially important in premarital agreements when a client insists on including a provision that is likely to be unenforceable (such as a term that the parties will have no children or must practice a particular religion).

f. Governing Law

This Agreement shall be governed, controlled, and interpreted under the laws of the state of _____.

Drafting Tip

Given that laws vary from state to state, this provision anticipates a possible “conflict of law” question. For example, the parties may agree that the law of Maryland will govern but they eventually divorce in California. According to basic choice of law principles, the California court will apply Maryland law in construing the agreement unless the result of doing so would violate strong public policy in California. This is a potentially important choice given the degree to which states vary in their approaches to dividing property upon divorce and to determining the validity of premarital agreements.¹⁸

Drafting Tip

Some agreements include a provision that sets out the steps to be taken in the event of a dispute regarding any terms of the agreement in addition to judicial relief (a party seeking to enforce a surviving agreement can sue for breach of contract and seek specific performance). It may include options such as mediation and arbitration.

Drafting Tip

The provisions in this last section of the sample premarital agreement are “boilerplate” to a considerable extent. **Boilerplate** is standard language commonly used in a particular kind of document. However, as with all documents, care must be taken to tailor even boilerplate to jurisdictional requirements and the facts of a case at hand.

Boilerplate

standard language commonly used in a particular kind of document and that usually does not require negotiation

continued

IN WITNESS WHEREOF, the parties have signed, sealed, and acknowledged this Agreement on the day and year indicated below.

Witness _____

Name of prospective spouse A _____

Date: _____

Witness _____

Name of prospective spouse B _____

Date: _____

Drafting Tip

Certifications by notaries, etc., should be provided in a form appropriate to the jurisdiction. It is important to verify and comply with applicable procedural rules, such as witness requirements and the like. Even if not required, each page of the agreement and any attached exhibits should be signed or initialed to protect against later claims that a particular provision was not included in the original agreement.

EXHIBIT 1

SCHEDULE OF ASSETS FOR Prospective Spouse A.

(abbreviated in length)

Assets	Fair Market Value	Adjustments	Net Value
<u>Real Estate</u>			
<u>(List) Personal Property</u>			
Bank accounts			
Stocks and securities			
Retirement funds			
Life insurance			
Antiques			
Jewelry			
Collections			
Vehicles including boats, etc.			
Other			
Total			

continued

Liabilities

(List)

Total**Net Worth****Date:**_____
Signature of prospective spouse A**I hereby acknowledge that I have received and reviewed this schedule of assets and liabilities.****Date:**_____
Signature of prospective spouse B

WHAT ARE THE TRENDS REGARDING ENFORCEABILITY OF PREMARITAL AGREEMENTS?

A premarital agreement may be deemed valid because it meets all of the technical jurisdictional requirements for such documents. If there is never a controversy surrounding the agreement and the parties simply abide by its provisions, enforceability does not become an issue. However, if challenged, the burden of proof of invalidity is on the party challenging enforcement of the agreement.

The Uniform Premarital Agreement Act's Position on Enforceability

Each state sets forth by statute and/or case law its own requirements for what constitutes a valid and enforceable agreement. Some states invest premarital agreements with a presumption of validity as long as certain requirements are satisfied.¹⁹ Approximately half of the states have adopted the Uniform Premarital Agreement Act (UPAA) approved by the National Conference of Commissioners on Uniform State Laws in 1983. The goal of the UPAA is to create uniformity and increased enforceability of premarital agreements through ordinary contract principles. Even in states that have not enacted the UPAA, its provisions frequently reflect trends in the law and are often considered by the courts.

Under §6 of the UPAA, premarital agreements will not be enforced if:

. . . the party against whom enforcement is sought proves that:

- a. [he or she] did not execute the agreement voluntarily; or
- b. the agreement was unconscionable when it was executed and, before execution of the agreement, that party
 - i. was not provided a fair and reasonable disclosure of the property or financial obligations of the other party,
 - ii. did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, and
 - iii. did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.

In general, subject to §6, the UPAA favors enforcement of the terms of premarital agreements as long as they do not lead to an unconscionable result. That determination is one to be made by the court as a matter of law. However, the act states a specific position with respect to provisions designed to modify or eliminate spousal support. If enforcement would result in a party becoming eligible for public assistance upon divorce or separation, the act provides that a court may order the other party to provide support to the extent necessary to avoid that result.

Enforceability of Premarital Agreements in States That Have Not Adopted the UPAA

The “Traditional View”—The Fairness Approach. After years of not enforcing premarital agreements that addressed rights upon divorce, following *Posner*, states have increasingly accepted premarital agreements on a case-by-case basis, focusing attention on whether an agreement at issue constituted a valid contract and was substantively and procedurally fair to the parties. This “traditional view” treats premarital agreements as contracts and as agreements between people who bear a special “fiduciary” relationship to one another and therefore holds them to a higher standard than contracts between strangers. It is essentially a fairness approach.

Some states that apply this approach look only to fairness considerations at the time of execution of the agreement. Other states have adopted a “*second look*” or “second glance” doctrine examining agreements to determine if they remain fair at the time of performance, i.e., divorce.

The Contemporary Approach—A Freedom to Contract Approach. In more recent years, there has been a trend away from subjecting premarital agreements to a higher standard and toward treating them as basic contracts. Contract law protects both freedom to contract and expectations that the terms of an agreement will be met by each of the contracting parties. Under contract law, absent proof of fraud, misrepresentation, or duress, agreements will be enforced unless enforcement will bring about an “unconscionable” result. Absent such a result, parties are free to make hasty, unfair bargains against their own self-interest. A party cannot avoid performance of a contract simply because it seems unfair, unreasonable, or to his or her disadvantage. However, a court may elect to reform a portion of the agreement to limit the effects of an unforeseen hardship or provide some other equitable remedy such as imposition of a constructive trust over the property of one party for the benefit of a seriously disadvantaged or abused party.

The opinion in the Pennsylvania case of *Simeone v. Simeone* describes how and why this trend has evolved in response to broad societal changes. (See Case 2.2.) In *Simeone*, the wife appealed a lower court’s decision upholding the validity of the premarital agreement that she and her husband had executed on the eve of their wedding in 1975. At the time, the wife was an unemployed twenty-three-year-old nurse. Her spouse was a thirty-nine-year-old neurosurgeon earning \$90,000 a year with an additional \$300,000 in assets. She signed the agreement without the advice of an attorney or knowing which legal rights she was giving up. The terms of the agreement limited her to support payments of \$200 per week in the event of separation or divorce, up to a maximum of \$25,000. When the premarital agreement was upheld and her petition for further alimony was denied by the Superior Court, she appealed to the Pennsylvania Supreme Court.

Second look doctrine

an approach to determining enforceability of premarital agreements adopted by some courts that involves examining the terms of a premarital agreement for fairness at the time of performance

CASE 2.2 *Simeone v. Simeone*, 525 Pa. 392, 581 A.2d 162 (1990)

FROM THE OPINION:

There is no longer validity in the implicit presumption that supplied the basis for . . . earlier decisions. Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the “weaker” party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there validity in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays often have substantial education, financial awareness, income, and assets.

Accordingly, the law has advanced to recognize the equal status of men and women in our society. . . . Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities that they were perceived as having in earlier times have, appropriately, been discarded. . . .

. . . Traditional principles of contract law provide perfectly adequate remedies where contracts are procured through fraud, misrepresentation, or duress. . . . Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts. . . . Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements.

Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains. . . . *Ignorant[i]a legis non excusat.*

Accordingly we find no merit in a contention raised by the appellant that the agreement should be declared void on the ground that she did not consult with independent legal counsel. To impose a *per se* requirement that parties entering a premarital agreement must obtain independent legal counsel would be contrary to traditional principles of contract law, and would constitute a paternalistic and unwarranted interference with the parties’ freedom to enter contracts.

Further, the reasonableness of a prenuptial bargain is not a proper subject for judicial review. . . .

. . . If parties viewed an agreement as reasonable at the time of its inception, as evidenced by their having signed the agreement, they should be foreclosed from later trying to evade its terms by asserting that it was not in fact reasonable. . . .

Further, everyone who enters a long-term agreement knows that circumstances can change during its term, so that what initially appeared desirable might prove to be an unfavorable bargain. Such are the risks that contracting parties routinely assume. . . .

We are reluctant to interfere with the power of persons contemplating marriage to agree upon, and to act in reliance upon, what *they* regard as an acceptable distribution scheme for their property. A court should not ignore the parties’ expressed intent by proceeding to determine whether a prenuptial agreement was, in the court’s view, reasonable at the time of inception or at the time of divorce. . . .

. . . we do not depart from the longstanding principle that a full and fair disclosure of the financial positions of the parties is required. . . .

SIDEBAR

Read the full opinion in the *Simeone* case available on the companion website. After reading the opinion, what do you think the requirements should be in order for a premarital agreement to be valid and enforceable?

When working on a case that involves a premarital agreement, it is important to know what the current criteria for enforceability are in the applicable jurisdiction based on both statutes and case law. For example, in a “contract” approach jurisdiction, the party challenging validity of the agreement will have to show that the agreement did not satisfy the basic requirements of a contract, that the contract was the result of fraud or duress, or that a term was unconscionable in some fashion at the time of execution. In a “second look” fairness approach jurisdiction, courts will focus primarily on procedural fairness at the time of execution, and substantive fairness both at the time of execution and at performance. Knowing what has to be proved or defended against should guide the paralegal’s information-gathering efforts. Paralegal Application 2.5 describes information-gathering needs in a “second look” jurisdiction.

In addition to the three kinds of requirements indicated earlier in this chapter, most contracts, including premarital agreements, must satisfy a state’s *Statute of Frauds*, which specifies the kinds of contracts that must be in writing and signed in order to be enforced. A contract in consideration of marriage is one of the traditional Statute of Frauds exceptions to oral contract validity. It is important to determine whether the validity or enforcement of a premarital agreement at issue may be subject to an exception in the particular Statute of Frauds governing the case.²⁰

Statute of Frauds

the requirement that certain types of contracts be in writing such as a contract that by its terms cannot be completed within a year or a contract for the sale of land

PARALEGAL APPLICATION 2.5

INFORMATION-GATHERING NEEDS IF A PREMARITAL AGREEMENT IS CHALLENGED IN A “SECOND LOOK” JURISDICTION—TASKS FOR A PARALEGAL

- Obtain a copy of the agreement and the file if available.
- Locate the state statute governing premarital agreements, if any, so it can be determined if its requirements were met.
- Research state case law on point.
- Research circumstances surrounding the drafting and execution of the agreement such as:
 - Who suggested the agreement?
 - Who drafted it?
 - Was each party represented? How was counsel obtained and who paid for the representation?
 - What was the timing of the drafting and execution?
 - What financial disclosures were made and how complete and accurate were they?
 - What were the parties’ respective financial circumstances, education levels, and business backgrounds?
 - Was there any history of threats or emotional or physical abuse prior to execution of the agreement?
 - Was the execution taped?
- Identify potential witnesses with whom either party may have discussed the agreement, including attorneys, financial advisors, friends, family members, etc.
- Find out how circumstances have changed since the execution of the agreement. What are the current financial circumstances of each of the parties? Have children been born to the marriage? Has one of the parties developed a serious health problem?
- Recommend a discovery strategy, if warranted. Discovery methods for premarital agreement controversies are the same as for divorce: Interrogatories, Depositions, Requests for Admissions, Production of Documents, or Mental Examinations, and other informal methods such as interviews, examination of public records, etc.

PARALEGAL APPLICATION 2.6

AN ENFORCEABLE AGREEMENT? WHAT DO YOU THINK?

THE FACTS

Joseph and Susan were married in March of 1990, when he was forty-seven and she was forty-one. They had known each other in high school, dated occasionally in the 1970s, and renewed their acquaintance in 1987. Joseph proposed marriage in 1989 on condition that Susan sign a premarital agreement, which she agreed to do. At the time of the marriage, she was living with her daughter from her first marriage in a two-bedroom house. She was working as a secretary earning \$25,000 a year. She owned no real property and had few assets. On request of Susan's attorney, two weeks before the agreement was signed, Joseph disclosed assets indicating his net worth was between \$108 and \$133 million. Although she requested a significant share of those assets during negotiations, she eventually settled for an agreement providing that, in the event of divorce, she would receive the marital home free of encumbrances, yearly support of \$35,000 until her death or remarriage with an annual cost-of-living increase, an automobile, and medical insurance until her death or remarriage. Both attorneys were present when Susan and Joseph executed the agreement and the signing was recorded. The videotape shows Joseph's attorney reciting the terms and the parties communicating their understanding and consent. They also acknowledged that they each had counsel of their own choice, exchanged financial disclosure, and understood what their rights would be in the absence of an agreement. (The wife testified at the time of the divorce that she did not want to sign and felt ill on that day, but the tape revealed no sign of distress, resistance, or unwillingness to sign.)

In March 1998, the husband filed for divorce. The trial court held that the agreement was invalid because it was not fair and reasonable at the time of execution or enforcement. The husband appealed.

SIDEBAR

How would this appeal most likely be decided under the traditional fairness approach? Why? How would it be decided under the freedom to contract approach applying an unconscionability standard? Why? How do you think it should be decided? What additional information would you like to have? To learn how the Massachusetts Supreme Judicial Court decided the case, go to the companion website and read *DeMatteo v. DeMatteo*, 436 Mass. 18, 762 N.E.2d 797 (2002).

PARALEGAL APPLICATION 2.7

RELATIONSHIP BETWEEN A PREMARITAL AGREEMENT AND AN ACTION FOR DIVORCE

When a Premarital Agreement exists, the Divorce Complaint should put the court on notice of its existence and indicate whether the party filing for divorce seeks to have it enforced or challenges its validity on one or more grounds. The paralegal should keep this in mind when drafting a complaint.

The case *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 105 Cal. Rptr. 2d 863 (2001), available on the companion website in the material related to Chapter 2, addresses the applicability of the statute of frauds to a premarital agreement executed in Egypt. The opinion also touches on:

- the nature of the document at issue as a premarital agreement
- the recognition of premarital agreements in California

- problems that arise when documents are written in a foreign language
- the admissibility of parol evidence to prove the validity of an agreement
- conflict of law issues between the law of Islam and the law of the State of California. (The court notes that the term “Islamic Law” is relatively uncertain, as there are at least four schools of interpretation of Islamic law.)

THE ROLE OF THE PARALEGAL IN A PREMARITAL AGREEMENT CASE

The role of a paralegal in a premarital agreement case primarily will depend on whether the case involves the negotiation and execution of an agreement, or the enforceability of an already existing agreement. The sample agreement and several of the paralegal applications provided in this chapter address some aspects of the paralegal’s role at each of these stages. An experienced paralegal may perform the following tasks:

Tasks Common to Both Stages

- participate in meetings with the client as requested by the supervisor
- research the jurisdictional requirements for valid and enforceable premarital agreements
- help the client and the attorney gather necessary information and documents
- maintain communication with the client
- schedule meetings with the client, the other party and his or her attorney, and any other essential individuals (e.g., mediators, etc.)
- prepare related forms and correspondence (including fee agreements, confirmation of meetings, etc.)
- track/monitor progress on the case and ensure that required timelines are met

Negotiation and Execution of the Agreement

- prepare exhibits for use in negotiations
- draft successive versions of an agreement and related schedules and attachments based on instructions from the supervising attorney (Law offices customarily have a variety of premarital agreement “forms” available for reference in office files, form books, on disks, and/or online.)
- review proposed agreements from the other party for consistency with the client’s position and agreed-upon terms based on information provided by the supervisor
- make arrangements for obtaining an affidavit of competency, if appropriate
- arrange for execution of the agreement

Enforcement of an Existing Agreement

- be certain that the client’s Complaint for Divorce (or Answer) puts the court on notice as to the existence of the agreement and the client’s position with respect to potential enforceability
- prepare related memoranda based on research as requested
- draft discovery materials such as interrogatories, requests for admissions, requests for production of documents, requests for physical or mental examinations, and proposed questions for depositions
- draft responses to discovery requests, working with the client and the supervising attorney
- assist with preparation for hearings or a trial on the merits including drafting pretrial memoranda for review, preparing exhibits, and arranging for service of subpoenas on potential witnesses, if needed
- help identify and prepare prospective witnesses

PARALEGAL APPLICATION 2.8

AN ALERT

This chapter began by noting that premarital agreements providing for rights upon divorce were unenforceable for generations. That has clearly changed and we now have new issues to consider. The highly controversial topic of same-sex marriage will no doubt be debated over the next decade on public policy grounds favoring a traditional definition of marriage as the legal union of one man and one woman. In a state that allows same-sex marriage, a premarital agreement between the parties may well be enforceable in that state at least with respect to matters governed by that state's law. Whether or not it will be enforceable in any other state remains to be seen.

CHAPTER SUMMARY

A premarital agreement is a contract executed by two individuals about to marry that takes effect upon their marriage. In it the parties establish for themselves their respective rights in the event the marriage terminates by legal process (divorce, legal separation, or annulment) and/or as a result of the death of one of the parties. Typically, the agreement will address financial issues of spousal support and property division, but it may also address nonfinancial matters related to the parties' expectations during the marriage.

Premarital agreements establishing the rights of spouses upon divorce are a relatively recent development. Their origins, evolution, and current trends are highlighted in pertinent case excerpts. In general, to be valid, a premarital agreement must satisfy the requirements for a valid contract (capacity to contract, offer and acceptance, consideration, and legal subject matter) as well as the requirements of agreements between individuals who bear a fiduciary relationship to one another: procedural fairness (fairness in negotiation and execution) and substantive fairness (fairness in its terms). The agreement must also satisfy the applicable Statute of Frauds.

Although agreements customarily contain some "boilerplate" or standard provisions, considerable care must be taken to tailor each agreement to the unique needs of the parties involved. The sample agreement provided in the

chapter is very basic, and suggestions are offered with respect to potential variations based on the wishes of the parties involved. It includes features that one would expect to see in most agreements: recitations regarding representation by counsel, financial disclosure, and voluntariness of execution; definitions and dispositions of separate and marital property; a provision relating to spousal support; and a provision relating to benefits or rights upon death of a party.

Whether or not a particular agreement or specific provision within an otherwise valid agreement will be enforceable depends on the approach applied in a given jurisdiction based on its governing statutes and case law. Just over half of the states have adopted the Uniform Premarital Agreement Act (UPAA). The remaining states apply either a traditional fairness approach or the more contemporary freedom to contract approach. In assessing fairness, some states have adopted the "second look" doctrine, which calls for a consideration of fairness of the terms of an agreement at the time of performance as well as at the time of execution.

Throughout the chapter a number of tasks are identified that a supervisor might assign to a paralegal. Several paralegal applications and tips are also provided, which are designed to alert the paralegal to special issues related to the drafting, execution, and enforcement of premarital agreements.

KEY TERMS

Affidavit of Competency
Boilerplate
Cohabitation agreement
Collaborative law

Consideration
Fiduciary
Ignorantia legis non excusat
Mediation

Meeting of the minds
Per se invalid
Postmarital agreement (postmarital contract, postnuptial agreement)

Premarital agreement (premarital contract, antenuptial agreement)	Second look doctrine	Unconscionable
Procedural fairness	Separation agreement	Void
Public policy	Statute of Frauds	Waiver
	Substantive fairness	

REVIEW QUESTIONS

- Describe the nature and purpose of a premarital agreement.
- Identify reasons why an individual might want to have a premarital agreement.
- Identify the requirements for a valid contract.
- Define procedural fairness. What factors will a court consider in determining procedural fairness with respect to premarital agreements?
- Define substantive fairness. What factors will a court consider in determining the substantive fairness of a premarital agreement?
- Explain why one attorney should not represent both parties to a premarital agreement.
- Identify the kinds of information that a client should be given by his or her attorney before entering a premarital agreement.
- Describe the kinds of information that should be gathered in preparation for the drafting of a premarital agreement.
- Identify the most commonly included provisions of a premarital agreement.
- Identify some of the kinds of terms individuals may want to include in a premarital agreement that may not be enforceable and explain why. In this context, explain the importance of a severability clause in an agreement.
- Describe the historical trend from non-enforceability to enforceability of premarital agreements. In this context, indicate the significance of the *Posner* case.
- Explain the difference between a freedom to contract and a fairness approach to enforcement. In this context, what is the significance of the *Simeone* case?
- What is the “second glance” or “second look” doctrine?
- What is the position of the Uniform Premarital Agreement Act on enforceability of agreements?

FOCUS ON THE JOB

THE FACTS

Richard Marshall is 72 years old. He is a retired engineer who had a very successful career in the telecommunications industry. He has been married three times and is paying alimony to two of his three prior wives. The third wife is independently wealthy and is paying him alimony of \$2,000 per month, which will cease if and when he marries again. He has a vacation home on the New Jersey shore; a pension from AT&T; a 48-foot world-class cruising yacht valued at approximately \$1 million; a 401(K) that since his retirement, has grown to a value of \$1.5 million; a collection of antique BMW motorcycles with a book value of approximately \$100,000; and an investment portfolio presently valued at \$700,000. He calls this account his “toy,” and with it he makes aggressive and highly speculative investments. In addition, he has several very valuable paintings he inherited from his grandmother that are on display in a local museum of art. He has never had them appraised but believes they are worth well over a million dollars. He doesn’t see any reason to mention them to his bride-to-be because he never intends to retrieve them from the museum. His five much-loved children are now all adults with families of their own. He has seven grandchildren with whom he visits

regularly. His father is deceased but his mother is still alive and in her nineties. She has all her faculties but has some physical limitations. He wants her to live with him and his fiancée, Elaine, when they are married, and expects that the two of them will be his mother’s primary caretakers until her death.

Richard’s “one true love,” Elaine Cannon, is 32 years old. Her only husband died three years ago. They had three children, who are aged 6, 9, and 11. The children are presently living with her in her New York condominium valued at \$1.5 million. She also has a vacation home in Bar Harbor, Maine which she inherited from her husband. It had been in his family for years, and she lets several of his relatives continue to use the cabin (assessed at \$225,000), as they always had before her husband’s death. She has a successful career as a television news broadcaster, but Richard wants her to give up her career and be a stay-at-home mom to her three children. He loves and enjoys her children but wants her to promise not to have any more. She presently earns about \$500,000 a year, and the rest of her assets are in a trust fund for the benefit of her children. The fund is substantial, given her contributions and those flowing from her late husband’s estate. She has always worked hard and is

looking forward to leaving her job and “just being a mom.” She is very happy and feels fortunate to have found Richard. She believes he will be a wonderful husband. Given what she is giving up in terms of her career, Richard wants to be responsible for paying all of the expenses related to their life together (housing, food, utilities, vacations, etc.) but expects her to be responsible for expenses relating to her children.

The parties intend to marry in about three months. Richard has asked Elaine to execute a premarital agreement. She says that whatever he wants is fine with her, and she sees no need to go to the expense of hiring an attorney to represent her. She believes that she is sufficiently educated and informed to make her own decisions. She is perfectly willing to share her financial information with Richard and trusts him implicitly. She is very excited about the wedding and looks forward to a large celebration with over 200 family and friends. She is aware that her future husband does not want any more children but suspects she may be one-month pregnant. She is quite sure that when

he finds out, he will be just as excited as she is about their “love child.”

THE ASSIGNMENT

Working in teams of three—one person playing the role of Richard, one the role of Elaine, and the third the role of Richard’s attorney, Juliana Wilson—draft a premarital agreement with attached schedules that is tailored to the above fact pattern. Assign local addresses within your state to each of the parties and counsel. Your draft should reflect what you have learned from reading this chapter class discussion, and any additional research you may have done or are required by your instructor to do. You should begin by determining the requirements for a valid premarital agreement in your jurisdiction and locating a variety of models in form books and/or online. When doing the latter, you will likely learn whether your state is a community property or an equitable division state and whether or not it has adopted the Uniform Premarital Agreement Act.

FOCUS ON ETHICS

As indicated in the above fact pattern, Elaine does not believe she needs to have another attorney advise her with respect to the negotiation and execution of the proposed premarital agreement. She has told both Richard and his attorney, Juliana Wilson, how she feels and that she trusts both of them to be fair with her. Assume that you are the paralegal for Attorney Wilson. Draft a letter to Elaine for your supervisor’s review and signature in which you explain why it is strongly advised that she be represented by independent counsel and what the potential risks are of

failing to do so. Indicate, if she insists on not obtaining counsel, what steps, if any, need to be taken in an effort to protect your client against a later allegation that the agreement was unfair in its terms or execution or that it was the product of fraud or duress, etc. The tone of the letter needs to be firm but also reflect sensitivity to the situation—you have two people who care for each other and want to marry and, at the same time, you are talking about an agreement that would govern their rights upon divorce and death!

FOCUS ON CASE LAW

Locate the most recently decided case in the state where you live that governs the issue of the enforceability (or non-enforceability) of a premarital agreement in whole or in part and the standard to be applied in making that

determination. Read the case and then brief it using a format prescribed by your instructor or, if none, the format available on the companion website for this text in the material related to Chapter 1.

FOCUS ON STATE LAW AND PROCEDURE

Assume that Elaine in the above comprehensive fact pattern does not tell Richard about their “love child” until two months after their marriage. Richard is so upset by this turn of events that he promptly files for divorce and seeks to enforce the parties’ premarital agreement, which provides that, if the parties are married for less than two years, Elaine receives only what she brought into the marriage. Elaine does

not want the agreement enforced and wants a substantial spousal support award for a six-year period, until the baby enters elementary school and she returns to work. She says that Richard should not be allowed to benefit from the agreement because he never told her about the paintings, and she only recently found out about them by accident at a museum fundraiser. She retains Attorney Olga Carroll to

represent her in this matter. Assume that you are Attorney Carroll's paralegal and that she has asked you to research the enforceability of the agreement at issue in your state. Prepare a memorandum describing the results of your research and your conclusion with respect to Elaine's chances of prevailing. Your report should be in a basic internal memo format such as the following:

MEMORANDUM

To: Olga Carroll, Esq.

From: *Your Name, Paralegal*

File Reference: *Name of client followed by case caption with a docket number (to be provided by your instructor)*

Re: *Enforceability of Premarital Agreement*

Date:

Description of Issue/Assignment: *What is it that you have been asked to do?*

Results of Research: *What did you learn about the enforceability of premarital agreements in your state?*

Application to the Case: *Apply the law (case and statutory) to the facts of the case at issue.*

Conclusion: *What is the likelihood that Elaine will prevail with respect to the enforceability of the premarital agreement?*

FOCUS ON TECHNOLOGY

WEBSITES OF INTEREST

<http://www.divorcenet.com>

This site contains information on a number of family law topics. Search by topic and/or by state.

<http://www.divorceource.com>

Click on divorce laws and then search by topic and/or state. Links are provided to both articles and sites for cases. A considerable amount of the material cannot be viewed without a subscription (available at a modest fee).

<http://www.findlaw.com>

This site contains a wide range of information about premarital agreements.

<http://www.jlaw.com>

The focus of this site is on Jewish law in a variety of topical areas. An example of a premarital agreement is provided (without any guarantee as to enforceability).

<http://www.legalforms.com>

This is an example of a site where individuals can purchase premarital agreement packages. There is no guarantee that the material provided satisfies particular states' current requirements, although the packages are promoted as state-by-state products.

ASSIGNMENTS

1. Using online resources, determine whether or not your state has adopted the Uniform Premarital Agreement Act.
2. Assume that the firm where you are employed wants to develop a "common question and answers" information/fact sheet regarding premarital agreements. Search the Web for ideas on what should be included in such a sheet. Start with <http://www.findlaw.com>.