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WEDNESDAY, JUNE 24, 2015
Chicago Daily Law Bulletin®
Volume 161, No. 123

Premarital agreements for same-sex couples

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Premarital agreements are being sought by an increasing number of couples entering into marriage to avoid the uncertainties and expense of litigation in the event of a divorce.

A premarital agreement can protect and allocate property interests as well as determine or restrict a spouse's right to maintenance, otherwise known as alimony.

In 1990, Illinois adopted the Uniform Premarital Agreement Act, which makes it very difficult to invalidate a properly drafted premarital agreement. With very limited exceptions, the courts will uphold and enforce premarital agreements, including spousal waivers of support.

With 20 U.S. jurisdictions now recognizing marriage between same-sex couples, many of these prospective spouses are seeking premarital agreements for the same reasons as their heterosexual counterparts.

Arguably, until all states recognize marriage equality, a same-sex couple may have an even greater need for a premarital agreement. In a nonrecognition state, in the absence of an enforceable contract, the asset-possessed party may find themselves subject to claims of unjust enrichment and other common-law causes of action.

Today, nearly every state permits unmarried partners to bring common-law claims to resolve their property disputes, even those states that reject common-law marriage. *Blumenthal v. Brewer*, 2014 IL App (1st) 132250, (appeal allowed; Ill., March 25, 2015).

Moreover, without a binding contract, a same-sex couple in a nonrecognition state may lack a forum to seek an allocation of property or spousal support. When a couple have entered into a premarital agreement, it affords them the opportunity to resolve financial issues even if the courts lack authority to dissolve their marriage.

It is possible that one member of the same-sex couple will seek to avoid the enforcement of a premarital agreement in a nonrecognition state on the theory that the consideration for a premarital agreement is the marriage, and because the marriage is void, the agreement lacked consideration and is thus also void. Such an argument is likely to fail as courts have long recognized unmarried co-habitants' right to contract to define their economic rights. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

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"Unmarried persons who are living together have the same rights to lawfully contract with each other regarding their property as do other unmarried individuals." *Hay v. Hay*, 678 P.2d 672 (Nev. 1984).

Accordingly, a written premarital agreement is likely to be enforced as a cohabitation agreement in a nonrecognition state, particularly if it provides that the consideration includes, but is not limited to, the marriage between the parties.

There are certain precautions that should be taken when preparing an Illinois premarital agreement for a same-sex couple. "Premarital Agreements and the Migratory Same Sex Couple," Family Law Quarterly, Volume 48, Number 3, Fall 2014.

First, any agreement should include a provision that the validity, enforceability and interpretation of the agreement will be governed by Illinois law, regardless of the subsequent residence of the parties, where any property may be owned, or whether the marriage is recognized as valid.

The agreement should also expressly state that, in the event the parties are residing in a nonrecognition state at the time of the separation and one moves to a marriage equality state, the other will submit to the personal jurisdiction of the marriage equality state for the purposes of obtaining a divorce and enforcing the terms of the agreement.

Last, all claims of unjust enrichment, detrimental reliance or other common-law causes of action should be expressly waived.

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