

PREMARITAL AGREEMENTS AND COHABITATION AGREEMENTS

CHAPTER OUTLINE

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KINDS OF AGREEMENTS

We need to distinguish the different kinds of agreements that can be entered by adult parties who are living together in an intimate relationship or who are about to enter or exit such a relationship. The categories of agreements are summarized in Exhibit 2.1. Our main concerns in this chapter are the premarital agreement and the cohabitation agreement. We will consider the others later in the book.

PREMARITAL AGREEMENTS

A *premarital agreement* is a contract between prospective spouses made in contemplation of marriage and to be effective upon marriage. More specifically, it is a contract made by two individuals who are about to be married that covers spousal support, property division, and related matters in the event of the separation of the parties, the death of one of them, or the dissolution of the marriage by divorce or annulment. Of course, the marriage itself is a contract. A premarital agreement, in effect, is a supplemental contract that helps define some of the terms of the marriage contract.

Why, you might ask, would two individuals about to enter the blissful state of marriage discuss such matters as “who gets what” if they ever divorce? The kinds of people who tend to make premarital agreements:

- are older
- have substantial property of their own
- have an interest in a family-run business
- have children and perhaps grandchildren from prior marriages

Exhibit 2.1 Kinds of Agreements		
Kind	Definition	Example
Cohabitation Agreement	A contract made by two individuals who intend to stay unmarried indefinitely that covers financial and related matters while living together, upon separation, or upon the death of one of them.	Ed and Claire meet at a bank where they work. After dating several years, they decide to live together. Although they give birth to a child, they do not want to be married. They enter an agreement that specifies what property is separately owned and how they will divide property purchased with joint funds in the event of a separation.
Premarital Agreement (also called prenuptial agreement (a “prenup”) or antenuptial agreement)	A contract made by two individuals who are about to be married that covers spousal support, property division, and related matters in the event of the separation of the parties, the death of one of them, or the dissolution of the marriage by divorce or annulment.	Jim and Mary want to marry. Each has a child from a prior marriage. Before the wedding, they enter an agreement that specifies the property each brings to the marriage as separate property. The agreement states that neither will have any rights in this property; it will go to the children from their prior marriages. In addition, the agreement states that all income earned by a party during the marriage shall be the separate property of that party rather than marital or community property.
Postnuptial Agreement (“postnup”; also called a midmarriage or midnuptial agreement)	A contract made by two individuals while they are married that covers financial and related matters. The parties may have no intention of separating. If they have this intention, the agreement is called a separation agreement.	While happily married, George and Helen enter an agreement whereby George lends Helen \$5,000 at 5% interest. She is to make monthly payments of \$300. (To make this loan, George uses money he recently inherited from his mother.)
Separation Agreement	A contract made by two married individuals who have separated or are about to separate that covers support, custody, property division, and other terms of their separation.	Sam and Jessica have separated. In anticipation of their divorce, they enter an agreement that specifies how their marital property will be divided, who will have custody of their children, and what their support obligations will be. Later they will ask the divorce court to approve this agreement.

Such individuals may want to make clear that the new spouse is not to have any claim on designated property, or that the children of the former marriage have first claim to property acquired before the second marriage.

Another large category of couples favoring premarital agreements are young professionals, particularly those in their early thirties, with separate careers, who may have lived together before marriage. Although the women’s movement of the 1980s and 1990s did not crusade in favor of premarital agreements, the “protect yourself” message of this movement certainly helped increase the popularity of premarital agreements among brides-to-be. Finally, the skyrocketing divorce rate has made more and more couples aware of the need for preplanning for the possible crisis of separation and dissolution. One preplanning tool that is available is the premarital agreement.

Parties cannot, however, completely reshape the nature of their marital status through a contract. Although premarital agreements are favored by the courts, there are limitations and requirements we need to explore.

Valid Contract

States differ on the requirements for a valid premarital agreement. (For a general overview of the elements of a contract, see the beginning of chapter 3.) In most states the agreement must be in writing. The parties must have legal capacity to enter a binding contract and must sign voluntarily. Fraud or duress will invalidate the agreement. An additional requirement in a few states is that the contract be notarized. The **consideration** for the agreement is the mutual promise of the parties to enter the marriage. To avoid litigation over the niceties

consideration

Something of value that is exchanged between the parties.



"It's a prenuptial agreement, silly! I'm asking you to *marry* me!"

Source: Mark Hannabury, 90 Case and Comment 34 (Mar-Apr. 1985). Reprinted with permission.

of the law of consideration, however, many states provide that such an agreement is enforceable without consideration.

Disclosure of Assets

One of the main objectives of a premarital agreement is to take away rights that spouses would otherwise have in each other's assets. This is done by a **waiver** of such rights. For a waiver to make sense, you must have knowledge of the other person's assets and debts. This raises a number of questions:

- Do the parties have a duty to make a disclosure of their assets and debts to each other before signing the premarital agreement?
- If so, how detailed must this disclosure be?
- Can the parties waive their right to have this disclosure?

Most states require disclosure, but allow parties to waive their right to receive it. Of course, a party is not entitled to disclosure if he or she already has knowledge of the other party's wealth or net worth. When disclosure is required, states differ on how much disclosure is necessary. Some insist on a full and frank disclosure. In other states, it is enough to provide a general picture of one's financial worth. Careful attorneys will always try to provide maximum disclosure, so as to rebut any later claim by a spouse that he or she did not know the scope of the other spouse's wealth when the premarital agreement was signed. Furthermore, such attorneys will make sure the assets that are disclosed are not undervalued. Often the agreement includes a clause that says full disclosure has been made. This clause, however, is not always controlling, particularly if it can be shown that the party was tricked or forced into signing the entire agreement.

Fairness and Unconscionability

A few states require the agreement to be fair to both parties. There was a time when society viewed women as vulnerable and in need of special protection.

waiver

Giving up a right or privilege by explicitly rejecting it or by failing to take appropriate steps to claim it at the proper time.

There was almost a presumption that a woman's prospective husband would try to take advantage of her through the premarital agreement. Courts that took this view of the status of women tended to scrutinize such agreements to make sure they were fair to the prospective bride.

The women's movement has helped change this perspective. There is a greater degree of equality between the sexes. Consequently, if a woman makes a bad bargain in a premarital agreement, most courts are inclined to force her to live with it so long as:

- there was adequate disclosure of the identity and value of the other's assets and debts
- there was no fraud or duress
- there was an opportunity to seek advice from independent counsel or financial advisers
- there is no danger of her becoming a public charge and going on welfare because of how little the premarital agreement provided

Of course, the same is true of males of modest means who later regret signing premarital agreements with relatively wealthy women.

Cautious attorneys advise their clients to give their prospective spouses sufficient time to study and think about the premarital agreement before signing. Waiting until the morning of the wedding to bring up the subject of a premarital agreement is not wise, particularly if the parties have substantially different education and business backgrounds. The more immature a person is in age and in worldly matters, the more time he or she needs to consider the agreement and to consult with independent experts or friends who are able to explain (1) the present and future financial worth of his or her prospective spouse and (2) what the premarital agreement is asking him or her to waive.

What if the agreement is substantially unfair to one of the parties, such as by granting him or her few property rights and no support from the other in the event of a separation or divorce? Shockingly unfair agreements are considered **unconscionable**. Will a court enforce an unconscionable premarital agreement? The answer may depend, in part, on whether there was adequate disclosure prior to signing.

Almost half of the states have adopted the Uniform Premarital Agreement Act. Under § 6 of that act, there are two major reasons a court will refuse to enforce a premarital agreement. First, the agreement was not entered voluntarily. Second, the agreement is unconscionable *and* there was inadequate disclosure of assets. Hence, in these states, the court *will* enforce an unconscionable agreement if it was voluntarily entered with adequate disclosure.

Yet there are limits. Most courts do not want to see spouses become destitute as a result of what they voluntarily gave up in a premarital agreement. Furthermore, even if an agreement was fair at the time it was entered, circumstances may have changed since that date so that it is no longer fair.

Norm and Irene enter a premarital agreement in which they waive all rights they have in each other's separate property. In the event of a divorce, the agreement provides that Norm will pay Irene support of \$500 a month for two years. A year before the parties divorce, Irene is diagnosed with cancer. She will need substantially more than \$500 a month for support. Norm has resources to pay her more than what the premarital agreement provides. If he does not do so, Irene will need public assistance.

To avoid this unconscionable result, some courts will be inclined to disregard the spousal support clause in the premarital agreement and order Norm to pay Irene additional support. The enforceability of this part of the agreement will be judged as of the date of the separation or divorce, not the date the agreement was signed.

unconscionable

Shocking to the conscience; substantially unfair.

When individuals have a **confidential relationship**, they owe each other a duty of full disclosure and fair dealing. (This duty is sometimes referred to as a **fiduciary** duty.) They cannot take advantage of each other. Examples of individuals who have a confidential relationship include attorney and client, banker and depositor, and husband and wife. What about individuals engaged to be married—prospective spouses—who are preparing a premarital agreement? Some states say that they also have a confidential relationship. Courts in such states tend to scrutinize premarital agreements carefully and to invalidate provisions that are unfair to one of the parties. Indeed, if one side receives an advantage in the agreement, a presumption may arise that the advantage was obtained by undue influence. Most states, however, say that there is no confidential relationship between individuals about to be married. The duty of disclosure still exists in such states, but not at the level that would be required if they had a confidential relationship.

confidential relationship

A relationship of trust in which one person has a duty to act for the benefit of another.

fiduciary

Pertaining to the high standard of care that must be exercised on behalf of another.

- a. Jim and Mary are about to be married. Mary is a wealthy actress. Jim is a struggling artist. Both agree that it would be a good idea to have a premarital agreement. Mary suggests that Jim make an appointment to visit her tax preparer, whom Mary will instruct to give Jim a complete understanding of her assets. Laughing, Jim replies, "Not necessary. I'm insulted at the suggestion, my love." A year after the marriage, the parties divorce. Mary seeks to apply the premarital agreement, which provides that Jim is not entitled to support nor to any of Mary's property in the event of a divorce. Jim argues that the agreement is unenforceable. Discuss whether he is correct.
- b. Do women have enough equality in today's society that they should be forced to live with agreements that, in hindsight, they should not have made? Is it more demeaning to a woman to rescue her from a bad agreement or to force her to live in drastically poorer economic circumstances because of the premarital agreement she signed?

ASSIGNMENT 2.1

Public Policy

Care must be taken to avoid provisions in a premarital agreement that are illegal because they are against **public policy**. For example, the parties cannot agree in advance that neither will ever make a claim on the other for the support of any children they might have together. The livelihood of children cannot be contracted away by such a clause. So, too, it would be improper to agree never to bring a future divorce action or other suit against the other side. It is against public policy to discourage the use of the courts in this way, as legitimate grievances might go unheard.

Very often the premarital agreement will specify alimony and other property rights in the event of a divorce. Many courts once considered such provisions to be against public policy because they *facilitate* (or encourage) *divorce*. The theory is that a party will be more inclined to seek a divorce if he or she knows what funds or other property will be available upon divorce, particularly, of course, if the financial terms upon divorce are favorable. Most courts, however, are moving away from this position. Divorces are no longer difficult to obtain in view of the coming of no-fault divorce laws. There is less pressure from society to keep marriages together at all costs. A spouse who wants a divorce can obtain one with relative ease and probably does not need the inducement of a favorable premarital agreement to end the marriage. Hence, most (but by no means all) courts uphold provisions in premarital agreements that provide a designated amount of alimony or, indeed, that provide no alimony in the event of a divorce.

public policy

The principles inherent in the customs, morals, and notions of justice that prevail in a state; the foundation of public laws; the principles that are naturally and inherently right and just.

As indicated, however, this approach is not taken in all states. Some courts refuse to enforce *any* premarital agreement that tries to define rights in the event of a divorce. They will enforce only non-divorce clauses such as one covering the disposition of property upon death. Other courts distinguish between an alimony-support clause and a property-division clause in a premarital agreement. When the parties eventually divorce and one of them tries to enforce the premarital agreement, such courts are more likely to enforce the property-division clause than the alimony-support clause.

Death clauses in premarital agreements are less controversial. Parties often agree to give up the rights they may have (e.g., dower, see chapter 6) in the estate of their deceased spouse. If the premarital agreement is not otherwise invalid, such terms are usually upheld by the courts.

Some premarital agreements try to regulate very specific and sensitive aspects of the marriage relationship. For example, there might be a clause on which household chores the husband is expected to perform or how frequently the parties will engage in sexual intercourse. Although such clauses are not illegal, their practical effect is questionable, as it is unlikely that a court would become involved in enforcing terms of this nature.

The Uniform Premarital Agreement Act has a very liberal view of what the parties can cover in a premarital agreement. Section 3 of the act provides as follows:

- (a) Parties to a premarital agreement may contract with respect to:
 - (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
 - (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
 - (3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
 - (4) the modification or elimination of spousal support;
 - (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
 - (6) the ownership rights in and disposition of the death benefit from a life insurance policy;
 - (7) the choice of law governing the construction of the agreement; and
 - (8) any other matter, including their personal rights and obligations, not in violation of public policy of a statute imposing a criminal penalty.
- (b) The right of a child to support may not be adversely affected by a premarital agreement.

Interviewing and Investigation Checklist

Factors Relevant to the Validity of the Premarital Agreement

(C = client; D = defendant/spouse)

Legal Interviewing Questions

- | | |
|--|--|
| <ol style="list-style-type: none"> 1. On what date did you begin discussing the premarital agreement? 2. Whose idea was it to have an agreement? 3. On what date did you first see the agreement? 4. Who actually wrote the agreement? 5. Did you read the agreement? If so, how carefully? 6. Did you understand everything in the agreement? | <ol style="list-style-type: none"> 7. Describe in detail what you thought was in the agreement. 8. Did you sign the agreement? If so, why? 9. Were any changes made in the agreement? If so, describe the circumstances, the nature of each change, who proposed it, etc. 10. Do you recall anything said during the discussions on the agreement that was different from what was eventually written down? 11. Was anyone present at the time you discussed or signed the agreement? |
|--|--|

continued

12. Where is the agreement kept? Were you given a copy at the time you signed?
13. Before you signed the agreement, did you consult with anyone, e.g., attorney, accountant, relative?
14. If you did consult with anyone, describe that person's relationship, if any, with D.
15. What were you told by the individuals with whom you consulted? Did they think it was wise for you to sign the agreement? Why or why not?
16. How old were you when you signed the agreement? How old was D?
17. How much did you know about D's background before you agreed to marry? What generally did you think D's wealth and standard of living were?
18. How did you obtain this knowledge?
19. While you were considering the premarital agreement, describe what you specifically knew about the following: D's bank accounts (savings, checking, trust), insurance policies, home ownership, business property, salary, investments (e.g., stocks, bonds), rental income, royalty income, inheritances (recent or expected), cars, planes, boats, etc. Also, what did you know about D's debts and other liabilities? For each of the above items about which you had knowledge, state how you obtained the knowledge.
20. When did you first learn that D owned (____) at the time you signed the agreement? (Insert items in parentheses that C learned about only after the agreement was signed.)
21. Do you think you were given an honest accounting of all D's assets at the time you signed? Why or why not?
22. Do you think the agreement you signed was fair to you and to the children you and D eventually had? Why or why not?

Possible Investigation Tasks

- Obtain copies of the premarital agreement and of drafts of the agreement, if any, reflecting changes.
- Contact and interview anyone who has knowledge of or was present during the discussions and/or signing of the agreement.
- Try to obtain bank records, tax records, etc., that would give some indication of the wealth and standard of living of D and of C at the time they signed the premarital agreement.
- Prepare an inventory of every asset that C *thought* D owned at the time the agreement was signed, and an inventory of every asset your investigation has revealed D *in fact* owned at the time of the signing.

Independent Counsel

In most states, there is no requirement that either party have independent counsel advising him or her on the meaning of the proposed premarital agreement and on the advisability of negotiating for specific terms. The lack of independent counsel, however, is sometimes offered as evidence that the more vulnerable party was the victim of deception and coercion in entering the agreement. Hence an attorney representing a wealthy client almost always advises his or her client not to enter a premarital agreement until the proposed spouse has had the benefit of consultation with independent counsel—even if the wealthy client must pay for such counsel.

Drafting Guidelines

At the end of this section on premarital agreements, you will find a series of sample clauses for such agreements. See also the drafting guidelines in the following checklist.

Premarital Agreements: A Checklist of Drafting Guidelines

Ensuring the Enforceability of a Premarital Agreement

(*FH* = *future husband*; *FW* = *future wife*)

Although all the steps listed in this checklist may not be required in your state, they will help ensure the enforceability of the agreement. This checklist assumes that the attorney drafting the agreement repre-

sents the prospective husband, who is going to enter the marriage with considerably more wealth than the prospective wife.

Preparation

- Research the requirements for premarital agreements in the state (e.g., whether they must be subscribed, acknowledged, notarized, or recorded).

continued

Premarital Agreements: A Checklist of Drafting Guidelines—Continued

- Weeks (and, if possible, months) before the marriage, notify the FW when the agreement will be prepared and that she should obtain independent counsel.
- The greater the disparity in the age, wealth, education, and business experience of the FH and FW, the more time the FW should be given to study the agreement.
- Make sure the FW is old enough to have the legal capacity to enter a valid contract in the state.
- Determine whether the FW has ever been treated for mental illness. If she has, determine whether a current mental health evaluation is feasible to assess FW's present capacity to understand the agreement.
- Prepare a list of all currently owned assets of each party with the exact or approximate market value of each asset. (Include real property, jewelry, household furnishings, stocks, bonds, other securities, and cash.) This list should be referred to in the agreement, shown to the FW and to her independent counsel, and attached to the agreement.
- Prepare a list of all known future assets that each party expects to acquire during the marriage, with the exact or approximate market value of each asset. (Include future employment contracts, options, and anticipated purchases.) This list should be referred to in the agreement, shown to the FW and to her independent counsel, and attached to the agreement.
- Hire an accountant to prepare a financial statement of the FH detailing assets and liabilities. This statement should be referred to in the agreement, shown to the FW and to her independent counsel, and attached to the agreement.
- Obtain copies of recent personal tax returns, business tax returns, existing contracts of employment, deeds, purchase agreements, credit card bills, pension statements, and brokerage reports. These documents should be made available to the FW and to her independent counsel.
- Verify the accuracy of the names, addresses, and relationships of every individual to be mentioned in the agreement.

Participants and Their Roles

- The FH's attorney, financial advisor, and other experts who have any communication with the FW should make clear to the FW that they represent the FH only and should not be relied on to protect the interests of the FW.
- If needed, suggestions should be made to the FW about where she can find independent counsel and other experts who have never had any business or social dealings with the FH.
- If needed, funds should be made available to the FW to hire independent counsel or other experts.
- If no independent counsel of the FW is used, representatives of the FH will explain the terms of the agreement to the FW. When doing so, they should again remind the FW that their sole role is to protect the best interests of the FH.
- If English is the second language of the FW, arrange for a translator to be present. Encourage the FW to select this translator.
- There should be at least two witnesses present who will witness the execution of the agreement. (Paralegals are sometimes asked to act as witnesses to such documents.)

Content of the Agreement

- State the reasons the parties are entering the agreement.
- For each party, include a separate list of the names, addresses, and titles, if any, of every individual who helped the party prepare and understand the agreement.
- State whether the assets of the FH and of the FW that are now separate property will remain separate.
- State whether the appreciation of separate property will constitute separate property.
- List FH's existing children, other relatives, or friends and specify what assets they will be given to the exclusion of FW.
- List FW's existing children, other relatives, or friends and specify what assets they will be given to the exclusion of FH.
- List the documents that were shown to, read by, and understood by FW (e.g., lists of the assets, copies of tax returns, and financial statements). State which of these documents are attached to the agreement.
- Briefly summarize the major property and support rights that FW and FH would have upon dissolution of a marriage or upon the death of either *in the absence of a premarital agreement* (e.g., the right to an equitable share in all marital property, the right to alimony, and the right to elect against the will of a deceased spouse). Then include a statement that the parties understand that by signing the premarital agreement, they are waiving these rights.
- State whether there is a business or property that FH will have the right to manage and dispose of without the consent or participation of FW.

continued

- State whether FW will own and be entitled to the death benefits of specific life insurance policies.
- Indicate which state's law will govern the interpretation and enforcement of the agreement.
- State whether arbitration will be used if FW and FH have disagreements over the agreement and whether the arbitrator's findings can be appealed.
- State the method FH and FW will use to modify or terminate the agreement during the marriage.
- Do not ask for a waiver of disclosure of assets.
- Do not ask for a waiver of mutual support during the marriage.
- Do not ask for a waiver of child support.
- Do not ask for a waiver of the right to seek custody or visitation.
- Do not provide that substantial property will be transferred to FW in the event the marriage is dissolved.
- Do not specify a date on which the prospective marriage will be dissolved.
- If the parties are of child-bearing age, do not state that either or both will not have children.
- State that each party will keep the contents of the agreement confidential.

Signing the Agreement

- Videotape the session, particularly while FW is explaining why she is signing; whom she relied upon in accepting the terms of the agreement; her understanding of FH's present and future assets; her understanding of what she is waiving in the agreement; and, if she does not have independent counsel, why she chose not to have such counsel.
- FH and FW should sign every page of the agreement.
- The signatures should be notarized.
- Any changes to the agreement should be dated and signed by the parties in the margin next to the change.

Pretend you are about to be married. Draft a premarital agreement for you and your future spouse. You can assume anything you want (within reason) about the financial affairs and interests of your spouse-to-be and yourself. Number each clause of the agreement separately and consecutively. Try to anticipate as many difficulties as possible that could arise during the marriage and state in the agreement how you want them resolved.

ASSIGNMENT 2.2

CLAUSES IN PREMARITAL AGREEMENTS

Here are some sample clauses used in three premarital agreements. For terms you do not understand in the clauses, consult the glossary at the end of the book.

SAMPLE PREMARITAL AGREEMENT CLAUSES

I Release of Husband's Interest in Wife's Estate and Limiting Wife's Interest in Husband's Estate

Whereas, _____, of _____, herein called the Husband, and _____, of _____, herein called the Wife, contemplate entering into marriage relations; and whereas, the Husband has a large estate and has children by a former marriage; and whereas, the Wife is possessed of property in her own right and has a child by a former marriage; and whereas, the said parties desire to prescribe, limit, and determine the interest and control which each of them may have in the estate of the other party; therefore the following agreement is entered into:

Know all men by these presents: That we, _____ and _____, being about to enter into the marriage relations, do hereby agree:

continued

SAMPLE PREMARITAL AGREEMENT CLAUSES—CONTINUED

Husband Releases His Rights in Wife's Estate

1. In the event of the death of the Wife during the continuance of said marriage relations, the Husband surviving her, then the Husband shall receive from the estate of the Wife the sum of five dollars; such sum when paid by the executors or administrators of the estate of the Wife to be in full for all claims and demands of every kind and character which the Husband shall have against the estate of the wife.

Wife Limits Her Rights in Husband's Estate

2. In the event of the death of the Husband during the said marriage relations, the Wife agrees that her claim upon the estate of the Husband shall be limited to \$____, and a payment by the executors or the administrators of the estate of the Husband to the Wife, her heirs or legal representatives, of the sum of \$____ shall be in full for all claims and demands of every kind and character which the Wife shall have against the estate of the Husband.

During Marriage Each to Have Full Control of Own Property

3. During the continuance of said marriage relations, each of the parties is to have full right to own, control, and dispose of his or her separate property the same as if the marriage relations did not exist, and each of the parties is to have full right to dispose of and sell any and all real or personal property now or hereafter owned by each of them without the other party joining, and said transfer by either of the parties to this contract shall convey the same title that said transfer would convey had the marriage relations not existed. This contract limits the right of either party to participate in the estate of the other, whether the marriage relation is terminated by death or legal proceedings.

Purpose of Contract to Limit Rights

4. The purpose of this agreement is to define and limit the claims and demands which each of the parties shall have against the estate of the other. Should either party die during the pendency of this contract, or should the contract be terminated by legal proceedings, the claims herein stipulated and defined shall be the limit which either party may have against the other party or his or her estate.

Contract Made with Full Knowledge

5. This agreement is entered into with full knowledge that each of the parties has a separate estate, and no claim or demand can be predicated upon the fact that there has been any misrepresentation or concealment as to the amount and condition of said separate estate, it being expressly agreed that each of the parties considers the amount hereinabove fixed to be sufficient participation in the estate of the other, and it being expressly stated that each of the parties has sufficient general knowledge of the condition of the estate of the other to justify making and entering into this agreement.

In Witness Whereof, etc.

• *The token payment of five dollars is the equivalent of the husband's agreement to renounce any claim to his wife's estate. This small amount is inserted so that no one can later claim that the parties forgot to provide for the husband's claim against his wife's estate.*

• *Here the parties are waiving the right to detailed disclosure of each other's assets. They declare "general knowledge" to be sufficient.*

**II
Each Relinquishing Interest in Other's Property**

Agreement made the ____ day of ____, 20 ____, between Ed Gray, of ____, and Grace Kay, of ____.
Whereas, the parties contemplate entering into the marriage relation with each other, and both are severally possessed of real and personal property in his and her own right, and each have children by former marriages, all of said children being of age and possessed of means of support independent of their parents, and it is desired by the parties that their marriage shall not in any way change their legal right, or that of their children and heirs, in the property of each of them.

Therefore it is agreed:

Home

1. Ed Gray agrees that he will provide during the continuance of the marriage a home for Grace Kay, and that the two children of Grace Kay may reside in such home with their mother so long as said children remain unmarried.

Husband Releases Rights in Wife's Property

2. Ed Gray agrees, in case he survives Grace Kay, that he will make no claim to any part of her estate as surviving husband; that in consideration of said marriage, he waives and relinquishes all right of curtesy or other right in and to the property, real or personal, which Grace Kay now owns or may hereafter acquire.

Wife Releases Rights in Husband's Property

3. Grace Kay agrees, in case she survives Ed Gray, that she will make no claim to any part of his estate as surviving wife; that in consideration of said marriage she waives and relinquishes all claims to dower, homestead, widow's award, or other right in and to the property, real or personal, which Ed Gray now owns or may hereafter acquire.

• *The agreement makes specific provision for children of a prior marriage.*

continued

Intent That Marriage Shall Not Affect Property

4. It is declared that by virtue of said marriage neither one shall have or acquire any right, title, or claim in and to the real or personal estate of the other, but that the estate of each shall descend to his or her heirs at law, legatees, or devisees, as may be prescribed by his or her last will and testament or by the law of the state in force, as though no marriage had taken place between them.

Agreement to Join in Conveyances

5. It is agreed that in case either of the parties desires to mortgage, sell or convey his or her real or personal estate, each one will join in the deed of conveyance or mortgage, as may be necessary to make the same effectual.

Full Disclosure between the Parties

6. It is further agreed that this agreement is entered into with a full knowledge on the part of each party as to the extent and probable value of the estate of the other and of all the rights conferred by law upon each in the estate of the other by virtue of said proposed marriage, but it is their desire that their respective rights to each other's estate shall be fixed by this agreement, which shall be binding upon their respective heirs and legal representatives.

In Witness Whereof, etc.

III Pooling of Property

This agreement made this the ____ day of ____, 20____, between ____, of ____, and ____, of ____.
Whereas, the parties are contemplating marriage and establishing a home together; and
Whereas, the parties upon their marriage desire to pool their resources for the benefit of each other; and
Whereas, this agreement is made in order to avoid any future conflict as to their rights and interests in said property.

Now, therefore, the parties agree as follows:

1. The parties shall enter into the marriage relation and live together as husband and wife.
2. On or before the date of marriage, all property belonging to the parties, including bonds, bank accounts and realty, shall be reissued, redeposited and deeds drawn so that each party shall be the joint owner, with right of survivorship, of all of the property at present owned and held by the parties individually.
3. Each party obligates himself or herself to purchase and hold all property, present and future, jointly with the other party and agrees to execute any instrument necessary to convey, sell, or encumber any property, real or personal, when it is to the best interest of both parties that same be conveyed, sold, or encumbered.
4. At the death of either party the property belonging to both shall become the absolute property of the other, free from claims of all other persons. To make effective this section of the agreement a joint will of the parties is made and is placed in their safe deposit box in the ____ Bank in the City of ____, ____.
5. Should either party file a divorce against the other, then the party so filing shall by such filing forfeit to the other all right, title, and interest in all the property, real, personal or mixed, jointly held and owned by them.
6. The parties agree that the original of this instrument shall be deposited in escrow with ____ to be held by him.
7. This agreement cannot be revoked except by written consent of both parties and the holder in escrow shall not deliver the original to anyone except a court of competent jurisdiction or to the parties to this instrument upon their mutual demand for the surrender thereof.
8. This agreement is made in triplicate with each party hereto retaining a copy thereof, but the copy shall not be used in evidence or serve any legal purpose whatsoever if the original is available.

In Witness Whereof, etc.

- *The parties are agreeing that the separate property they are bringing into the marriage shall be converted into marital property.*
- *The parties are agreeing to the preparation of a joint will.*

Source: B. Stone, *Modern Legal Forms* § 4.1ff., p. 274ff. (rev. 2d ed., West Group, 1995). Reprinted with permission of West Group.

COHABITATION AGREEMENTS

Compare the following two situations:

Jim hires Mary as a maid in his house. She receives weekly compensation plus room and board. For a three-month period Jim fails to pay Mary's wages, even though she faithfully performs all of her duties. During this period, Jim seduces Mary. Mary sues Jim for breach of contract due to nonpayment of wages.

Bob is a prostitute. Linda hires Bob for an evening but refuses to pay him his fee the next morning. Bob sues Linda for breach of contract due to nonpayment of the fee.

The result in the second situation is clear. Bob cannot sue Linda for breach of contract. A contract for sex is not enforceable in court. Linda promised to pay money for sex. Bob promised and provided sexual services. This was the consideration he gave in the bargain. But sex for hire is illegal in most states. (At one time, **fornication** and **adultery** were crimes in many states even if no payment was involved.) Bob's consideration was **meretricious** sexual services and, as such, cannot be the basis of a valid contract.

The result in the first situation above should also be clear. Mary has a valid claim for breach of contract. Her agreement to have a sexual relationship with Jim is incidental and, therefore, irrelevant to her right to collect compensation due her as a maid. She did not sell sexual services to Jim. There is no indication in the facts that the parties bargained for sexual services or that she engaged in sex in exchange for anything from Jim (e.g., continued employment, a raise in pay, lighter work duties). Their sexual involvement with each other is a **severable** part of their relationship and should not affect her main claim. Something is severable when what remains after it is removed can survive without it. (The opposite of severable is *essential* or *indispensable*.)

Now we come to a more difficult case:

Dan and Helen meet in college. They soon start living together. They move into an apartment, pool their resources, have children, etc. Twenty years after they entered this relationship, they decide to separate. Helen now sues Dan for a share of the property acquired during the time they lived together. At no time did they ever marry.

The fact that Dan and Helen never married does not affect their obligation to support their children, as we shall see in chapter 8. But what about Dan and Helen themselves? They **cohabited** and never married. They built a relationship, acquired property together, and helped each other over a long period of time. Do they have any support or property rights in each other now that they have separated?

This is not an academic question. The Bureau of the Census counts **unmarried partner** households. An unmarried partner is a person who shares living quarters with the householder and has a close personal relationship with (but is not related to) the householder. In 2000, there were 5,475,768 unmarried partner households in the country:

- male householder and female partner: 2,615,119
- male householder and male partner: 301,026
- female householder and male partner: 2,266,258
- female householder and female partner: 293,365

For years, the law has denied any rights to an unmarried person who makes financial claims based upon a period of cohabitation. The main reasons for this denial are as follows:

- To grant financial or property rights to unmarried persons would treat them as if they were married. Our laws favor the institution of marriage. To recognize unmarried relationships would denigrate marriage and discourage people from entering it.
- Most states have abolished common law marriage, as we will see in chapter 3. To allow substantial financial rights to be awarded upon the termination of an unmarried relationship would be the equivalent of giving the relationship the status of a common law marriage.
- Sexual relations are legal and morally acceptable within marriage. If the law recognizes unmarried cohabitation, then illicit sex is being condoned.

fornication

Sexual relations between unmarried persons or between persons who are not married to each other.

adultery

Sexual relations between a married person and someone other than his or her spouse.

meretricious

Pertaining to unlawful sexual relations; vulgar or tawdry.

severable

Removable without destroying what remains.

cohabited

Lived together as husband and wife whether or not they were married. Also defined as setting up the same household in an emotional and sexual relationship whether or not they ever marry. The noun is *cohabitation*.

unmarried partner

A person who shares living quarters with the householder and has a close personal relationship with (but is not related to) the householder.

These arguments are still dominant forces in many states. In 1976, however, a major decision came from California: *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). This case held that parties living together would not be denied a remedy in court upon their separation solely because they never married. Although all states have not followed *Marvin*, the decision has had a major impact in this still-developing area of the law.

The parties in *Marvin* lived together for seven years without marrying.¹ The plaintiff alleged that she entered an oral agreement with the defendant that provided (1) that he would support her, and (2) that while “the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined.” She further alleged that she agreed to give up her career as a singer in order to devote full time to the defendant as a companion, homemaker, housekeeper, and cook. During the seven years that they were together, the defendant accumulated in his name more than \$1 million in property. When they separated, she sued for her share of this property.

The media viewed her case as an alimony action between two unmarried “ex-pals” and dubbed it a **palimony** suit. Palimony, however, is not a legal term. The word *alimony* should not be associated with this kind of case. Alimony is a court-imposed obligation of support that grows out of a failed marital relationship. There was no marital relationship in the *Marvin* case.

One of the first hurdles for the plaintiff in *Marvin* was the problem of “meretricious sexual services.” The defendant argued that even if a contract did exist (which he denied), it was unenforceable because it involved an illicit relationship. The parties were not married but were engaging in sexual relations. The court, however, ruled that

[A] contract is unenforceable only to the extent that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services. . . . The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses.²

The agreement will be invalidated only if sex is an express condition of the relationship. If the sexual aspect of their relationship is severable from their agreements or understandings on earnings, property, and expenses, the agreements or understandings will be enforced. An example of an *unenforceable* agreement would be a promise by a man to provide for a woman in his will in exchange for her agreeing to live with him for the purpose of bearing his children. This agreement is *explicitly* based on a sexual relationship. Thus sex in such a case cannot be separated from the agreement and is *not* severable.

The next problem faced by the plaintiff in *Marvin* was the theory of *recovery*. Married parties have financial rights in each other because of their *marital status*, which gives rise to duties imposed by law. What about unmarried parties? The *Marvin* court suggested several theories of recovery for such individuals:

- Express contract
- Implied contract
- Quasi contract
- Trust
- Partnership
- Joint venture
- Putative spouse doctrine

Before we examine these theories, three points must be emphasized. First, as indicated earlier, not all states agree with the *Marvin* doctrine that there are

¹The parties were Michelle Marvin (formerly Michelle Triola) and Lee Marvin, a famous actor. Although they never married, Michelle changed her last name to Marvin.

²*Marvin v. Marvin*, 557 P.2d at 112, 113.

palimony

A nonlegal term for payments made by one nonmarried party to another after they cease living together, usually because they entered an express or implied contract to do so while they were cohabiting.

circumstances when unmarried cohabiting parties should be given a remedy upon separation. Second, in states that follow *Marvin*, there is disagreement over how many of the items in the preceding list of remedies will be accepted. Some states accept all of them and are even willing to explore others to achieve justice in particular situations. In contrast, there are states in which the only theory that will be accepted is an express contract. Third, all of the theories will be to no avail, even in states that follow *Marvin*, if it can be shown that meretricious sexual services were at the heart of the relationship and cannot be separated (are not severable) from the other aspects of the relationship.

Express Contract

In an express cohabitation agreement or contract, the parties expressly tell each other what is being “bargained” for (e.g., household services in exchange for a one-half interest in a house to be purchased, or companion services [non-sexual] in exchange for support during the time they live together). There must be an offer, acceptance, and consideration. Although this is the cleanest theory of recovery, it is often difficult to prove. Rarely will the parties have the foresight to commit their agreement to writing, and it is equally rare for witnesses to be present when the parties make their express agreement. Ultimately the case will turn on which party the court believes.

Implied Contract

Another remedy is to sue under a theory of **implied contract**, also called an *implied in fact contract*. This kind of contract exists when a reasonable person would conclude that the parties had a tacit understanding that they had a contractual relationship even though its terms were never expressly discussed. Consider the following example:

Someone delivers bottled milk to your door daily, which you never ordered. You consume the milk every day, place the empty bottles at the front door, exchange greetings with the delivery person, never demand that the deliveries stop, etc.

At the end of the month when you receive the bill for the milk, you will not be able to hide behind the fact that you never expressly ordered the milk. Under traditional contract principles, you have entered an “implied contract” to buy the milk, which is as binding as an express contract. Unless the state has enacted special laws to change these principles, you must pay for the milk.

In the case of unmarried individuals living together, we must similarly determine whether an implied contract existed. Was it clear by the conduct of the parties that they were entering an agreement? Was it obvious under the circumstances that they were exchanging something? Did both sides expect “compensation” in some form for what they were doing? If so, an implied contract existed, which can be as enforceable as an express contract.

Quasi Contract

A **quasi contract** is also called an *implied in law contract*. Although called a contract, it is a legal fiction because it does not involve an express agreement and we cannot reasonably infer that the parties had an agreement in mind. The doctrine of quasi contract is simply a device designed by the courts to prevent **unjust enrichment**.³ An example might be a doctor who provides med-

implied contract

A contract that is not created by an express agreement between the parties but is inferred as a matter of reason and justice from their conduct and the surrounding circumstances.

quasi contract

A contract created by law to avoid unjust enrichment.

unjust enrichment

Receiving property or benefit from another when in fairness and equity the recipient should make restitution of the property or provide compensation for the benefit, even though there was no express or implied promise to do so.

³In a suit that asserts the existence of a quasi contract, the amount of recovery awarded a victorious plaintiff is measured by what is called *quantum meruit*, which means “as much as he deserves.”

ical care to an unconscious motorist on the road. The doctor can recover the reasonable cost of medical services under a quasi contract theory even though the motorist never expressly or impliedly asked for such services. Another example might be a man who arranges for a foreign woman to come to this country to live in his home and provide domestic services. Assume there was no express or implied understanding between them that she would be paid. If what she provided was not meretricious, the law might obligate him to pay the reasonable value of her services, less the value of any support she received from him during the time they were together. The court's objective would be to avoid unjust enrichment. A court might reach a similar result when unmarried cohabitants separate.

Trust

A **trust** is another option to consider. At times, the law will hold that a trust is implied. Assume that Tim and Sandra, an unmarried couple, decide to buy a house. They use the funds in a joint account to which both contribute equally. The deed to the house is taken in Tim's name so that he has legal title. On such facts, a court will impose an implied trust for Sandra's benefit. She will be entitled to a half-interest in the house through the trust. A theory of implied trust might also be possible if Sandra contributed services rather than money toward the purchase of the property. A court would have to decide what her interest in the property should be in light of the nature and value of these services.

Another example of a trust that is imposed by law is called a **constructive trust**. Assume that a party obtains title to property through fraud or an abuse of confidence. The funds used to purchase the property come from the other party. A court will impose a constructive trust on the property if this is necessary to avoid the unjust enrichment of the person who obtained title in this way. This person will be deemed to be holding the property for the benefit of the party defrauded or otherwise taken advantage of.

Partnership

A court might find that an unmarried couple entered the equivalent of a **partnership** and thereby acquired rights and obligations in the property involved in the partnership.

Joint Venture

A **joint venture** is like a partnership, but on a more limited scale. A court might use the joint venture theory to cover some of the common enterprises entered into by two unmarried individuals while living together (e.g., the purchase of a home). Once a joint venture is established, the parties have legally enforceable rights in the fruits of their endeavors.

Putative Spouse Doctrine

In limited circumstances, a party might have the rights of a **putative spouse**. This occurs when the parties attempt to enter a marital relationship, but a legal *impediment* to the formation of the marriage exists (e.g., one of the parties is underage or is married to someone else). If at least one of the parties is ignorant of this impediment, the law will treat the "marriage" as otherwise valid. Upon separation, the innocent party might be entitled to the reasonable value of the services rendered while together, or a share of the property accumulated by their joint efforts.

trust

A legal entity that exists when one person holds property for the benefit of another.

constructive trust

A trust created by operation of law against one who has obtained legal possession of property (or legal rights to property) through fraud, duress, abuse of confidence, or other unconscionable conduct.

partnership

A voluntary contract between two (or more) persons to use their resources in a business or other venture, with the understanding that they will proportionately share losses and profits.

joint venture

An express or implied agreement to participate in a common enterprise in which the parties have a mutual right of control.

putative spouse

A person who reasonably believed he or she entered a valid marriage even though there was a legal impediment that made the marriage unlawful.

ASSIGNMENT 2.3

- a. Helen Smith and Sam Jones live together in your state. They are not married and do not intend to become married. They would like to enter a contract that spells out their rights and responsibilities. Specifically, they want to make clear that the house in which they both live belongs to Helen even though Sam has done extensive remodeling work on it. They each have separate bank accounts and one joint account. They want to make clear that only the funds in the joint account belong to both of them equally. Next year they hope to have or adopt a child. In either event, they want the contract to specify that the child will be given the surname, "Smith-Jones," a combination of their own last names. Draft a contract for them. Include any other clauses you think appropriate (e.g., on making wills, the duration of the contract, on the education and religion of children).
- b. Tom and George are gay. They live together. George agrees to support Tom while the latter completes engineering school, at which time Tom will support George while the latter completes law school. After Tom obtains his engineering degree, he leaves George. George now sues Tom for the amount of money that would have been provided as support while George attended law school. What result?
- c. Richard and Lea have lived together for ten years without being married. This month, they separated. They never entered a formal contract, but Lea says that they had an informal understanding that they would equally divide everything acquired during their relationship together. Lea sues Richard for one-half of all property so acquired. You work for the law firm that represents Lea. Draft a set of interrogatories for Lea that will be sent to Richard in which you seek information that would be relevant to Lea's action.

Interviewing and Investigation Checklist**Factors Relevant to the Property Rights of Unmarried Couples****Legal Interviewing Questions**

1. When and how did the two of you meet?
2. When did you begin living together?
3. Why did the two of you decide to do this? What exactly did you say to each other about your relationship at the time?
4. Did you discuss the living arrangement together? If so, what was said?
5. What was said or implied about the sexual relationship between you? Describe this relationship. Was there ever any express or implied understanding that either of you would provide sex in exchange for other services, for money, or for other property? If sexual relations had not been a part of your relationship, would you have still lived together?
6. What was your understanding about the following matters: rent, house purchase, house payments, furniture payments, food, clothing, medical bills?
7. Did you agree to keep separate or joint bank accounts? Why?
8. What other commitments were made, if any? For example, was there any agreement on providing support, making a will, having children, giving each other property or shares in property? Were any of these commitments put in writing?
9. Did you ever discuss marriage? If so, what was said by both of you on the topic?
10. What did you give up in order to live with him or her? Did he or she understand this? How do you know?
11. What did he or she give up in order to live with you?
12. What other promises were made or implied between you? Why were they made?
13. How did you introduce each other to others?
14. Did you help each other in your businesses? If so, how?
15. What were your roles in the house? How were these roles decided upon? Through agreement? Explain.

continued

16. Did he or she ever pay you for anything you did? Did you ever pay him or her? Explain the circumstances.
17. If no payment was ever made, was payment expected in the future? Explain.
18. Were the two of you “faithful” to each other? Did either of you ever date others? Explain.
19. Did you use each other’s money for any purpose? If so, explain the circumstances. If not, why not?

Possible Investigation Tasks

- Obtain copies of bank statements, deeds for property acquired while the parties were together, loan applications, tax returns, etc.
- Interview persons who knew the parties.
- Contact professional housekeeping companies to determine the going rate for housekeeping services.

SAMPLE COHABITATION AGREEMENT

I Intention of the Parties

____ and ____ declare that they are not married to each other, but they are living together under the same roof, and by this agreement intend to protect and define each other’s rights pertaining to future services rendered, earnings, accumulated property and furnishings and other matters that may be contained herein. It is expressly set forth herein that the consent of either party to cohabit sexually with the other is not a consideration, either in whole or in part, for the making of this agreement. It is further expressly set forth herein that the general purpose of this agreement is that the earnings, accumulations and property of each party herein shall be the separate property of the person who earns or acquires said property, and shall not be deemed community property, joint property, common law property or otherwise giving the non-earning or non-acquiring party an interest in same.

- *The parties want to make clear that their sexual relationship is not the essence of their relationship and of their agreement.*

II Representations to the Public

It is agreed that should either or both of the parties to this agreement represent to the public, in whatever manner, that they are husband and wife, that said representation shall be for social convenience only, and shall in no way imply that sexual services are a consideration for any party of this agreement, nor shall it imply that sexual cohabitation is taking place.

- *If parties hold themselves out to be husband and wife, a court might conclude that they have entered a common law marriage if such marriages are allowed in the state where they live or where they spend significant time. (See chapter 3.) See, however, clause XIII, in which they explicitly disclaim an intent to enter a common law marriage.*

III Property, Earnings, and Accumulations

It is agreed that all property of any nature or in any place, including but not limited to the earnings and income resulting from the personal services, skill, effort, and work of either party to this agreement, whether acquired before or during the term of this agreement, or acquired by either one of them by purchase, gift or inheritance during the said term, shall be the separate property of the respective party, and that neither party shall have any interest in, and both parties hereby waive any right or interest he or she may have in the property of the other.

- *Note that clause IV does not cover business or professional services they render to each other. Such services are covered in clause IX.*

IV Services Rendered

It is agreed that whatever household, homemaking, or other domestic work and services that either party may contribute to the other or to their common domicile shall be voluntary, free, and without compensation, and each party agrees that work of this nature is done without expectation of monetary or other reward from the other party.

V Debts and Obligations

It is agreed that all debts and obligations acquired by either party which is to the benefit of that party shall be the debt or obligation of that party only, and that the other shall not be liable for same. Should one party be forced to pay a debt rightfully belonging to and benefiting the other, the other promises to reimburse, indemnify and hold harmless the one who has paid said debt or obligation.

Those debts and obligations which are to the benefit of both parties, such as utilities, garbage, local telephone service, rent, and renter’s insurance shall be paid in such sums and in such proportion by each party as shall be mutually agreeable.

continued

SAMPLE COHABITATION AGREEMENT—CONTINUED**VI Money Loaned**

All money, with the exception of mortgage or rent payments, transferred by one party to the other, either directly or to an account, obligation, or purchase of the other, shall be deemed a loan to the other, unless otherwise stated in writing. This shall include such things as downpayments on a home or vehicle, and deposits in either party's separate bank account.

VII Rented Premises

It is agreed that should the parties share rented premises, said rented premises shall "belong" to the person who first rented the same, and should the parties separate, the second one shall leave taking only such belongings as he or she owned prior to moving in or purchased while living together.

If the parties both rent the premises from the beginning, then it is agreed that they will have a third person flip a coin to see who "owns" the premises, and the winner will have the option to remain while the loser leaves.

VIII Rent or Mortgage

It is agreed that the parties may split the rent or mortgage payments in whatever proportion they choose, each contributing such sum as is mutually agreeable. It is also agreed that if one party contributes to the mortgage payment of a premises belonging to or being purchased in the name of the other party, that such contribution shall be deemed rent only, and shall be non-refundable and shall not create in the person who is living in the premises owned or being purchased by the other, any interest in said property or in the equity therein.

IX Business Arrangements

A. It is agreed that should one party hereto contribute services, labor, or effort to a business enterprise belonging to the other, that the party contributing said services, labor or effort shall not acquire by reason thereof any interest in, ownership of, or claim to said business enterprise, nor shall said person be compensated in any way for said services, labor, or effort, unless the terms of said compensation are expressly agreed to by both parties.

B. Should the parties share services, labor or effort in a jointly owned business enterprise the relative interests of each party shall be apportioned according to a separate partnership agreement, or, if there is no express agreement, then in proportion that each contributed thereto.

C. It is agreed that the business known as ____ is the individual and separate business of [Name of Owner], and is not to be deemed a jointly owned business of both parties.

X Separate Accounts

In conformity with the intentions of the parties set forth herein, both parties agree to maintain separate bank accounts, insurance accounts (except "renter's" insurance to insure the contents of an apartment, house, etc., which the parties may jointly hold), tax returns, credit accounts, credit union accounts, medical accounts, automobile registration and ownership, and deeds to property, and to make all purchases of personal property, including furniture, appliances, records, books, works of art, stereo equipment, etc., separate, in order to avoid confusion as to the ownership of same, and also in order to avoid nullifying the general intent of this agreement.

XI Duration of This Agreement

This agreement shall remain in effect from the date the parties start cohabiting until either party leaves or removes himself or herself from the common domicile with the intention not to return, or until they marry, or until they make a new written agreement that is contrary to the terms of this agreement.

XII Attorney Fees and Costs

Each party agrees to act in good faith with the provisions of this agreement, and should one party breach the agreement or fail to act in good faith therewith, such party agrees to pay to the other such attorney fees and costs as may be reasonable in order to properly enforce the provisions herein.

XIII No Common Law Marriage Intended

Even though the parties hereto are cohabiting under the same roof and may give the appearance of being married, or from time to time represent to the public that they are husband and wife, they do not intend by such acts to acquire the status of "common law" marriage, and expressly state herein that this is not an agreement to marry, that they are not now married, and that they understand they are not married to each other during the term of this agreement.

continued

XIV Waiver of Support

Both parties waive and relinquish any and all rights to "alimony," "spousal support," or other separate maintenance from the other in the event of a termination of their living together arrangement.

Dated: _____

Witness:

[Name and Signature of Party]

[Name and Signature of Party]

Notary Public:

_____ (Seal)

My commission expires: _____

Source: W. Mulloy, *West's Legal Forms* § 3.54, pp. 225–29 (2d ed., West Group, 1983). Reprinted with permission of West Group.

SUMMARY

The four main kinds of agreements parties enter before, during, and after marriage are cohabitation agreement, premarital agreement, postnuptial agreement, and separation agreement. A premarital agreement is a contract made by two individuals who are about to be married that covers spousal support, property division, and related matters in the event of the separation of the parties, the death of one of them, or the dissolution of the marriage by divorce or annulment. To be enforceable, the agreement must meet the requirements for a valid contract, must be based on disclosure of assets, must not be unconscionable, and must not be against public policy.

A cohabitation agreement is a contract between two unmarried parties (who intend to remain unmarried) covering financial and related matters while they live together, upon separation, or upon death. Some states will enforce such agreements so long as they are not based solely on meretricious sexual services, or so long as the sexual aspect of their agreement is severable from the rest of the agreement. When one party sues the other for breaching the agreement, the media's misleading phrase for the litigation is palimony suit.

If the aggrieved party cannot establish the existence of an express or implied cohabitation contract, other theories might be used by the court to avoid the unfairness of one of the parties walking away from the relationship with nothing. These theories include quasi contract, trust, partnership, joint venture, and the putative spouse doctrine.

KEY CHAPTER TERMINOLOGY

cohabitation agreement
premarital agreement
postnuptial agreement
separation agreement
consideration
waiver
unconscionable
confidential relationship
fiduciary

public policy
fornication
adultery
meretricious
severable
cohabited
unmarried partner
palimony
implied contract

quasi contract
unjust enrichment
trust
constructive trust
partnership
joint venture
putative spouse



ON THE NET: PREMARITAL AGREEMENTS AND COHABITATION

Sample Premarital Agreement

www.uslegalforms.com/samples/samplemarital.pdf

www.medlawplus.com/forminfo/premaritalagreement.htm

consumer.usatoday.findlaw.com/forms/le19_4_1.pdf

Jewish Law: Suggested Antenuptial Agreement

www.jlaw.com/Articles/antenuptial_agreement4.html

Premarital Agreements Online

www.edisso.com/antenupt.htm

Divorce Source (click your state; type “antenuptial” or “cohabitation”)

www.divorcesource.com

Alternatives to Marriage Project

www.unmarried.org

Family Law Advisor: Cohabitation Agreements

www.divorcenet.com/co/co%20Dart03.html

Unmarried Couples and the Law

www.palimony.com