FAMILY LAW

FIFTH EDITION

WILLIAM P. STATSKY

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Family Law, Fifth Edition
by William P. Statsky

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CHAPTER 4

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 4.1. 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

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Exhibit 4.1 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 5.) 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

consideration
Whatever the parties are mutually promising or exchanging in their agreement.

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

ASSIGNMENT 4.1

What are the requirements for entering a valid premarital agreement in your state? (See General Instructions for the State-Code Assignment in Appendix A.)

Disclosure of Assets

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.

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,

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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. 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.

unconscionable
Shocking to the conscience; substantially unfair.

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, a topic we will examine at length in the *Bonds* case. Second, the agreement is unconscionable *and* there was inadequate disclosure of assets. Note the language of the act:

> § 6. An agreement is not enforceable if the party against whom enforcement is sought proves that:
> (a) [he or she] did not execute the agreement voluntarily; or
> (b) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party,
> (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, and
> (3) did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.

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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.

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.

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.

ASSIGNMENT 4.2

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. (See General Instructions for the Legal Analysis Assignment in Appendix A.)

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?

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.

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 sup-

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port 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.

ASSIGNMENT 4.3

Would the following provisions in a premarital agreement be legal in your state? Explain why. (See General Instructions for the Court-Opinion Assignment in Appendix A.)

a. A clause designating how much support one spouse will receive from the other during the marriage.
b. A clause stating that the husband will never have to wash the dishes.
c. A clause stating that the children from a prior marriage will not live with the parties.
d. A clause stating that any children born to the couple will not attend formal services of any religion.
e. A clause stating a minimum number of times that the parties will engage in sexual intercourse per month.

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.

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.

ASSIGNMENT 4.4

The property division clause in the premarital agreement of George and Jane provides that in the event of a divorce George will receive $750,000 and Jane will receive all other property acquired during the marriage. Is this clause legal? (See the General Instructions for the Legal-Analysis Assignment in Appendix A.)

Death clauses in premarital agreements are less controversial. Parties often agree to give up the rights they may have (e.g., dower, see chapter 8) in the estate of their deceased spouse. If the premarital agreement is not otherwise invalid, such terms are usually upheld by the courts.

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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 an antenuptial 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 or 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

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?
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?
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

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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 and Voluntariness

What happens if a party signs a premarital agreement without the benefit of independent counsel? Is it strong evidence that the agreement could not have been voluntarily entered? The recent celebrated case of *In re Marriage of Bonds* answered this question. A multimillionaire baseball player, Barry Bonds, entered a premarital agreement with his prospective wife, Sun Bonds. Paragraph 10 of the agreement provided:

> 10. CONTROL AND EARNINGS OF BOTH HUSBAND AND WIFE DURING MARRIAGE. We agree that all the earnings and accumulations resulting from the other's personal services, skill, efforts and work, together with all property acquired with funds and income derived therefrom, shall be the separate property of that spouse.

This clause meant that Sun Bonds would have no marital rights in Barry Bonds's baseball salary, clearly the largest asset in the coming marriage. She did not have independent counsel when she signed the agreement.

The case arose in California, a community property state in which each spouse has a 50 percent interest in marital property such as a spouse's salary, regardless of which spouse earned the salary. A valid premarital agreement can change this rule. If the *Bonds* case had arisen in a noncommunity property state, the same issue would have had to be decided. The question before the court would still be whether the absence of independent counsel rendered the premarital agreement involuntary and therefore unenforceable.

As you read *In re Marriage of Bonds,* notice the extensive factual detail provided by the court. This detail comes from the evidence that both sides presented during the trial. This factual detail will give you some idea of the extent of interviewing and investigation that attorneys and their paralegals must undertake in such cases.

CASE

In re Marriage of Bonds

24 Cal. 4th 1, 5 P.3d 815 (2000)
Supreme Court of California

Background: *At the time Barry Bonds married Susann (Sun) Bonds, he was earning $106,000 a year with the Pittsburgh Pirates. At the time of his divorce, he was earning millions a year with the San Francisco Giants. Before they married, they signed a premarital agreement prepared by Barry's counsel in which she*

continued

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CASE

In re Marriage of Bonds—*Continued*

waived any interest in his earnings during the marriage. Sun Bonds did not have independent counsel and she argued that the agreement was invalid because she did not sign it voluntarily. The trial court found that Sun entered the agreement voluntarily with a full understanding of its terms. Sun appealed to the Court of Appeal, which reversed and directed a retrial on the issue of voluntariness. Barry has now appealed to the California Supreme Court.

Decision on Appeal: *The Court of Appeal is reversed. There is substantial evidence that Sun Bonds signed voluntarily despite the lack of independent counsel.*

Opinion of the Court

Chief Justice GEORGE delivered the opinion of the court: . . .

Sun and Barry met in Montreal in the summer of 1987 and maintained a relationship during ensuing months through telephone contacts. In October 1987, at Barry's invitation, Sun visited him for 10 days at his home in Phoenix, Arizona. In November 1987, Sun moved to Phoenix to take up residence with Barry and, one week later, the two became engaged to be married. In January 1988, they decided to marry before the commencement of professional baseball's spring training. On February 5, 1988, in Phoenix, the parties entered into a written premarital agreement in which each party waived any interest in the earnings and acquisitions of the other party during marriage. . . . That same day, they flew to Las Vegas, and were married the following day.

Each of the parties then was 23 years of age. Barry, who had attended college for three years and who had begun his career in professional baseball in 1985, had a contract to play for the Pittsburgh Pirates. His annual salary at the time of the marriage ceremony was approximately $106,000. Sun had emigrated to Canada from Sweden in 1985, had worked as a waitress and bartender, and had undertaken some training as a cosmetologist, having expressed an interest in embarking upon a career as a makeup artist for celebrity clients. Although her native language was Swedish, she had used both French and English in her employment, education, and personal relationships when she lived in Canada. She was unemployed at the time she entered into the premarital agreement.

[Barry sought a dissolution of the marriage in May of 1994. Sun was awarded custody of their two minor children and child support] in the amount of $10,000 per month per child. Spousal support was awarded in the amount of $10,000 per month, to terminate December 30, 1998. Only the first issue—the validity of the premarital agreement—is before this court.

Barry testified that he was aware of teammates and other persons who had undergone bitter marital dissolution proceedings involving the division of property, and recalled that from the beginning of his relationship with Sun he told her that he believed his earnings and acquisitions during marriage should be his own. He informed her he would not marry without a premarital agreement, and she had no objection. He also recalled that from the beginning of the relationship, Sun agreed that their earnings and acquisitions should be separate, saying "what's mine is mine, what's yours is yours." Indeed, she informed him that this was the practice with respect to marital property in Sweden. She stated that she planned to pursue a career and wished to be financially independent. Sun knew that Barry did not anticipate that she would shoulder her living expenses while she was not employed. She was not, in fact, employed during the marriage. Barry testified that he and Sun had no difficulty communicating.

Although Barry testified that he had previous experience working with lawyers in the course of baseball contract negotiations and the purchase of real property, his testimony at trial did not demonstrate an understanding of the legal fine points of the agreement.

Sun's testimony at trial differed from Barry's in material respects. She testified that her English language skills in 1987 and 1988 were limited. Out of pride, she did not disclose to Barry that she often did not understand him. She testified that she and Barry never discussed money or property during the relationship that preceded their marriage. She agreed that she had expressed interest in a career as a cosmetologist and had said she wished to be financially independent. She had very few assets when she took up residence with Barry, and he paid for all their needs. Their wedding arrangements were very informal, with no written invitations or caterer, and only Barry's parents and a couple of friends, including Barry's godfather Willie Mays, were invited to attend. No marriage license or venue had been arranged in advance of their arrival in Las Vegas.

Several persons testified as to the circumstances surrounding the signing of the premarital agreement. Sun testified that on the evening before the premarital agreement was signed, Barry first informed her that they needed to go the following day to the offices of his lawyers, Leonard Brown and his associate Sabi-

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nus Megwa. She was uncertain, however, whether Barry made any reference to a premarital agreement. She testified that only at the parking lot of the law office where the agreement was to be entered into did she learn, from Barry's financial advisor, Mel Wilcox, that Barry would not marry her unless she signed a premarital agreement. She was not upset. She was surprised, however, because Barry never had said that signing the agreement was a precondition to marriage. She did not question Barry or anyone else on this point. She was under the impression that Barry wished to retain separate ownership of property he owned before the marriage, and that this was the sole object of the premarital agreement. She was unaware the agreement would affect her future and was not concerned about the matter, because she was nervous and excited about getting married and trusted Barry. Wilcox's statement had little effect on her, because she had no question but that she and Barry were to be married the following day.

Sun recalled having to hurry to arrive at the lawyers' office in time both to accomplish their business there and make the scheduled departure of the airplane to Las Vegas so that she and Barry could marry the next day. Sun recalled that once they arrived at the lawyers' office on February 5, 1988, she, her friend Margareta Forsberg, Barry, and Barry's financial advisor Mel Wilcox were present in a conference room. She did not recall asking questions or her friend asking questions, nor did she recall that any changes were made to the agreement. She declared that her English language skills were limited at the time and she did not understand the agreement, but she did not ask questions of anyone other than Margareta Forsberg or ask for more time, because she did not want to miss her flight and she was focused on the forthcoming marriage ceremony. She did not believe that Barry understood the agreement either. Forsberg was unable to assist her. Sun did not recall the lawyers telling her that she should retain her own lawyer, that they were representing Barry and not her, that the applicable community property law provided that a spouse has an interest in the earnings and in acquisitions of the other spouse during marriage, or that she would be waiving this right if she signed the agreement. The lawyers may have mentioned the possibility of her being represented by her own lawyer, but she did not believe she needed one. She did not inform anyone at the meeting that she was concerned about the agreement; the meeting and discussion were not cut short, and no one forced her to sign the agreement.

Forsberg, a native of Sweden and 51 years of age at the time the agreement was signed, confirmed that she was present when attorneys Brown and Megwa explained the agreement, that Wilcox also was present, that no changes to the agreement were made at Sun's or Forsberg's request, and that she had been unable to answer Sun's questions or explain to Sun the terminology used in the agreement. She confirmed that Sun's English was limited, that the lawyers had explained the agreement, and that Sun never stated that she was considering not signing the agreement, that she did not understand it, or that she was not signing of her own free will. Sun never said that Barry threatened her or forced her to sign, that she wanted to consult independent counsel concerning the agreement, or that she felt pressured. Forsberg understood that Brown and Megwa were Barry's attorneys, not Sun's. She testified that when the attorneys explained the agreement, she did not recall any discussion of Sun's community property rights.

Barry and other witnesses offered a different picture of the circumstances leading to the signing of the premarital agreement, an account found by the trial court to be more credible in material respects, as reflected in its statement of decision. Barry and his attorney Brown recalled that approximately two weeks before the parties signed the formal agreement, they discussed with Sun the drafting of an agreement to keep earnings and acquisitions separate. Brown testified that he told Sun at this meeting that he represented Barry and that it might be in her best interest to obtain independent counsel.

Barry, Brown, and Megwa testified that Wilcox was not present at the February 5, 1988, meeting, which lasted between one and two hours, and that at the meeting the attorneys informed Sun of her right to independent counsel. All three recalled that Sun stated she did not want her own counsel, and Megwa recalled explaining that he and Brown did not represent her. Additionally, all three recalled that the attorneys read the agreement to her paragraph by paragraph and explained it as they went through it, also informing her of a spouse's basic community property rights in earnings and acquisitions and that Sun would be waiving these rights. Megwa recalled it was clearly explained that Barry's income and acquisitions during the marriage would remain Barry's separate property, and he recalled that Sun stated that such arrangements were the practice in Sweden. Furthermore, Barry and the two attorneys each confirmed that Sun and Forsberg asked questions during the meeting and were left alone on several occasions to discuss its terms, that Sun did not exhibit any confusion, and that Sun indicated she understood the agreement. They also testified that changes were

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made to the agreement at Sun's behest. Brown and Megwa experienced no difficulty in communicating with Sun, found her confident and happy, and had no indication that she was nervous or confused, intimidated, or pressured. No threat was uttered that unless she signed the agreement, the wedding would be cancelled, nor did they hear her express any reservations about signing the agreement. Additionally, legal secretary Illa Washington recalled that Wilcox waited in another room while the agreement was discussed, that Sun asked questions and that changes were made to the agreement at her behest, that Sun was informed she could secure independent counsel, that Sun said she understood the contract and did not want to consult another attorney, and that she appeared to understand the discussions and to feel comfortable and confident. . . .

[The trial court concluded that Barry had demonstrated by clear and convincing evidence that the agreement and its execution were free from the taint of fraud, coercion, or undue influence and that Sun entered the agreement with full knowledge of the property involved and her rights therein. The court of appeal reversed and directed a retrial on the issue of voluntariness. The court stressed that Sun lacked independent counsel and had not waived counsel effectively. It asserted that attorneys Brown and Megwa failed to explain that Sun's interests conflicted with Barry's, failed to urge her to retain separate counsel, and may have led Sun to believe they actually represented her interests as they explained the agreement paragraph by paragraph. The court of appeal concluded that the trial court erred in failing to give proper weight to the circumstance that Sun was not represented by independent counsel. It also pointed to Sun's limited English-language skills and lack of "legal or business sophistication," and stated that she "received no explanation of the legal consequences to her ensuing from signing the contract" and "was told there would be 'no marriage' if she did not immediately sign the agreement." It also referred to typographical errors and omissions in the agreement, the imminence of the wedding and the inconvenience and embarrassment of canceling it, Sun's asserted lack of understanding that she was waiving her statutory right to a community property interest in Barry's earnings, and the absence of an attorney acting as an advocate on her behalf.]

Pursuant to Family Code section 1615 [based on the Uniform Premarital Agreement Act], a premarital agreement will be enforced unless the party resisting enforcement of the agreement can demonstrate either (1) that he or she did not enter into the contract voluntarily, or (2) that the contract was unconscionable when entered into and that he or she did not have actual or constructive knowledge of the assets and obligations of the other party and did not voluntarily waive knowledge of such assets and obligations. In the present case, the trial court found no lack of knowledge regarding the nature of the parties' assets, a necessary predicate to considering the issue of unconscionability, and the Court of Appeal accepted the trial court's determination on this point. We do not reconsider this factual determination, and thus the question of unconscionability is not before us. . . . [T]he only issue we face concerns the trial court's determination that Sun entered into the agreement voluntarily. . . .

[Family Code § 1615 does not define] the term "voluntarily." . . . *Black's Law Dictionary* defines "voluntarily" as "Done by design. . . . Intentionally and without coercion." (Black's Law Dict. (6th ed. 1990) p. 1575.) The same source defines "voluntary" as "Proceeding from the free and unrestrained will of the person. Produced in or by an act of choice. Resulting from free choice, without compulsion or solicitation. The word, especially in statutes, often implies knowledge of essential facts." (Ibid.) The *Oxford English Dictionary* defines "voluntarily" as "[o]f one's own free will or accord; without compulsion, constraint, or undue influence by others; freely, willingly." (19 *Oxford English Dict.* (2d ed. 1989) p. 753.) . . .

[A number of factors are relevant to the issue of voluntariness. A court should examine whether the evidence indicates coercion or lack of knowledge and consider] the impact upon the parties of such factors as the coercion that may arise from the proximity of execution of the agreement to the wedding, or from surprise in the presentation of the agreement; the presence or absence of independent counsel or of an opportunity to consult independent counsel; inequality of bargaining power in some cases indicated by the relative age and sophistication of the parties; whether there was full disclosure of assets; and the parties' understanding of the rights being waived under the agreement or at least their awareness of the intent of the agreement. . . . [T]he parties' general understanding of the effect of the agreement constitutes a factor for the court to consider in determining whether the parties entered into the agreement voluntarily. . . .

In *In re Marriage of Dawley,* 17 Cal. 3d 342, 131 Cal. Rptr. 3, 551 P.2d 323, we rejected the wife's

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claim that a premarital agreement waiving community property rights had been obtained through undue influence, pointing out that in the particular case the pressure to marry created by an unplanned pregnancy fell equally on both the parties, that both parties were educated and employed, and that the party challenging the agreement did not rely upon the other party's advice, but consulted her own attorney. [See also] *La Liberty v. La Liberty,* (1932) 127 Cal. App. 669, 16 P.2d 681 (rejecting lack of independent counsel as a basis for rescission, given the parties' apparent understanding of the meaning of the premarital agreement.) . . .

We have considered the range of factors that may be relevant to establish the involuntariness of a premarital agreement in order to consider whether the Court of Appeal erred in according such great weight to one factor—the presence or absence of independent counsel for each party. . . .

[Nothing in our statute] makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. . . . [The presence of independent counsel or a reasonable opportunity to consult counsel is] merely one factor among several that a court should consider in examining a challenge to the voluntariness of a premarital agreement. . . .

[W]e conclude that the trial court's determination that Sun voluntarily entered into the premarital agreement in the present case is supported by substantial evidence. . . .

The Court of Appeal held the trial court erred in finding the parties' agreement to be voluntary. The appellate court stressed the absence of counsel for Sun, and . . . pointed to Sun's limited English language skills and lack of "legal or business sophistication," stated that she "received no explanation of the legal consequences to her ensuing from signing the contract" and "was told there would be 'no marriage' if she did not immediately sign the agreement." It also referred to typographical errors and omissions in the agreement, the imminence of the wedding and the inconvenience and embarrassment of cancelling it, and Sun's asserted lack of understanding that she was waiving her statutory right to a community property interest in Barry's earnings.

The trial court, however, determined that Sun entered into the premarital contract voluntarily, without being subject to fraud, coercion, or undue influence, and with full understanding of the terms and effect of the agreement. . . . It determined that [Barry] had demonstrated by clear and convincing evidence that the agreement had been entered into voluntarily.

The trial court made specific findings of fact regarding the factors we have identified as relevant to the determination of voluntariness. These findings are supported by substantial evidence and should have been accepted by the Court of Appeal. . . .

The trial court determined that there had been no coercion. It declared that Sun had not been subjected to any threats, that she had not been forced to sign the agreement, and that she never expressed any reluctance to sign the agreement. It found that the temporal proximity of the wedding to the signing of the agreement was not coercive, because under the particular circumstances of the case, including the small number of guests and the informality of the wedding arrangements, little embarrassment would have followed from postponement of the wedding. It found that the presentation of the agreement did not come as a surprise to Sun, noting that she was aware of Barry's desire to "protect his present property and future earnings," and that she had been aware for at least a week before the parties signed the formal premarital agreement that one was planned.

These findings are supported by substantial evidence. Several witnesses, including Sun herself, stated that she was not threatened. The witnesses were unanimous in observing that Sun expressed no reluctance to sign the agreement, and they observed in addition that she appeared calm, happy, and confident as she participated in discussions of the agreement. Attorney Brown testified that Sun had indicated a desire at their first meeting to enter into the agreement, and that during the discussion preceding execution of the document, she stated that she understood the agreement. As the trial court determined, although the wedding between Sun and Barry was planned for the day following the signing of the agreement, the wedding was impromptu—the parties had not secured a license or a place to be married, and the few family members and close friends who were invited could have changed their plans without difficulty. (For example, guests were not arriving from Sweden.) In view of these circumstances, the evidence supported the inference, drawn by the trial court, that the coercive force of the normal desire to avoid social embarrassment or humiliation was diminished or absent. Finally, Barry's testimony that the parties early in their relationship had discussed their desire to keep separate their property and earnings, in addition to the testimony of Barry and Brown that they had met with Sun at least one week before the document was signed to discuss the need for an agreement, and the evidence establishing that Sun understood and concurred in the agreement, constituted substantial evidence to support the trial court's

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conclusion that Sun was not subjected to the type of coercion that may arise from the surprise and confusion caused by a last-minute presentation of a new plan to keep earnings and property separate during marriage. In this connection, certain statements in the opinion rendered by the Court of Appeal . . .—that Sun was subjected to aggressive threats from financial advisor Mel Wilcox[;] that the temporal proximity of the wedding was coercive under the circumstances of this case; and that defects in the text of the agreement indicate it was prepared in a rush, came as a surprise when presented, and was impossible to understand—are inconsistent with factual determinations made by the trial court that we have determined are supported by substantial evidence.

With respect to the presence of independent counsel, although Sun lacked legal counsel, the trial court determined that she had a reasonable opportunity to obtain counsel. The trial court stated: "Respondent had sufficient awareness and understanding of her right to, and need for, independent counsel. Respondent also had an adequate and reasonable opportunity to obtain independent counsel prior to execution of the Agreement. Respondent was advised at a meeting with Attorney Brown at least one week prior to execution of the Agreement that she had the right to have an attorney represent her and that Attorneys Brown and Megwa represented Petitioner, not Respondent. On at least two occasions during the February 5, 1988, meeting, Respondent was told that she could have separate counsel if she chose. Respondent declined. Respondent was capable of understanding this admonition."

These factual findings are supported by substantial evidence. Brown testified that at the meeting that preceded the February 5, 1988, meeting at which the premarital agreement was executed, both Sun and Barry indicated they wished to enter into a premarital agreement, and that Brown informed Sun that he represented Barry and that therefore it might be in her best interest to have her own attorney. She declined. Brown testified that at the February 5, 1988, session he explained the basics of community property law, telling Sun that she would be disavowing the protection of community property law by agreeing that income and acquisitions during marriage would be separate property. He informed her of her right to separate counsel, and told both parties that the agreement did not have to be signed that day. He again informed Sun that he represented Barry. He testified that Sun stated that it was not necessary for her to have counsel, and that she said she understood how the contract affected her interests under the community property law. Attorney Megwa also testified that the attorneys discussed basic community property law with Sun and told her that she had a right to have her own attorney and that she did not have to sign the agreement. He testified that the subject of her obtaining her own counsel came up at least three times during the February 5, 1988, meeting, and that she stated explicitly that she did not wish to submit the agreement to separate counsel for review. Megwa testified that he had cautioned Sun that she should not sign the agreement (which she had reviewed herself and which then had been explained to her clause by clause) unless it reflected her intentions, and that she said she understood the agreement.

The Court of Appeal . . . rejected the conclusion of the trial court that Sun understood why she should consult separate counsel. This determination by the appellate court contradicts the specific finding of the trial court that Sun understood what was at stake. The trial court's finding is supported by the language of the agreement itself, including the indication in paragraph 10 that the earnings and accumulations of each spouse "during marriage" would be separate property, and additional language stating that "[w]e desire by this instrument to agree as to the treatment of separate and community property *after* the marriage. . . ." (Italics added.) The trial court's finding also was supported by evidence establishing that the attorneys explained to Sun the rights she would have under community property law. In addition, Barry testified that ever since the issue first came up at the beginning of the relationship, Sun had agreed that the parties' earnings and acquisitions should be separate. Further, the attorneys testified that during the February 5, 1988, meeting, Sun stated her intent to keep marital property separate. These circumstances establish that Sun did not forgo separate legal advice out of ignorance. Instead, she declined to invoke her interests under the community property law because she agreed, for her own reasons, that Barry's and her earnings and acquisitions after marriage should be separate property.

The Court of Appeal . . . surmised that Sun did not have a reasonable opportunity to consult counsel because a copy of the agreement was not provided in advance of the February 5, 1988, meeting, and because Sun had insufficient funds to retain counsel and was not informed that Barry would pay for independent counsel's services. Again, this determina-

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tion is contradicted by the conclusion of the trial court that Sun had "an adequate and reasonable opportunity to obtain independent counsel prior to execution of the Agreement." The trial court's determination was supported by evidence that Sun had been told about the agreement and her potential need for counsel at least a week before the document was executed and that she was told at the February 5, 1988, meeting that she could consult separate counsel and was not required to sign the contract that day. Additionally, there was evidence supporting the inference that she declined counsel because she understood and agreed with the terms of the agreement, and not because she had insufficient funds to employ counsel. . . .

With respect to the question of inequality of bargaining power, the trial court determined that Sun was intelligent and, evidently not crediting her claim that limited English made her unable to understand the import of the agreement or the explanations offered by Barry's counsel, found that she was capable of understanding the agreement and the explanations proffered by Barry's attorneys. There is ample evidence to support the trial court's determination regarding Sun's English-language skills, in view of the circumstances that for two years prior to marriage she had undertaken employment and education in a trade that required such skills, and before meeting Barry had maintained close personal relationships with persons speaking only English. In addition, Barry and his witnesses all testified that Sun appeared to have no language problems at the time she signed the agreement. Brown and Megwa testified that Sun indicated at the February 5, 1988, meeting that she understood the agreement, and indeed the contract contains a paragraph indicating that the parties attest that they "fully understand [ ]" the terms of the agreement. The trial court's findings with respect to the notice and opportunity Sun received to obtain independent counsel at least one week before the agreement was executed, as well as evidence indicating Sun long had known and agreed that the marriage would entail separation of earnings and acquisitions, tend to undercut any inference that coercion arose from unequal bargaining power, including Barry's somewhat greater sophistication and the involvement of two attorneys and a financial advisor on Barry's behalf. In addition, although these persons represented Barry, there is substantial evidence that they did not pressure Sun or even urge her to sign the agreement. Further, although Barry had three years of college studies as well as some experience in negotiating contracts, while Sun had only recently passed her high school equivalency exam (in English) and had little commercial experience, there is evidence that Barry did not understand the legal fine points of the agreement any more than Sun did. In addition, the basic purport of the agreement—that the parties would hold their earnings and accumulations during marriage as separate property, thereby giving up the protection of marital property law—was a relatively simple concept that did not require great legal sophistication to comprehend and that was, as the trial court found, understood by Sun. Finally, we observe that the evidence supports the inference that Sun was intrepid rather than a person whose will is easily overborne. She emigrated from her homeland at a young age, found employment and friends in a new country using two languages other than her native tongue, and in two years moved to yet another country, expressing the desire to take up a career and declaring to Barry that she "didn't want his money." These circumstances support the inference that any inequality in bargaining power—arising primarily from the absence of independent counsel who could have advised Sun not to sign the agreement or urged Barry to abandon the idea of keeping his earnings separate—was not coercive.

With respect to full disclosure of the property involved, the trial court found that Sun was aware of what separate property was held by Barry prior to the marriage, and as the Court of Appeal noted, she failed to identify any property of which she later became aware that was not on the list of property referred to by the parties when they executed the contract. The trial court also determined that Sun was aware of what was at stake—of what normally would be community property, namely the earnings and acquisitions of the parties during marriage. Substantial evidence supports this conclusion, including Sun's statements to Barry before marriage, the terms used in the contract, and Brown and Megwa's testimony that they painstakingly explained this matter to Sun.

With respect to the question of knowledge, as already explained it is evident that the trial court was impressed with the extent of Sun's awareness. The trial court did not credit her claim that before the premarital agreement was presented to her, the parties never had discussed keeping their earnings and acquisitions separate during marriage. Nor did the trial court credit her claim that the subject and content of the agreement came as a surprise to her, or that she did not understand that absent the agreement, she would be entitled to share in Barry's earnings and acquisitions during marriage. The finding that she was sufficiently aware of her statutory rights and how the agreement "adversely affected these rights" is supported by the testimony of Barry, Brown, and Megwa that the attorneys explained

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these matters before Sun signed the agreement. In addition, as noted, Barry testified that he and Sun agreed long before their marriage that their earnings and acquisitions would remain separate. . . .

The factors we have identified in assessing the voluntariness of the agreement entered into between Barry and Sun are not rigidly separate considerations; rather the presence of one factor may influence the weight to be given evidence considered primarily under another factor. In this respect, the trial court's finding that Sun had advance knowledge of the meaning and intent of the agreement and what was at stake for her is influential, as we have seen, in considering some of the other factors.

In considering evidence that Sun responded to Barry's suggestion that she secure independent counsel with the observation that she did not need counsel because she had nothing, the Court of Appeal . . . drew the inference least in support of the judgment—namely, that this statement indicated Sun did not understand that she did have property interests at stake in the form of the community property rights that would accrue to her under applicable statutes, in the absence of a premarital agreement. We believe that this was error on the part of the appellate court, because substantial evidence supported the trial court's determination to the contrary. It is clear from the testimony of Brown and Megwa that, even if Sun did not peruse the entire document herself, they read it to her paragraph by paragraph, thoroughly explaining the matter to her. Barry's testimony further established that he and Sun had agreed from the beginning of their relationship that each would forgo any interest in the other's earnings and acquisitions during marriage.

Family Code section 1615 places on the party seeking to avoid a premarital agreement the burden of demonstrating that the agreement was involuntary. The trial court determined that Sun did not carry her burden, and we believe that its factual findings in support of this conclusion are supported by substantial evidence.

The judgment of the Court of Appeal is reversed. . . .

ASSIGNMENT 4.5

a. Make a list of every fact that helps support the conclusion that the agreement was signed involuntarily. For each fact, state why.

b. Make a list of every fact that helps support the conclusion that the agreement was signed voluntarily. For each fact, state why.

c. Assess the voluntariness of the premarital agreement in (i)–(iv). Assume in each instance that the parties did not have independent counsel.

(i) Harry presented Linda with the premarital agreement for the first time at the jewelry store where they were buying a ring the day before the wedding. Immediately after the wedding, they were scheduled to begin an expensive honeymoon cruise.

(ii) Sam presented Mary with the premarital agreement for the first time two weeks before the wedding, just after Mary's elderly and frail parents arrived for the wedding from abroad.

(iii) When Diane signed the premarital agreement, she was a pregnant teenager, anxious about the legitimacy of her child. Her husband-to-be and the father of the child, Bill, was an older man.

(iv) The spouse signing the premarital agreement was a paralegal.

d. Should the law *require* each party to have his or her own independent counsel in order for the premarital agreement to be valid?

e. Do you think that there should be any difference between determining the voluntariness of a confession in a criminal case and the voluntariness of a premarital agreement in a civil case? Why or why not?

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.

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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 represents 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).
- 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.

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Premarital Agreements: A Checklist—*Continued*

- 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.
- 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.

ASSIGNMENT 4.6

a. Find an opinion written by a court in your state that discusses the fairness or reasonableness of a premarital agreement. Give the facts and result of the opinion. If no such opinion exists in your state, try to find one written by a court in a neighboring state. According to the opinion, what standards are used in the state to assess the enforceability of the agreement? (See General Instructions for the Court-Opinion Assignment in Appendix A.)

b. 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. (See General Instructions for the Agreement-Drafting Assignment in Appendix A.)

c. After your instructor makes note of the fact that you have drafted an agreement, you will be asked to exchange agreements with another member of the class. You are to analyze the agreement written by your classmate. Go through each numbered clause in the agreement and determine whether it is valid or invalid according to the standards identified in this chapter and/or according to the law governing premarital agreements in your state. When you cannot apply a standard, in whole or in part, because you need more facts, simply list the factual questions to which you would like answers in order to be able to assess the validity of the clause in question. (See General Instructions for the Legal-Analysis Assignment in Appendix A.)

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Pre-Civil Union Agreements

In chapter 5 we will discuss gay marriages and the substitute created in Vermont called the **civil union** relationship. Gay marriages are not legal in the United States today. However, the civil union relationship in Vermont is designed to provide same-sex couples with state benefits that are equal to those available in Vermont marriages. One of the benefits of a Vermont marriage is the right to enter a premarital agreement that will alter most of the spousal support and property rights that normally apply to a marriage in the event of the death of one of the spouses or the dissolution of the marriage. Because those in a Vermont civil union are to have rights equal to those of spouses in a Vermont marriage, one would expect that the parties contemplating a civil union should be able to enter a pre-civil union agreement that defines rights in the event of the death of one of the parties or the dissolution of the union. The civil union status, however, is relatively new, and therefore there is little case law interpreting such agreements.

civil union
A same-sex legal relationship in Vermont that has the same benefits, protections, and responsibilities under Vermont law that are granted to spouses in a marriage.

CLAUSES IN PREMARITAL AGREEMENTS

Here are some sample clauses used in several premarital agreements. Note the variety of phrasing used in different agreements to cover the same topic. Margin comments are provided to highlight important themes in the clauses. For terms you do not understand in the clauses, consult the glossary at the end of the book.

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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. In fact, **fornication** and **adultery** are crimes in some states even if no payment is involved. Bob's consideration was **meretricious** sexual services and, as such, cannot be the basis of a valid contract.

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.

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.*)

severable
Removable without destroying what remains.

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 10. 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?

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.*

This is not an academic question. The Bureau of the Census says that between 1960 and 1997, the number of "unmarried-couple households" in America increased from 439,000 to more than 4.1 million. This category consists of two unrelated adults of the opposite sex who share a housing unit. The Bureau of the Census refers to these unmarried heterosexuals as **POSSLQs** (pronounced *possle-kews*), an acronym that stands for *p*eople (or *p*ersons) of the *o*pposite *s*ex [who are] *s*haring *l*iving *q*uarters. Furthermore, an additional 1.5 million households consist of two unrelated adults of the same sex.[1]

POSSLQs
Acronym for "people (or persons) of the opposite sex [who are] sharing living quarters."

[1]These are not all homosexual-couple households. The count includes some couples who are not cohabiting (e.g., those that include a roommate, a boarder, or a paid employee). In the future, the Census Bureau will use a new category of "unmarried partner," which is a person who is not related to the householder, who shares living quarters, and who has a close personal relationship with the householder.

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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 5. 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.

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.[2] 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.

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.

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.[3]

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 *un*enforceable 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

[2]The parties were Michelle Marvin (formerly Michelle Triola) and Lee Marvin, a famous actor. Although they never married, Michelle changed her last name to Marvin.
[3]*Marvin v. Marvin,* 557 P.2d at 112, 113.

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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 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 [nonsexual] in exchange for support during the time they live together). There must be an offer, acceptance, and legal consideration. (*Consideration* is whatever the parties are mutually promising or exchanging.) 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

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.

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.

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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.**[4] An example might be a doctor who provides medical 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.

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.

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.

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 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.

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

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

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

[4]In 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."

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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

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.

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.

CASE

Hewitt v. Hewitt

77 Ill. 2d 49, 394 N.E.2d 1204, 3 A.L.R. 4th 1 (1979)
Supreme Court of Illinois

Background: *Victoria Hewitt met Robert Hewitt in college. When she became pregnant, he told her they were husband and wife and that no formal ceremony was necessary. He said he would "share his life, his future, his earnings and his property" with her. They announced to their parents that they were married and held themselves out as husband and wife. She helped him in his education and business. During fifteen years together, they had three children. They never entered a ceremonial marriage. (Since 1905 Illinois has not allowed common law marriages.*) Upon their separation, she sued him for "an equal share of the profits and properties accumulated" while together. The circuit court dismissed her complaint. She appealed. The lower appellate court reversed and ruled that she could sue him for violating an express oral contract. Robert then appealed. The case is now on appeal before the Supreme Court of Illinois.*

Decision on Appeal: *Judgment for Robert. It is against public policy in Illinois to enforce property rights of unmarried cohabitants.*

Opinion of the Court:

Justice UNDERWOOD delivered the opinion of the court. . . .

In finding that plaintiff's complaint stated a cause of action on an express oral contract, the appellate court adopted the reasoning of the California Supreme Court in the widely publicized case of *Marvin v. Marvin* (1976), 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106, . . . The issue of unmarried cohabitants' mutual property rights, however, . . . cannot appropriately be characterized solely in terms of contract law, nor is it limited to considerations of equity or fairness as between the parties to such relationships. There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships. Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage. Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as "illicit" or "meretricious" relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society? In the event of death shall the survivor have the status of a surviving spouse for purposes of inheritance, wrongful death actions, workmen's compensation, etc.? And still more importantly: what of the children born of such relationships? What are their support and inheritance rights and by what standards are custody questions resolved? What of the sociological and psychological effects upon them of that type of environment? Does not the recognition of legally enforceable property and custody rights emanating from nonmarital cohabitation in practical effect equate with the legalization of common law marriage at least in the circumstances of this case? And, in summary, have the increasing numbers of unmarried cohabitants and changing mores of our society reached the point at which the general welfare of the citizens of this State

*A common law marriage is a marriage of two people who agree to be married, cohabit, and hold themselves out as husband and wife even though they do not go through a traditional ceremonial marriage. See chapter 5.

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is best served by a return to something resembling the judicially created common law marriage our legislature outlawed in 1905?

Illinois' public policy regarding agreements such as the one alleged here was implemented long ago in *Wallace v. Rappleye* (1882), 103 Ill. 229, 249, where this court said: "An agreement in consideration of future illicit cohabitation between the plaintiffs is void." . . . It is true, of course, that cohabitation by the parties may not prevent them from forming valid contracts about independent matters, for which it is said the sexual relations do not form part of the consideration. (*Restatement of Contracts* secs. 589, 597 (1932). . . .)

The real thrust of plaintiff's argument here is that we should abandon the rule of illegality because of certain changes in societal norms and attitudes. It is urged that social mores have changed radically in recent years, rendering this principle of law archaic. It is said that because there are so many unmarried cohabitants today the courts must confer a legal status on such relationships. . . . If this is to be the result, however, it would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity. . . .

[J]udicial recognition of mutual property rights between unmarried cohabitants would, in our opinion, clearly violate the policy of our recently enacted Illinois Marriage and Dissolution of Marriage Act . . . "[to] strengthen and preserve the integrity of marriage and safeguard family relationships." (Ill. Rev. Stat. 1977, ch. 40, par. 102.) We cannot confidently say that judicial recognition of property rights between unmarried cohabitants will not make that alternative to marriage more attractive by allowing the parties to engage in such relationships with greater security. . . .

The policy of the Act gives the State a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will. This seems to us another indication that public policy disfavors private contractual alternatives to marriage. . . .

[W]e believe that these questions are appropriately within the province of the legislature, and that, if there is to be a change in the law of this State on this matter, it is for the legislature and not the courts to bring about that change. We accordingly hold that plaintiff's claims are unenforceable for the reason that they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.

Appellate court reversed; circuit court affirmed.

CASE

Watts v. Watts

137 Wis. 2d 506, 405 N.W.2d 303 (1987)
Supreme Court of Wisconsin

Background: *Sue Watts alleges that she quit her job and abandoned her career in exchange for James Watts's promise to take care of her. For twelve years, they raised a family and worked in a family business together. They never married. (Common law marriages are not allowed in Wisconsin.) When the relationship deteriorated, she sued him in circuit court for her share of the property they had accumulated. Among her legal theories were breach of contract, constructive trust, and unjust enrichment. The circuit court dismissed the case, arguing that the legislature, not the court, should provide relief to parties who have accumulated property in nonmarital cohabitation relationships. The case is now on appeal before the Supreme Court of Wisconsin.*

Decision on Appeal: *Reversed. Sue Watts should be allowed to bring her claims against James.*

Opinion of the Court:

Justice ABRAHAMSON delivered the opinion of the court. . . .

Nonmarital cohabitation does not render every agreement between the cohabiting parties illegal. . . . The plaintiff alleges that during the parties' relationship, and because of her domestic and business contributions, the business and personal wealth of the couple increased. Furthermore, the plaintiff alleges that she never received any compensation for these contributions to the relationship and that the defendant indicated to the plaintiff both orally and through his conduct that he considered her to be his wife and that she would share equally in the increased wealth.

The plaintiff asserts that since the breakdown of the relationship the defendant has refused to share

continued

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CASE

Watts v. Watts—*Continued*

equally with her the wealth accumulated through their joint efforts or to compensate her in any way for her contributions to the relationship. . . . [H]er claim . . . is that she and the defendant had a contract to share equally the property accumulated during their relationship. The essence of the complaint is that the parties had a contract, either an express or implied in fact contract, which the defendant breached.

Wisconsin courts have long recognized the importance of freedom of contract and have endeavored to protect the right to contract. A contract will not be enforced, however, if it violates public policy. A declaration that the contract is against public policy should be made only after a careful balancing, in the light of all the circumstances, of the interest in enforcing a particular promise against the policy against enforcement. Courts should be reluctant to frustrate a party's reasonable expectations without a corresponding benefit to be gained in deterring "misconduct" or avoiding inappropriate use of the judicial system. *Merten v. Nathan,* 108 Wis. 2d 205, 211, 321 N.W.2d 173, 177 (1982); *Restatement (Second) of Contracts,* Section 178 comments b and e (1981).

The defendant appears to attack the plaintiff's contract theory on three grounds. First, the defendant apparently asserts that the court's recognition of plaintiff's contract claim for a share of the parties' property contravenes the Wisconsin Family Code. Second, the defendant asserts that the legislature, not the courts, should determine the property and contract rights of unmarried cohabiting parties. Third, the defendant intimates that the parties' relationship was immoral and illegal and that any recognition of a contract between the parties or plaintiff's claim for a share of the property accumulated during the cohabitation contravenes public policy.

The defendant rests his argument that judicial recognition of a contract between unmarried cohabitants for property division violates the Wisconsin Family Code on *Hewitt v. Hewitt,* 77 Ill. 2d 49, 394 N.E.2d 1204, 3 A.L.R. 4th 1 (1979). In *Hewitt* the Illinois Supreme Court concluded that judicial recognition of mutual property rights between unmarried cohabitants would violate the policy of the Illinois Marriage and Dissolution Act because enhancing the attractiveness of a private arrangement contravenes the Act's policy of strengthening and preserving the integrity of marriage. The Illinois court concluded that allowing such a contract claim would weaken the sanctity of marriage, put in doubt the rights of inheritance, and open the door to false pretenses of marriage. . . .

The defendant has failed to persuade this court that enforcing an express or implied in fact contract between these parties would in fact violate the Wisconsin Family Code. The Family Code, chs. 765–68, Stats. 1985–86, is intended to promote the institution of marriage and the family. We find no indication, however, that the Wisconsin legislature intended the Family Code to restrict in any way a court's resolution of property or contract disputes between unmarried cohabitants.

The defendant also urges that if the court is not willing to say that the Family Code proscribes contracts between unmarried cohabiting parties, then the court should refuse to resolve the contract and property rights of unmarried cohabitants without legislative guidance. The defendant asserts that this court should conclude, as the *Hewitt* court did, that the task of determining the rights of cohabiting parties is too complex and difficult for the court and should be left to the legislature. We are not persuaded by the defendant's argument. Courts have traditionally developed principles of contract and property law through the case-by-case method of the common law. While ultimately the legislature may resolve the problems raised by unmarried cohabiting parties, we are not persuaded that the court should refrain from resolving such disputes until the legislature gives us direction. . . .

We turn to the defendant's third point, namely, that any contract between the parties regarding property division contravenes public policy because the contract is based on immoral or illegal sexual activity. . . . Courts have generally refused to enforce contracts for which the sole consideration is sexual relations, sometimes referred to as "meretricious" relationships. See *In Matter of Estate of Steffes,* 95 Wis. 2d 490, 514, 290 N.W.2d 697 (1980), citing *Restatement of Contracts,* Section 589 (1932). Courts distinguish, however, between contracts that are explicitly and inseparably founded on sexual services and those that are not. This court, and numerous other courts, have concluded that "a bargain between two people is not illegal merely because there is an illicit relationship between the two so long as the bargain is independent of the illicit relationship and the illicit relationship does not constitute any part of the consideration bargained for and is not a condition of the bargain." *Steffes,* supra, 95 Wis. 2d at 514, 290 N.W.2d 697.

While not condoning the illicit sexual relationship of the parties, many courts have recognized that

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the result of a court's refusal to enforce contract and property rights between unmarried cohabitants is that one party keeps all or most of the assets accumulated during the relationship, while the other party, no more or less "guilty," is deprived of property which he or she has helped to accumulate. See e.g., *Marvin v. Marvin,* 18 Cal. 3d 660, 682, 134 Cal. Rptr. 815, 830, 557 P.2d 106, 121 (1976).

The *Hewitt* decision, which leaves one party to the relationship enriched at the expense of the other party who had contributed to the acquisition of the property, has often been criticized by courts and commentators as being unduly harsh. Moreover, courts recognize that their refusal to enforce what are in other contexts clearly lawful promises will not undo the parties' relationship and may not discourage others from entering into such relationships. *Tyranski v. Piggins,* 44 Mich. App. 570, 577, 205 N.W.2d 595 (1973). A harsh, per se rule that the contract and property rights of unmarried cohabiting parties will not be recognized might actually encourage a partner with greater income potential to avoid marriage in order to retain all accumulated assets, leaving the other party with nothing.

In this case, the plaintiff has alleged many facts independent from the parties' physical relationship which, if proven, would establish an express contract or an implied in fact contract that the parties agreed to share the property accumulated during the relationship. The plaintiff has alleged that she quit her job and abandoned her career training upon the defendant's promise to take care of her. A change in one party's circumstances in performance of the agreement may imply an agreement between the parties. *Steffes,* supra, 95 Wis. 2d at 504, 290 N.W.2d 697; *Tyranski,* supra, 44 Mich. App. at 574, 205 N.W.2d at 597. In addition, the plaintiff alleges that she performed housekeeping, childbearing, childrearing, and other services related to the maintenance of the parties' home, in addition to various services for the defendant's business and her own business, for which she received no compensation. Courts have recognized that money, property, or services (including housekeeping or childrearing) may constitute adequate consideration independent of the parties' sexual relationship to support an agreement to share or transfer property. See *Tyranski,* supra, 44 Mich. App. at 574, 205 N.W.2d at 597; *Steffes,* supra 95 Wis. 2d at 501, 290 N.W.2d 697.*

According to the plaintiff's complaint, the parties cohabited for more than twelve years, held joint bank accounts, made joint purchases, filed joint income tax returns, and were listed as husband and wife on other legal documents. Courts have held that such a relationship and "joint acts of a financial nature can give rise to an inference that the parties intended to share equally." *Beal v. Beal,* 282 Or. 115, 122, 577 P.2d 507, 510 (1978). The joint ownership of property and the filing of joint income tax returns strongly implies that the parties intended their relationship to be in the nature of a joint enterprise, financially as well as personally.

Having reviewed the complaint and surveyed the law in this and other jurisdictions, we hold that the Family Code does not preclude an unmarried cohabitant from asserting contract and property claims against the other party to the cohabitation. We further conclude that public policy does not necessarily preclude an unmarried cohabitant from asserting a contract claim against the other party to the cohabitation so long as the claim exists independently of the sexual relationship and is supported by separate consideration. Accordingly, we conclude that the plaintiff in this case has pleaded the facts necessary to state a claim for damages resulting from the defendant's breach of an express or an implied in fact contract to share with the plaintiff the property accumulated through the efforts of both parties during their relationship. . . . [W]e do not judge the merits of the plaintiff's claim; we merely hold that she be given her day in court to prove her claim. . . .

The plaintiff's [next] theory of recovery involves unjust enrichment. Essentially, she alleges that the defendant accepted and retained the benefit of services she provided knowing that she expected to share equally in the wealth accumulated during their relationship. She argues that it is unfair for the defendant to retain all the assets they accumulated under these circumstances and that a constructive trust should be imposed on the property as a result of the defendant's unjust enrichment. . . .

Unlike claims for breach of an express or implied in fact contract, a claim of unjust enrichment does not arise out of an agreement entered into by the parties. Rather, an action for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make

*Until recently, the prevailing view was that services performed in the context of a "family or marriage relationship" were presumed gratuitous. However, that presumption was rebuttable. In *Steffes,* we held the presumption to be irrelevant where the plaintiff can show either an express or implied agreement to pay for those services, even where the plaintiff has rendered them "with a sense of affection, devotion and duty." Id. 95 Wis. 2d at 503, 290 N.W.2d at 703–704. For a discussion of the evolution of thought regarding the economic value of homemaking services by cohabitants, see Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services,* 10 Family Law Quarterly 101, 110–14 (Summer 1976).

continued

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CASE

Watts v. Watts—*Continued*

restitution where retaining such a benefit would be unjust. *Puttkammer v. Minth,* 83 Wis. 2d 686, 689, 266 N.W.2d 361, 363 (1978).

Because no express or implied in fact agreement exists between the parties, recovery based upon unjust enrichment is sometimes referred to as "quasi contract," or contract "implied in law" rather than "implied in fact." Quasi contracts are obligations created by law to prevent injustice. *Shulse v. City of Mayville,* 223 Wis. 624, 632, 271 N.W. 643 (1937).

In Wisconsin, an action for unjust enrichment, or quasi contract, is based upon proof of three elements: (1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit. . . .

As part of his general argument, the defendant claims that the court should leave the parties to an illicit relationship such as the one in this case essentially as they are found, providing no relief at all to either party. For support, the defendant relies heavily on *Hewitt v. Hewitt,* supra, to argue that courts should provide no relief whatsoever to unmarried cohabitants until the legislature provides specifically for it.

As we have discussed previously, allowing no relief at all to one party in a so-called "illicit" relationship effectively provides total relief to the other, by leaving that party owner of all the assets acquired through the efforts of both. Yet it cannot seriously be argued that the party retaining all the assets is less "guilty" than the other. Such a result is contrary to the principles of equity. Many courts have held, and we now so hold, that unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both.

In this case, the plaintiff alleges that she contributed both property and services to the parties' relationship. She claims that because of these contributions the parties' assets increased, but that she was never compensated for her contributions. She further alleges that the defendant, knowing that the plaintiff expected to share in the property accumulated, "accepted the services rendered to him by the plaintiff" and that it would be unfair under the circumstances to allow him to retain everything while she receives nothing. We conclude that the facts alleged are sufficient to state a claim for recovery based upon unjust enrichment.

As part of the plaintiff's unjust enrichment claim, she has asked that a constructive trust be imposed on the assets that the defendant acquired during their relationship. A constructive trust is an equitable device created by law to prevent unjust enrichment. *Wilharms v. Wilharms,* 93 Wis. 2d 671, 678, 287 N.W.2d 779, 783 (1980). To state a claim on the theory of constructive trust the complaint must state facts sufficient to show (1) unjust enrichment and (2) abuse of a confidential relationship or some other form of unconscionable conduct. The latter element can be inferred from allegations in the complaint which show, for example, a family relationship, a close personal relationship, or the parties' mutual trust. These facts are alleged in this complaint or may be inferred. *Gorski v. Gorski,* 82 Wis. 2d 248, 254–55, 262 N.W.2d 120 (1978). Therefore, we hold that if the plaintiff can prove the elements of unjust enrichment to the satisfaction of the circuit court, she will be entitled to demonstrate further that a constructive trust should be imposed as a remedy. . . .

In summary, we hold that the plaintiff's complaint has stated a claim upon which relief may be granted. . . . Accordingly, we reverse the judgment of the circuit court, and remand the cause to the circuit court for further proceedings consistent with this opinion.

ASSIGNMENT 4.7

a. Why did the *Hewitt* court rule that cohabitation agreements were illegal? Why did the *Watts* court rule that they can be legal?

b. Which opinion was correctly decided, *Hewitt* or *Watts?*

c. Assume that James Watts died without leaving a will while he still had a good relationship with Sue Watts. Would she be able to claim a share of his estate as one of his heirs?

d. How would the facts of *Hewitt* be resolved in your state? How would the facts of *Watts* be resolved in your state? (See General Instructions for the Court-Opinion Assignment in Appendix A.)

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ASSIGNMENT 4.8

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). (See General Instructions for the Agreement-Drafting Assignment in Appendix A.)

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? (See General Instructions for the Legal-Analysis Assignment in Appendix A.)

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. (See General Instructions for the Interrogatories Assignment in Appendix A.)

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?

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Interviewing and Investigation Checklist—*Continued*

15. What were your roles in the house? How were these roles decided upon? Through agreement? Explain.
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.

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SUMMARY

The four main kinds of agreements parties enter before 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

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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
civil union
fornication
adultery
meretricious
severable
cohabited
POSSLQs
palimony
implied contract
quasi contract
unjust enrichment
trust
constructive trust
partnership
joint venture
putative spouse

ETHICS IN PRACTICE

You are a paralegal working at the law office of Paul Smith, Esq. Alice Henderson has asked the firm to write a cohabitation agreement for her and her boyfriend, Fred Lincoln. Both Alice and Fred come to the firm's office, where Paul Smith describes the agreement that he has drafted for them, telling them that it is a standard agreement considered fair to both parties. Alice and Fred are happy with the agreement and sign it. Any ethical problems?

ON THE NET: PREMARITAL AGREEMENTS AND COHABITATION

FormDepot: Antenuptial Agreement
http://www.formdepot.com/forms/clf/clf5.html

Jewish Law: Suggested Antenuptial Agreement
http://www.jlaw.com/Articles/antenuptial_agreement4.html

Premarital Agreements Online
http://www.edisso.com/antenup.htm

Divorce Source (click your state; type "antenuptial" or "cohabitation")
http://www.divorcesource.com

Alternatives to Marriage Project
http://www.unmarried.org

Family Law Advisor: Cohabitation Agreements
http://www.divorcenet.com/co/co%2Dart03.html

Unmarried Couples and the Law
http://www.palimony.com

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