Prenuptial Agreements in the United States

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I. Introduction

Prenuptial agreements, sometimes also referred to as "antenuptial agreements" or "premarital agreements," are agreements between parties contemplating marriage that alter or confirm the legal rights and obligations that would otherwise arise under the laws governing marriages that end either through divorce or death.[1] These agreements are fraught with controversy as to their appropriateness and their enforceability. Prenuptial agreements and the accompanying controversy are not unique to the United States. The purpose of this article is to give the non-American lawyer an overview of this rather complex area of American family law and estate planning, and also to highlight some of the common procedural and substantive requirements and issues currently in play in the United States today.

At one time in American legal history, courts in the United States did not enforce prenuptial agreements that addressed what would happen upon divorce because courts viewed them as agreements that contemplated divorce, and hence encouraged divorce.[2] In an era when most states had fault based divorce, divorce was not allowed simply by mutual consent; thus, these agreements that contemplated divorce were also seen as efforts to generate false evidence of fault grounds, and therefore forbidden—but the agreements could address what was to happen upon death.

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[1] *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.01 (2001).

[2] Brooks v. Brooks, 733 P.2d 1044, 1049 (Alaska 1987). *See also* Crouch v. Crouch, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964)("such [a] contract is promotive of divorce and void on grounds of public policy. Such contract[s] could induce a mercenary husband to to inflict on his wife any wrong he might desire with the knowledge that his pecuniary liability would be limited. In other words a husband could through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he otherwise would have to pay.").

The nationwide abandonment of traditional fault divorce starting in the 1970's eliminated at least one of the significant barriers to prenuptial agreements. However, the acceptance and enforcement of such premarital contracts between spouses has not been uniformly accepted throughout the United States, nor have the requirements by the state legislatures and courts been consistent or even coherent.

Under American law, prenuptial agreements are not simply garden variety contracts as between persons in a simple business transaction. This is an important aspect of the American law of prenuptial agreements given the unique history of individualism and individuals rights in American legal history and culture. The United States, as a general matter, highly values contractual freedom—so much so that the concept of the right to contract and to have those rights enforced is enshrined in the United States Constitution.[3] However, the intimate relationship of the parties to these agreements, the underlying caring and nurturing union that is presumably being contemplated, the fact that children may be produced of the union, and the significant role the state has in regulating this relationship and protecting the spouses and children have led to rules prohibiting certain issues from being addressed, a unique set of procedural requirements, tests for substantive fairness both at the time of execution and at the time of enforcement—all making these contracts unlike any standard commercial contract.

Unlike other countries that prohibit or refuse to enforce prenuptial contracts, most courts and legislative bodies in the United States now take the general position that prenuptial agreements are enforceable if they meet certain formal procedural requirements and are otherwise valid contracts under general contract principles.[4] However, factors that will also be

[3] U.S. CONST., art. I, § 10.
[4] *See, e.g.*, UNIF. MARITAL PROP. ACT §§ 3, 10, 9A U.L.A. 115, 131 (1998); Hrudka v. Hrudka, 919 P.2d 179, 186 (Ariz. Ct. App. 1995). *See also* Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*,

considered are the length of the marriage, the foreseeability of various developments in the marriage, the existence of children, and the general substantive fairness of the agreement both at the time the contract is executed and when it is to be enforced—and each state's courts and legislature will promulgate these factors in its own unique way.

This article shall attempt to give an overview of American rules regarding prenuptial agreements for foreign practitioners who encounter an American prenuptial agreement. Married American citizens increasingly are living in more than one country or moving from one country to another, and are marrying persons from other countries. Not only do American attorneys now have to advise clients how their foreign-drafted prenuptial agreement will be treated in the United States, but often the foreign practitioner will need to consider how to enforce an American prenuptial agreement in a foreign country or how a foreign prenuptial agreement would be construed in the United States. The purpose of this article is not to provide a definitive and lengthy treatise on these issues, but rather, to give the foreign practitioner a very basic overview of the laws of prenuptial agreements in the United States and to discuss briefly enforcement and construction issues involving agreements drafted in other countries.

The law surrounding prenuptial agreements in the United States is complex and changing rapidly as a result of demographic and cultural trends. What is particularly challenging for the foreign practitioner seeking to understand American laws regarding prenuptial agreements is that there are fifty states within the United States, and each has its own laws and practices with regard to the laws of prenuptial agreements—and sometimes the differences are dramatic. To add to the complexity of fifty states, each with a different set of both statutory and case law addressing prenuptial agreements, there may also be interplay with federal statutes and federal case law.

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49 STAN. L. REV. 887, 898 (1997)(noting that "prenuptial agreements that include divorce provisions are now generally enforceable in all states").

Given that most states have enacted statutes addressing prenuptial agreements, there is also the complex interplay between the common law and statutory law.[5]

Furthermore, states within the United States have their own property regimes, some of which are community property states, while others are common law property states.[6] This affects the presumptions regarding marital and non-marital property and the division of such property on the termination of a marital relationship. Even the United States Constitution is implicated in the laws of prenuptial agreements, especially with regard to the right of persons to enter contracts, notions of equal protection and enforcement, and also notions of procedural and substantive due process. While these agreements are largely governed by state law, in the United States even that proposition has its complexities.

As with any family law matter within the Untied States, the use of prenuptial agreements is also dramatically affected by the significant discretion that is given to family court judges when addressing family law matters. Given this discretion and the wide latitude in interpretation of such agreements, the individual views of the trial judge on these issues have significant importance. While it is enormously difficult to advise a client with any certainty as to the enforceability of a prenuptial agreement over the long term duration of a marriage, much of this is the result of the various approaches to the agreements taken by state courts, the whole concept of substantive fairness of the agreement, and whether such fairness will be contemplated at the time of execution of agreement or the time of enforcement. It is especially difficult to find certainty in this complex area of the law in a rapidly changing international and interconnected world.

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[5] *See* P. André Katz & Amanda Clayman, *When Your Elderly Clients Marry: Prenuptial Agreements and Other Considerations*, 16 J. AM. ACAD. MATRIM. LAW. 445, 462 n.2 (2000)(listing state statutes).
[6] Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1541 (2003).

II. Unique Aspects of American Demographics

One legal commentator writing in the area of prenuptial agreements noted that such agreements used to be a rather rare occurrence in a family law attorney's practice. Today in the United States these agreements are much more common.[7] One of the significant demographic trends driving this increase in prenuptial agreements is that at the present time, people from a variety of age groups and economic backgrounds are now seeking such agreements. Parties to these contracts may be relatively young and about to enter their first marriage, but one or both may be positioned to inherit wealth or a family business in the near future and family members may wish to keep the assets in the family. Either one or both of the parties may have been married before, and they have pre-existing children they want to provide for, or their divorce was such a horrific experience they want to resolve property division and spousal maintenance before a divorce occurs. Given that people now live longer, it is more common for both men and women to marry several times in a lifetime and to have accumulated significant income and assets that need protecting. Such older persons are candidates for the protections of such agreements. These agreements present special challenges to the drafters, not the least of which are concerns as to the capacity of such persons to enter into these complex agreements.[8] All of these trends are affected by current demographics.

In the past, the classic scenario giving rise to a prenuptial agreement was a situation where a wealthy man married a younger, less wealthy woman. He sought to limit his financial exposure in the event of death or divorce. No longer are such agreements sought out primarily

[7] Willard H. Dasilva, *Prenuptial Agreements: The Balance Between Love and Money*, 24 FAM. ADVOC. 4 (Winter 2004).

[8] *Id.*. For a discussion of unique drafting challenges for elderly and possibly incapacitated clients, see Stephen W. Schlissel & Jennifer Rosenkrantz, *Prenuptial Agreements for the Golden Years*, 24 FAM. ADVOC. 28 (Winter 2002).

by elderly men about to be married. More and more professional woman have built businesses or receive executive salaries which they too seek to protect in the event the marriage ends through death or divorce. Men and women are also amassing assets and income at even young ages, driving down the ages of persons seeking prenuptial agreements.

Another consideration, especially with younger couples contemplating one of the parties leaving the workforce and parenting children fulltime, is the issue of providing for children. Although it is a general rule in the United States that prenuptial agreements cannot reduce the duty of parents to support children nor bind the court to custody determinations, such agreements can be used to expand children's rights by establishing more generous or special benefits or a higher standard of living. Among the provisions that might be addressed are ongoing child support at a level above that mandated by statutory guidelines so as to maintain a standard living for the children enjoyed during the marriage, and provisions for private schooling or various extracurricular activities. As long as the agreement provides support beyond the state guidelines, it should not run afoul of public policies prohibiting such agreements from limiting child support.

While these trends may not be unique to the United States, they do definitely reflect demographic trends within this country. With a divorce rate hovering at approximately 50%, with ongoing concern in state legislatures to make marriage a more stable and enduring institution, and with increasingly complex family situations in and out of marriage, people increasingly are focusing on the utility of prenuptial agreements to address a wide variety of needs and situation.

III. Substantive Law of Prenuptial Agreements: Overview

While all fifty states recognize prenuptial agreements in one form or another, it is important to know in which state the agreement was written and where it will likely be enforced. Each of the states has its own law on the scope and enforcement of prenuptial agreements. There is a Uniform Prenuptial Agreement Act (UPAA), which approximately 26 states have adopted but, each of these states has included its own modifications to the UPAA.[9] The remaining states have adopted their own statutes or apply common law.

Despite the varying requirements from state to state, recurring requisites throughout the fifty states include: the agreement must be in writing, and it must meet certain technical requirements; the agreement must be signed before the marriage, and a marriage must occur; the agreement cannot cover topics that are against public policy; the agreement must meet standards for substantive fairness. Furthermore, there must be the opportunity for legal counsel, and there must be financial disclosure.

To create certainty about what law will apply, agreements usually include a provision directing what state's law will apply to enforcement of the agreement and what happens if the parties move from one state to another. These choice-of-law provisions are typically enforced although some states do not consistently defer to these provisions.

A. Technical Requirements

Prenuptial agreements must be in writing. While there have been some exceptions to this requirement using contract principals, the general and prudent rule is that the agreement should be in writing. The UPAA requires no other formalities beyond the agreement being in writing

[9] UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 48 (2001).

and signed by both parties.[10] Other jurisdictions require substantially greater formality. For example, Minnesota requires that each party's signature be witnessed by two individuals and that the party be sworn and acknowledge his or her signature before a notary public.[11]

B. Legal Counsel

Generally parties to a prenuptial agreement must have the opportunity to consult with legal counsel. The absence of counsel does not render a prenuptial agreement unenforceable, so long as the individual had an opportunity to consult with independent legal counsel.[12] The absence of counsel may be one factor in the future viability of the agreement but generally this aspect alone will not be dispositive.[13]

C. Financial Disclosure

All states require some degree of financial knowledge or the opportunity to obtain the knowledge. The level of disclosure varies from state to state. Some states permit parties to waive the disclosure. In some instances knowledge is imputed to a party even though no disclosure is made.[14] Other states impose an affirmative duty to disclose. A material, fraudulent nondisclosure or failure to disclose a material fact may void all or part of the agreement.[15] If, however, the nondisclosure did not prejudice a party, the agreement still may be enforced.[16]

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[10] *Id*. at § 6.
[11] *See* MINN. STAT. ANN. § 519.11 (2004).
[12] Lutz v. Schneider, 563 N.W.2d 90 (N.D. 1997).
[13] *See* In re Marriage of Bonds, 5 P.3d 815 (Cal. 2000). *See generally* Nancy R. Schembri, Note, *Prenuptial Agreements and the Significance of Independent Counsel*, 17 ST. JOHN'S J. LEGAL COMMENT 313 (2003).
[14] *See* Barnhill v. Barnhill, 386 So.2d 749 (Ala. Civ. App.), *cert. denied,* 386 So.2d 752 (1980); Pajak v. Pajak, 385 S.E.2d 384 (W Va. 1989).
[15] *See* Posner v. Posner, 257 So. 2d 530 (Fla. 1972); Corbett v. Corbett, 628 S.E.2d 588 (Ga. 2006)
[16] Hill v. Hill, 356 N.W.2d 49 (Minn. Ct. App. 1984); Schutterle v. Schutterle, 260 N.W.2d 341 (S.D. 1977).

D. Timing of Execution

All states require that the agreement be signed before the marriage. In many states there is a requirement that the agreement be signed at least 24 hours or the day before the wedding. The closer to the marriage the agreement is signed, the more likely it is to be challenged.[17]

E. Requirement of Marriage

For the agreement to be enforceable, there must be a marriage subsequent to execution of the agreement. This requirement can be challenged where there is an annulment, a void marriage or a delay in the marriage after execution of the agreement. The UPAA provides for the enforcement of a prenuptial agreement even where the marriage is void, but only in instances where the parties have been married for a long time and one of the parties has relied on the agreement during the marriage.

F. Public Policy Limits

Attempts to regulate certain areas of marriage may be unenforceable because they are against public policy. For example, any limits on support of children may be void as against public policy and affecting the rights of individual who were not parties to the agreement.[18] Provisions regarding child custody are also typically not enforceable.[19]

Some states do not permit prenuptial agreements to cover the payment or waiver of spousal support.[20] Other states do not permit a waiver of attorneys fees.[21]

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[17] *See* Tiryakian v. Tiryakian, 370 S.E.2d 852 (N.C. Ct. App.1988); Fletcher v. Fletcher, 628 N.E.2d 1343 (Ohio 1994);Bakos v. Bakos, 950 So. 2d 1257 (Fla. 2d DCA 2007)

[18] *See* Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990); Rogers v. Yourshaw, 448 S.E.2d 884 (Va. Ct. App. 1994).

[19] Alves v. Alves, 262 A.2d 111 (D. C. 1970).

[20] In re Marriage of Van Brocklin, 468 N.W.2d 40 (Iowa Ct. App. 1991).

G. Fairness and Enforcement Standards

Most states have some level of fairness that they impose on prenuptial agreements before they will be enforced. What degree of fairness is required and when the fairness will be tested varies from jurisdiction to jurisdiction. Some jurisdictions use an either or test; if the agreement is substantively unfair but there has been financial disclosure, then it is enforced[22], or if the agreement is substantively fair but there was no disclosure, it will still be enforced.[23]

The UPAA favors enforceability, so that not only must the agreement be unconscionable when executed but there must have been no disclosure or waiver of disclosure or other imputed knowledge of the other party's assets and income.[24] The only exception to this sweeping rule is in the case of a waiver or limit on spousal support that leaves a party eligible for public welfare. In that case only the court can award sufficient support to avoid the payment of welfare.

Other states have policies that are not as favorable to enforcement as the UPAA standards.[25] Some states will set aside an agreement if it is unconscionable at the time of execution no matter if there has been full disclosure. Other states have an even broader protection, by examining the fairness of the agreement at the time it is executed and when it is enforced.[26]

What constitutes substantive fairness upon execution often depends on the circumstances surrounding the agreement. These considerations are sometimes referred to as the Button factors

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[21] In re Marriage of Burke, 980 P.2d 265 (Wash. Ct. App.1999); Kessler v. Kessler, 818 N.Y.S. 2d 571 (2 Dep't 2006)
[22] Marsocci v. Marsocci, 911 A2d 690 (RI 2006).
[23] *See generally* Peggy L. Podell, *Before Your Client Says "I Do"—Premarital Agreements Will Hold Up Better With Full Financial Disclosure*, A.B.A. J. 80 (Aug. 1999).
[24] UNIF. PREMARITAL AGREEMENT ACT, *supra* note 12, at § 6.
[25] *See e.g.* Lentz v. Lentz, 721 N.W. 2d 861 (Mich. App. 2006)
[26] *See* Rider v. Rider, 669 N.E.2d 160 (Ind. 1996); *McKee Johnson*, 444 N.W.2d 259.(Minn 1989) *overruled on other grounds* In re Estate of Kinney, 733 N.W.2d 118 (Minn. 2007)

after the case Button v. Button,[27] and include: the objectives of the parties, the economic circumstances of the parties, the property owned by each party prior to the marriage, the existence of other family relationships and obligations, each party's income and earning capacity, the anticipated contributions of each party to the marriage, the age, physical and emotional health of the parties, the anticipated education and professional goals of each party including expectations that one party will contribute as a homemaker and parent.

The standards for substantive fairness at enforcement are usually more limited and focus on changed circumstances which could not have been foreseen and which make the agreement oppressive or unconscionable.[28] Such circumstances may be the unexpected birth of a child, a disability, financial reversals, etc.

While the standards for substantive fairness may be vague, it is clear that a prenuptial agreement is not unenforceable merely because it provides for less than the law would provide.[29] In fact providing for a different outcome than the law would provide is most often the intent of the agreement. An agreement is not void because of this result.

H. Other Drafting Considerations

Prenuptial agreements frequently cover the parties' rights and obligations not only upon divorce but also upon death; therefore, drafters of prenuptial agreements must be knowledgeable of the law for each area in the agreement's jurisdiction. Also if obligations are imposed by prior marriages or existing estate plans, these matters must also be considered.

[27] 388 N.W.2d 546 (Wis. 1986).
[28] Booth v. Booth, 486 N.W.2d 116 (Mich. Ct. App. 1992);; *Cf.* Lane v. Lane, 202 S.W. 2d 577 (Ky 2006).
[29] *McKee Johnson*, 444 N.W.2d 259.(Minn 1989) *overruled on other grounds* In re Estate of Kinney, 733 N.W.2d 118 (Minn. 2007).

Because of the increasing specialization of attorneys in the U.S., it is often necessary to have both a family law attorney and a trusts and estates attorney involved in the drafting to ensure that all of the necessary waivers and necessary language are included. For example, in some instances special waiver language must be used to effectively waive a spouse's right to elect to take against a will.

The execution of the agreement does not end the attorney's job. Frequently implementation must occur after the marriage, such as transfer of real estate, updated estate planning and creation of accounts. Also, it may be necessary to execute a separate waiver of a surviving spouse's rights to pension benefits if the plan requires.[30]

IV. Trends in Litigation and Enforcement

The trend favors the enforcement of prenuptial agreements. Generally enforcement of prenuptial agreements upon death is favored more so than upon divorce.[31] Enforcement policies in general must balance the competing public policies favoring the freedom to contract and encouraging divorce settlements versus the protection of parties in potentially vulnerable situations where overreaching can more easily occur. Because of the inherent trust the parties' relationship engenders, a far greater potential for abuse of that trust exists than there would be in a business context.

[30] *See* Hagwood v. Newton, 282 F.3d 285 (4th Cir. 2002).
[31] *See* Susan Wolfson, *Premarital Waiver of Alimony*, 38 FAM. L.Q. 141, 142 (2004).

A. Creation of the Agreement

Consider how the agreement was created and whether the circumstances created a cooperative and voluntary process or whether there was duress or coercion in the process. Some general questions to ask are:

- Was there sufficient time to consider the agreement so that no one was unduly pressured? This may not require that the actual agreement was presented at a very early time if the terms of the agreement were being discussed.[32]
- Did both parties have time to hire an attorney? Was there money to pay for an attorney? Was the attorney for one spouse chosen by the other spouse?
- Were there meaningful negotiations or was the agreement presented as an ultimatum to the other party? If the guests are arriving and one party is suddenly insisting on the other signing the agreement or the wedding will not go on, this can be considered duress.[33] Also if a party is pregnant and the marriage is conditioned on the prenuptial agreement, this may constitute duress.[34]

Attorneys can take additional precautions in the drafting and presentation of the prenuptial agreement to assist in supporting its validity. Each attorney should keep a careful record of the negotiations and drafts of the agreement to demonstrate if needed later that

[32] *See* Williams v. Williams, 720 S.W.2d 246 (Tex. Ct. App. 1986).
[33] *See* Zimmie v. Zimmie, 464 N.E.2d 142, 146-47 (Ohio 1984); In re Estate of Kinney, 2006 WL 1806386 (Minn. Ct. App. 2006) (unreported)
[34] *See* Ex Parte Williams, 617 So.2d 1033 (Ala. 1992). *Cf.* Hamilton v. Hamilton, 591 A.2d 720 (Pa. Super. Ct. 1991); Biliouris v. Biliouris, 852 N.E. 2d 687 (Mass. App. Ct. 2006)

meaningful discussions occurred and revisions were undertaken as requested. Document the circumstances existing at the time the agreement is signed. If extraordinary circumstances exist, such as an illness, pregnancy, or other concerns, be sure those aspects are noted. It may be prudent to videotape the signing to demonstrate the demeanor of both parties and their willingness to sign the agreement.[35] This strategy actually provides for a type of testimony at the time of execution in the event the agreement is later challenged. Finally, make a full financial disclosure as early as possible so any questions can be answered.

B. Terms of the Agreement

When drafting, keep in mind some of the future challenges that may be made to the agreement and draft to avoid or at least address those challenges. State the circumstances of the agreement clearly, including any special circumstances such as if one party plans to leave his or her career to care for children or a spouse. Anticipate changes that may occur in the future and draft to ensure that the agreement remains fair in the face of those changes. For example, what may be fair consideration after five years may not be fair after twenty-five years—plan for longevity. Anticipate disability and how that might change the fairness of the agreement.

If any questions exist about the value of assets, be sure to address the various aspects of valuation. If an asset's value is expected to change or if a party expects to receive an inheritance, be sure these circumstances are disclosed. Check for ambiguities especially with complex definitions of what property and income are to be covered by the agreement. If applicable, state how assets and income are anticipated to be spent during the marriage.

[35] *See, e.g.*, Kathleen Hogan, *The Candid Camera: Videotaping Execution of the Agreement*, 24 FAM. ADVOC. 25 (Winter 2002).

Prenuptial agreements typically cover property rights of a spouse upon divorce or the death of the other spouse. In addressing these rights, agreements often define rights in "marital" and "nonmarital" property. The definitions of these two concepts vary from state to state but generally, nonmarital property is property acquired before the marriage, by gift to one party but not both, or by inheritance. The definition may also include income and appreciation on nonmarital property. Marital property is typically property acquired during the marriage from earnings and gifts to both parties.[36]

The financial disclosure should be attached to the agreement and should be as complete as possible. In the alternative the agreement should state that the disclosure was made and list the documents actually provided to the future spouse. The agreement should recite the parties' legal rights and that each party has been informed of all of these rights and acknowledges receiving the information. The agreement should contain a method for alteration of its terms. Typically the changes must be in writing and meet the technical requirements of the original execution.

C. Challenges to the Agreement

The agreement must meet standard contract criteria as well as the special requisites for prenuptial agreements. Some considerations are whether the agreement meets contract standards, including whether there was a meeting of the minds. Also, the parties must understand the agreement. This does not require absolute understanding but only the opportunity. The

[36] *See* Victoria M. Ho & Kristine K. Rieger, *How to Analyze Marital v. Nonmarital Property in Divorce Proceedings*, 70 FLA. B.J. 84 (Oct. 1996).

unilateral failure to read the agreement or to read the agreement carefully is usually not a reason to set aside an agreement.[37]

The agreement must not have been obtained through fraud, duress or coercion. One question is whether the agreement was executed when the parties were older and their estates established or was it created when they were young and could not foresee the future?

Attorneys should carefully confirm that the agreement meets the technical requirements for the jurisdiction. If you are challenging the agreement, recheck the signatures, witnesses, etc. Attorneys should verify that the agreement meets the fairness requirements for the jurisdiction, as discussed above.[38] Query whether the agreement provides for changes and potential foreseen circumstances. Check for ambiguities in the language of the agreement that might make its enforcement unclear.

Make sure that the financial disclosures are accurate, and check for changes in value or income since execution of the agreement. Look at other financial disclosures at the time of the prenuptial agreement to see if those disclosures are consistent with those in the agreement. If an inaccurate financial disclosure occurred, question whether it was material or whether it in some way prejudiced the other party. If the failure to make an accurate disclosure would have no effect on whether the party signed the agreement, then the failure may not be fatal to the agreement. Evaluate whether any substantial and unforeseen changes in circumstances (such as an unforeseen increase or decrease in the parties' wealth) happened during the marriage. Evaluate also whether assets were combined so that they cannot be separated.

Question if the parties followed or ignored the agreement during the marriage. If the agreement has not been followed—for example if assets have not been kept separate—the

[37] Laird v. Laird, 597 P.2d 463 (Wyo. 1973).
[38] *See supra* text at notes 25-30.

argument can be made that the parties have waived some or all of the protections of the agreement. If a party has not lived up to an obligation in the agreement, such as the requirement to establish life insurance or a trust or pay certain bills, an argument can be made that the agreement was breached. Such a breach must typically be material to void the agreement.

The burden of proof in challenging the agreement varies by jurisdiction. In some jurisdictions there may be different standards depending on whether "nonmarital" or "marital" property is the subject of the agreement. Typically the proponent of the agreement has the burden of proof although this may be changed by statute.

Upon death (if applicable), query whether one party has adequately waived rights, such as a clear waiver of the right to elect against the will. General waivers may not be sufficient to constitute a waiver of specific rights.

An issue may arise as to what state's law will apply. Typically this will be the state in which the agreement was executed or the choice-of-law provision in the agreement itself. Ask whether compelling reasons exist why the agreement should be enforced under another state's law. For example, question whether the agreement violates some public policy of the enforcing state.

V. **International Issues**

The primary issues facing the foreign practitioner attempting to enforce a foreign-drafted prenuptial agreement in the United States, or a United States practitioner dealing with a party who is not a resident of the United States, involve conflicts of law issues and enforcement concerns when more than one jurisdiction is involved, and one of them is a foreign country.

Under the American law of conflicts, the general rule is that the validity and the enforceability of the contract is determined by the law of the state where the contract was entered into. or the state whose laws the agreement specified will apply in a choice of law provision. According to one commentator, this doctrine is equally applicable to prenuptial agreements.[39] In fact, one court has held that as a general rule, unless an explicit contrary intent is shown, a prenuptial agreement made in a foreign country is enforceable in the United States according to the law of the foreign country where it was executed.[40]

These general rules, however, are not without exception. The Restatement (Second) of Conflicts of Laws provides the following general statement of law that captures the majoring view of how state courts in the United States addresses this conflicts of law issue in the area of prenuptial agreements:

> a court shall apply the law of the state chosen by the parties in most cases, unless the state has no substantial relation to the contract or unless the law of that state offends a fundamental policy of a state having a greater interest in the particular issue. [41]

In situations where the parties did not express an intention as to the law to be applied, the majority approach, which tracks with the Restatement, is that the laws and polices of the state having the most significant relationship to the transaction of the parties should be applied.[42]

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[39] Laura W. Morgan, *Enforcement of Islamic Antenuptial Agreements*, 15 DIV. LITIG. 41 (Mar. 2003).
[40] *See, e.g.*, Fernadez v. Fernadez, 15 Cal. Rptr. 374 (Cal. Ct. App. 1961); Shaudry v. Shaudry, 388 A.2d 10001 (N.J. Super. Ct. App. Div.); Sapir v. Stein-Sapir, 382 N.Y.S. 2d 799 (1976). *See also* LAURA W. MORGAN & BRETT R. TURNER, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 15.02 at 448-449 (2001).
[41] Restatements are statements of law prepared by the American Law Institute (ALI). The ALI is a group of judges, academics, and practitioners who serve by appointment. The Restatements, which cover a variety of areas of substantive law, are usually proposed model codes that either capture the primary trends in American law or advocate what the ALI believes the law should be. While the ALI's promulgations do not carry the force of law of a statute or court decision, they do attempt to suggest best practices or a majority view of the law. Some courts have explicitly adopted positions taken by the ALI. In a legal system such as we have in the United States with its multiple jurisdictions, such summaries or restatements can be quite helpful in discussing disparate trends in the law.
[42] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 187,188 (1971 and Supp. 1988).

When applying these general principals of conflicts law to a prenuptial agreement that is being challenged, the application of the law will usually depend on the nature of the matter in dispute. For example, if the issue involves whether the document was properly executed, and is hence enforceable, a majority of states would apply the Restatement approach and apply the laws of the state where the document was executed or, if the agreement has one, the law of the state chosen by the parties in the choice of law provision. If the issue is one of substantive fairness at the time of enforcement, a court maybe more reluctant to simply defer to the state or country where the agreement was drafted or the state whose laws were chosen in a choice of law provision. With this type of issue, public policy considerations may be more significant.

When faced with a foreign drafted prenuptial agreement in the United States, under the doctrines recited above the first question to be answered before even reaching the issue of whether such an agreement can be enforced is whether the document purported to be a prenuptial agreement actually constitutes such a contract. Here it will be critical to examine the contents of the agreement, what is the ultimate purpose of the agreement, and whether statutory or case law requirements exist in the country where the document was drafted that will provide some guidance to a court in the United States trying to determine whether the agreement is in fact a valid prenuptial agreement under those laws. If it is an American prenuptial agreement that is being considered in a foreign country, assuming the same type of analysis would apply in the foreign country, it will then be critical for the court in the foreign attorney to determine whether the parties complied with the laws of the state where the document was drafted. Assuming that a valid agreement actually exists, the court must then reach the question of whether such an agreement has provisions that violate the public policy of the governing state.

Certainly another issue affecting the international enforcement and interpretation of prenuptial agreements can be implicated if a foreign country has passed on the validity and interpretation of such an agreement and then a court determination is sought as to enforcement in the United States. Two general bodies of law affect whether a "foreign judgment" must be enforced in another state or jurisdiction. The United States Constitution and most state constitutions have a full faith and credit clause that requires that the courts of each state honor other state's public acts, records, and judicial proceedings. The federal Full Faith and Credit Clause applies to all states of the United States, as well as federal, territorial, and District of Columbia courts.[43]

Since the Full Faith and Credit Clause would not apply to foreign countries' judgments and judicial determinations, one is left with the doctrine of comity. Comity is the principal under which a court in one country either declines to exercise jurisdiction under certain circumstances in deference to the laws and interests of another foreign country, or agrees to apply another country's judicial or other legal decisions because of confidence that the procedures used to arrive at the decisions or action were fair and appropriate given the circumstances.[44] One commentator, in describing the doctrine of comity, notes that nothing in the United States Constitution or any state constitutions requires a state within the United States to enforce or apply the judgments, decisions, or laws of a foreign country, and absent a federal treaty so requiring, the states can do as they please in_ foreign contracts are agreements; each state ultimately decides for itself how far it will go in applying a foreign country's laws and procedures to a contract or other agreement.[45]

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[43] U.S. CONST. art. IV, § 1.

[44] BLACK'S LAWS DICTIONARY 261-62 (7th ed. 1999). Black's Laws Dictionary 261-62 (7th ed. 1999), defines "comity" as "a willingness to grand a privilege, not as a matter or right, but out of deference and good will.

Among the factors an American court will consider in applying another country's laws in a dispute involving a prenuptial agreement are whether the laws and procedures are compatible with domestic American concepts of due process. These include fair notice, an appropriate jurisdictional basis, and a fair hearing. [46] Given that this doctrine of comity applies to orders and judgments of a court, if you are in a situation where you want an American court to invoke the doctrine of comity to a dispute involving a prenuptial agreement, it may be necessary to obtain a decision from a court in the foreign county as to the validity or enforceability of the agreement under that country's laws, and then seek to have that decision enforced in an American court. One caveat that bears repeating, however, is that especially in the area of family law, the judges have much discretion. You should make sure to know something about your court and how it views prenuptial agreements before invoking the doctrine of comity.

Conclusion

Because more and more persons contemplating marriage may be marrying persons from other countries or residing in more than one country, the drafting and enforcement of prenuptial agreements more and more frequently raises complex international legal issues. As a result, it will be more important for practitioners and courts to have some understanding of the substantive laws of each country or state involved, as well as the doctrines used to resolve international jurisdiction and choice of law disputes. Hopefully this article will assist courts and practitioners when the United States is involved in some way in a prenuptial agreement.

[4] 3 DAVID D. SIEGEL, CONFLICTS IN A NUTSHELL § 109 B (1982).