

CHAPTER

4

PREMARITAL AND COHABITATION AGREEMENTS

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A. Chapter Competencies

After studying chapter 4 the student should be able to:

1. distinguish among the following kinds of agreements: cohabitation, premarital, post-nuptial, and separation.
2. identify some of the reasons people enter premarital agreements.
3. state the standards a court will use to state whether a premarital agreement is legal.
4. state the circumstances under which a court might require a prospective spouse to live with the bad bargain he or she made in a premarital agreement.
5. conduct an interview and an investigation to uncover facts that would be relevant to the validity of a premarital agreement.
6. identify steps to ensure the enforceability of a premarital agreement.
7. draft a premarital agreement.
8. state when a cohabitation contract is legal.
9. identify policy reasons some courts are opposed to the legality of cohabitation contracts.
10. state when a nonmarital partner can recover on a theory of express contract.
11. state when a nonmarital partner can recover on a theory of implied contract.
12. state when a nonmarital partner can recover on a theory of quasi contract.
13. state when a nonmarital partner can recover on a trust theory.
14. state when a nonmarital partner can recover on a theory of partnership.
15. state when a nonmarital partner can recover on a theory of joint venture.
16. state the conditions under which the putative spouse doctrine will apply.
17. draft a nonmarital (cohabitation) contract.

The student should also know:

1. whether a pre-civil union agreement can be entered in Vermont.

B. Introduction

Here are some additional comments you might want to share with the class on the increasing popularity of premarital agreements:

“Prenuptial agreements—those contracts that specify who gets what if a marriage falls apart—have clearly grown more common. ‘Today at least 60 % of my clients have prenuptial agreements, and 90 % discuss the idea,’ said Kenneth Zuckerbrot, a senior tax partner at New York’s Ross & Hardies. ‘Five years ago, the subject came up less than half the time.’ . . .

“Raoul Felder, the matrimonial lawyer . . . remembers a lender who recently balked at funding a successful businessman because the man’s marriage was rumored to be rocky and he had no ‘prenup.’

“A recent feature of many agreements covers the spouse who puts the other spouse through professional school. ‘Lawyers report that many prenuptial agreements specify that a spouse who is supported through school must, in turn, send the other spouse through school.’”

Claudia H. Deutsch, *More Couples are Taking No Chance on Love*, The New York Times, August 13, 1995, at 10.

C. Assignment 4.1 (premarital agreement requirements)

After the students complete this assignment, you should ask them if they have anything to add to or subtract from Figure 4.2 later in the chapter on the enforceability of premarital agreements.

D. Assignment 4.2 (disclosure of assets and liabilities)

- a. The question is whether Jim waived his right to disclosure of Mary’s assets. She said she would arrange for him to learn about her financial condition via a meeting with her tax preparer, probably an accountant. Jim said no. He was insulted by the suggestion. At that stage of their relationship, he did not want to mix love and money.

Was it an intelligent or knowing waiver? Did he know what he was giving up? Probably, although her phrase “complete understanding” of her assets is somewhat vague. Does a complete understanding include market values of what she owned?

- b. There should be good opportunities for class debate on this part of the assignment. What do the male students think? What would be the feminist position?

E. Abolish Marriage?

Here’s a question you may want to ask the class: Should society abolish marriage? Should all relationships be handled through premarital agreements and cohabitation contracts? Therefore, there would be no need for divorce. All disputes would be resolved through breach-of-contract (breach of premarital agreement, and breach of cohabitation contract) actions. Does the class think this is a good idea?

F. Assignment 4.3 (legality of specific clauses)

Note that in each of these examples of clauses, the parties are still married; there is no indication that a separation or divorce is about to occur. Hence the courts would be asked to resolve a contract dispute between spouses in an ongoing marriage. Courts will be very reluctant to hear such actions. Among the difficulties will be the design of a method of enforcing such clauses against the breaching party.

Clause (a) is particularly troublesome. Suppose the amount of support is inadequate and the recipient spouse is about to become a public charge? A court would not enforce such a clause.

G. Assignment 4.4 (legality of specific clause)

Arguably, the amount that George will receive (\$750,000) is so large that we have a clear and compelling inducement to divorce. We don’t know what Jane would *actually* receive in the event of a divorce. She would receive “all other property acquired during the marriage.” Is this a lot? If it is, then the premarital agreement may also be an illegal inducement for her to divorce.

H. Assignment 4.5 (*In re Marriage of Bonds*)

- a. Facts that help support the conclusion that the agreement was signed involuntarily: Sun was presented with the agreement the day before the wedding; she did not have independent counsel when she signed; she was twenty-three years old and unemployed; she mistakenly thought that the purpose of the premarital agreement was to protect pre-marriage property only; etc.
- b. Facts that help support the conclusion that the agreement was signed voluntarily: Sue told Barry that the practice in Sweden was that each spouse kept his or her own earnings; she was told that she should obtain her own

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- counsel, but refused; she was multilingual; she spoke English in her employment, education, and personal relationships; she brought a friend with her to the signing; etc.
- c. In these hypotheticals (i–iv), the question is whether there was undue pressure to sign. If time was taken to study the premarital agreement proposal and perhaps obtain independent counsel, the expensive honeymoon trip (i) would have to be canceled, and the elderly parents' trip from abroad (ii) may have been for naught. Too much pressure to marry in order to avoid these results? The pregnant teenager (iii) arguably is most vulnerable to undue pressure given her predicament and the age disparity in the spouses-to-be. The case of the paralegal (iv) should prompt a good deal of class discussion. We may need to know what kind of paralegal the spouse was. A family law paralegal?(!) Even if this person was relatively inexperienced, he or she should have known the importance of having independent legal advice.
 - d. As a society we have never *required* someone to hire an attorney.
 - e. In a criminal case the consequences of mistakes can be devastating. Arguably, for example, imprisonment is significantly more substantial and ominous than a lopsided or unfair financial deal in a prenuptial agreement. Hence, we should ask for a higher standard of voluntariness in a criminal case than in a premarital agreement case.

I. Assignment 4.6(b) (draft a premarital agreement)

Consider photocopying one of the agreements that the students draft. Give a copy to each student. Go over it line by line in class. Collectively edit it. In effect, do part (b) of Assignment 4.6 in class for one of the agreements.

The General Instructions for the Agreement Drafting Assignment in Appendix A do not tell the students to number *every line* (as opposed to every paragraph or clause) along the left margin, with each page beginning at the top with line number "1." You might want to add this instruction, particularly if you are going to go over one of the papers in class. The line numbering system makes references to the text considerably easier during class discussions.

J. Jewish Pre-Nuptial Agreement

Later in chapter 7, we will examine the Get, a bill of divorcement in a Jewish divorce. In order to remarry within the Jewish religion after a divorce, the woman must receive a Get from her soon-to-be-ex-husband. Unfortunately, he does not always cooperate, to the great anguish of a woman who now wants a Jewish marriage with someone else. Chapter 7 describes some of the efforts used to pry a Get from him. Another technique is to try to get him (pardon the pun) to agree to provide a Get *before* the parties are married. This is done through a special premarital agreement. Here is one endorsed by the Rabbinical Council of America (page 21). You might want to photocopy it for the students or read sections of it to the students in class. This could be done now or later in chapter 7 when the Get is covered.

K. Contract Cohabitation: Some Introductory Questions

It is often said that you cannot legislate morality. Ask the class if this is true. If it is, does it make sense to prohibit cohabitation contracts, including the sexual dimension of such contracts? But doesn't the government "legislate" morality all the time? Aren't the anti-discrimination laws based on morality? The laws against stealing?

Does the law follow morality or does morality dictate what the law should be? Abortion was once considered by many to be morally unacceptable. Was the law of abortion changed because the prevailing morality changed on this point?

Can there be any doubt that legalizing cohabitation contracts is an assault on the traditional family? If so, does that mean the contracts should be outlawed?

If contract cohabitation is allowed, will there be extensive litigation all the time? How can the law enforce such contracts? Should the law allow something it cannot enforce? Should only written contracts be enforced? But wouldn't this be unfair?

L. Assignment 4.7 (*Hewitt v. Hewitt* and *Watts v. Watts*)

- a. Why did the *Hewitt* court rule that cohabitation agreements were illegal?
 - Sex can't be separated out; the relationship would not be formed if sex were not a part of the equation.
 - Recognizing cohabitation contracts would discourage people from entering traditional marriages. ("We cannot confidently say that judicial recognition of property rights between unmarried cohabitants will not make that alternative to marriage more attractive by allowing the parties to engage in such relationships with greater security. . . .")

Pre-Nuptial Agreement

Rabbinical Council of America

Agreement, dated _____ 20 _____ between _____ an individual residing at _____ (the "Bride") and _____ an individual residing at _____ (the "Bridegroom").

WHEREAS, the Bride and Bridegroom, both of the Jewish faith, are about to be married in accordance with the laws of this jurisdiction as well as the laws, traditions and teachings of the Jewish religion ("Halachah"), with the mutual desire and expectation that for the remainder of their natural lives they will live together as man and wife; and

WHEREAS, the Bride and Bridegroom agree that in the unfortunate event that their marriage is terminated by a court of competent jurisdiction, such termination will also be effected in accordance with the procedures mandated by Halachah.

NOW THEREFORE, in consideration of the forthcoming marriage and in order to give effect to the foregoing, the Bride and Bridegroom agree:

1. In the unfortunate event that our marriage is terminated for any reason by a court of competent jurisdiction, each of us agrees that we shall each promptly take such steps as will effect the termination of our marriage by the giving and acceptance of a divorce (a "GET"), which GET shall comply with the dictates of Halachah. Such Get will be given and received, as the case may be without further consideration, within thirty (30) days of the above-mentioned termination.

2. Each of us agrees that any dispute as to full performance by either of us of our obligations under paragraph 1 above shall be resolved by final, binding and enforceable arbitration. Such arbitration shall be conducted by the Beth Din the ["Arbitrator(s)"] of America, or its successor, or its designee for such purpose, in accordance with the rules established from time to time by the Arbitrator(s) for such purpose. Each of us agrees that the decision of such Arbitration shall not be subject to review. Each of us agrees to take such actions, including the giving and acceptance of a Get, in such form and manner as the Arbitrator(s) may prescribe. Each of us consents to the exclusive jurisdiction of the Arbitrator(s) for the foregoing purpose.

3. The Arbitration referred to in paragraph 2 above may be initiated by either of us, by a written notice to the other, and to the Arbitrator(s) of an intention to arbitrate. The Arbitrator(s) shall then designate the time and place for such arbitration. We shall each of us appear before the Arbitrator(s) at the place and time specified in its/their foregoing notice.

4. Each of us recognizes that pursuant to Halachah, each of us will be unable to remarry without a Get. Each of us recognizes that such a disability to remarry shall constitute actual substantial damage which is not quantifiable. Since actual damages will be incapable of determination, the Arbitrator(s) shall be authorized to impose in its/their decree liquidated damages in the amount of \$250.00 per day (the "Liquidated Amount") for failure of either of us to abide by the decision of the Arbitrator(s) as provided for in the Agreement, provided that neither the imposition of such liquidated damages nor any payment thereof shall release either of us from our obligations to comply with the remainder of the decisions of the Arbitrator(s). The Liquidated Amount shall be adjusted based upon the percentage of change of the consumer price index from the date of this Agreement to the date of imposition by the Arbitrator(s).

5. Without limiting the authority conferred upon the Arbitrator(s) by paragraph 4 above, the jurisdiction of the Arbitrator(s) under this Agreement shall be restricted to a determination as to whether our marriage has been terminated in compliance with the Halachah, and, if not, what acts must be performed for such termination. This Agreement does not authorize the Arbitrator(s) to determine any property settlement, equitable distribution, alimony, child support, or custody arrangement.

6. The obligations of each party under this Agreement shall be in addition to any and all obligations which are contained in the Ketubah which shall be given at our religious marriage ceremony.

7. This Agreement shall be construed and shall be enforceable in accordance with the laws of this jurisdiction. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, Bride and Bridegroom have entered into this Agreement in the City of _____ State of _____ U.S.A.

Witness:

Name: _____

Address _____

Signature _____

Witness:

Name: _____

Address _____

Signature _____

ACKNOWLEDGMENT

STATE OF _____ COUNTY OF _____ On the day of _____ 20 _____ before me personally came _____ who resides at _____ to me known to be the individual described in and who executed the foregoing instruments, and acknowledge that he executed the same.

NOTARY PUBLIC

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- The court suggests that a host of other headaches will result such as those involving workmen's compensation, inheritance, support, etc. ("In the event of death, shall the survivor have the status of a surviving spouse for purposes of inheritance, wrongful death actions, workmen's compensation, etc.? And still more importantly: what of the children born of such relationships? What are their support and inheritance rights and by what standards are custody questions resolved?")
- This kind of relationship should not be terminable at will.
- Let the legislature do it. ("[W]e believe that these questions are appropriately within the province of the legislature, and that, if there is to be a change in the law of this State on this matter, it is for the legislature and not the courts to bring about that change.")

Why did the Watts court rule that they can be legal?

- Sex *can* be separated out; here, there is consideration separate from sex. ("Courts distinguish, however, between contracts that are explicitly and inseparably founded on sexual services and those that are not.") ("In this case, the plaintiff has alleged many facts independent from the parties' physical relationship which, if proven, would establish an express contract or an implied in fact contract that the parties agreed to share the property accumulated during the relationship. The plaintiff has alleged that she quit her job and abandoned her career training upon the defendant's promise to take care of her. A change in one party's circumstances in performance of the agreement may imply an agreement between the parties. . . . In addition, the plaintiff alleges that she performed housekeeping, childbearing, childrearing, and other services related to the maintenance of the parties' home, in addition to various services for the defendant's business and her own business, for which she received no compensation. Courts have recognized that money, property, or services (including housekeeping or childrearing) may constitute adequate consideration independent of the parties' sexual relationship to support an agreement to share or transfer property.") ("[T]he parties cohabited for more than twelve years, held joint bank accounts, made joint purchases, filed joint income tax returns, and were listed as husband and wife on other legal documents. Courts have held that such a relationship and 'joint acts of a financial nature can give rise to an inference that the parties intended to share equally.' The joint ownership of property and the filing of joint income tax returns strongly implies that the parties intended their relationship to be in the nature of a joint enterprise, financially as well as personally.")
 - There should be freedom of contract. ("Wisconsin courts have long recognized the importance of freedom of contract and have endeavored to protect the right to contract.")
 - There is no need to wait for the legislature to pass laws on the legality of these kinds of living arrangements.
 - The court disagrees that it would go against specific statutes of legislature.
 - There would be an unfairness if we did not recognize this relationship. ("While not condoning the illicit sexual relationship of the parties, many courts have recognized that the result of a court's refusal to enforce contract and property rights between unmarried cohabitants is that one party keeps all or most of the assets accumulated during the relationship, while the other party, no more or less 'guilty,' is deprived of property which he or she has helped to accumulate.")
 - A harsh, per se rule that the contract and property rights of unmarried cohabiting parties will not be recognized might actually encourage a partner with greater income potential to avoid marriage in order to retain all accumulated assets, leaving the other party with nothing.
 - Enforcing an express or implied in fact contract between these parties would not violate the Wisconsin Family Code. The Wisconsin legislature did not intend the Family Code to restrict a court's resolution of property or contract disputes between unmarried cohabitants.
- b. There should be a good opportunity for class debate on this question.
- c. No. There was no marriage. Claiming a forced share is clearly limited to widows and widowers. Sue Watts would be considered a stranger under the laws of intestacy. But the logic and reasoning of *Watts* would suggest that she *should* be given a share of his intestate estate. Would she, however, need a forced share? Presumably she could bring the same action she brought in the *Watts v. Watts* litigation if James was no longer alive. Nothing in the *Watts v. Watts* opinion suggests that the remedies it provided for unmarried cohabitants would not be available after one of the cohabitants died.

M. Assignment 4.8 (draft a cohabitation agreement)

- a. As with Assignment 4.6(b), you may want to go over an agreement line by line in class.
- b. It is not illegal to be gay, although it is illegal in some states to engage in acts of homosexuality. Clearly two gay people can enter nonsexual contracts, e.g., a contract to paint a house, a contract to buy a car. The contract between Tom and George makes no express mention of sex.

There might be a damages problem here. If the contract is enforced, how are damages calculated? How long does the support last? Three years? What if George needs more than three years? What does support mean? All expenses including school expenses such as law school tuition? Does George receive the damages (once calculated) in a lump sum? Or, must the figure be reduced to present value? (See the discussion of pension valuation in chapter 8.)

N. Ethics in Practice

Paul Smith, Esq. is representing both sides in the drafting of the agreement. This is a conflict of interest in most states. One of the purposes of the cohabitation agreement is for each side to have protection—from each other—in the event that the relationship ends. How can Smith vigorously provide this protection for Alice and Fred?