

Litigating the Agreement
Case Strategies and Follow-Through to Maximize Success

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It is a truism that some very fine lawyers make mistakes not because they fail to know the law but because they fail to understand their client's goals and motivations. This failure can be particularly embarrassing when litigating the validity of premarital agreements where one must toggle back and forth between two time periods and navigate around changes in the law during the interval. One must resist jumping to conclusions without first listening to what the client wants and why he or she wants it. Only then can you develop, adjust, and implement an effective litigation strategy that the client will understand and appreciate from the beginning of the litigation until judgment is entered.

The initial interview

Inquire about the history of the relationship from meeting through courtship, courtship to marriage, and marriage to date. Although many clients may walk in with a full complement of preconceived notions, distill the client's conclusions about unfairness, duress, and confusion down to basic facts: Who? What? When? Where? Why? And How?

The authorities in your jurisdiction that will impact the litigation will be the basis of your checklist of

essential facts. In particular, know whether and when your state adopted any form of the Uniform Premarital Agreement Act (UPAA) or enacted particular legislation dealing with premarital agreements. Also determine whether the statute in question applies only to agreements executed after a certain date. Even if the statute does not explicitly govern, look at its elements and trace their legislative history to see whether they were enacted in direct response to prior litigated cases similar to yours. Note that while your agreement may be governed by a statute, your jurisdiction may still allow traditional common law challenges to validity. In any event, gather all pertinent facts to authorities of your jurisdiction, because you cannot know at the interview stage which may help or hurt. (Some statutes will actually itemize factual points or issues that may be dispositive).

Next, ask the client what type of lawyer drafted the agreement. Premarital agreements are not strictly the province of family lawyers and not all attorneys who draft them practice family law. Estate planners and tax attorneys who draft such agreements may not use family law parlance and principles. Determining the drafter's perspective will help you anticipate areas in which you can

argue that an agreement does not apply or is ambiguous and that evidence outside the four corners of the agreement should be admitted.

If your jurisdiction recognizes defenses of fraud, duress, or coercion at the time of execution, be sure to establish a timeline for all events from the first mention of an agreement until its execution. Determine the time period over which the agreement was negotiated. Explain that if the client is to prevail, testimony must be adduced from all who participated. This means everyone, from parents to legal advisors to the attorneys themselves, their staffs, and anyone who represented either side during negotiations and, of course, all those present at the signing, right down to the notary.

In the case of financial disclosures that generally form the basis for fraud claims, probe what the client learned about the prospective spouse's financial prospects and what your client disclosed about his or her finances during their courtship. Some jurisdictions will find an agreement valid if the spouse claiming fraud was exposed to enough general knowledge about property owned and sources of income to make an informed decision, even without specific written disclosures. Other jurisdictions will allow for express

waivers of disclosure. If written disclosures were made, ask about every person who would have seen them to pin down exactly what was provided, when it was provided, and what opportunity the client and his or her advisors had to verify the information. Ask whether the client had an accountant or other financial professional look at the disclosures and determine what expertise that person had.

After eliciting the history, find out which points the opposing spouse may dispute and what witnesses, documents, and interpretations the opposing spouse will attempt to use to disprove your client's assertions. Obviously, this can be done through depositions, requests to admit, and other discovery tools. Ask your client how he or she feels about the strength of proof for each disputed issue so that you will not emphasize facts about which the client is unsure.

Your interview should focus on the basis for your client's goals. For example, a client who feels he or she was pressured into signing a prenuptial agreement will want to challenge it in litigation, whereas a client who feels his or her spouse is trying to wiggle out of the agreement will likely want to uphold it.

Determine whether invalidating the agreement and applying dissolution-of-marriage principles to property and support will result in less being awarded to your client than he or she is entitled to under the agreement. Likewise, if a client has protected his or her premarital wealth such that it would be awarded as his or her nonmarital property in an action for dissolution or if under the terms of the agreement most property would be distributed between the spouses, it might actually advance the litigation not to enforce it.

Authorities

Juxtapose facts gathered during the client interview with authorities that may influence the validity issue.

Because premarital agreement litigation can touch on areas of the law not commonly used in dissolution-of-marriage actions, maintain and update a developments-in-the-law checklist. Because every state is different, this checklist will serve as a guide to important factors that may impact premarital agreement litigation in your jurisdiction.

Choice of law

Examine the premarital agreement for a choice-of-law provision that would allow you to litigate under another state's law. It may be difficult to persuade a court to follow the provisions of an agreement whose validity is contested.

Research whether the other state's authorities are materially different from your own. If they are and the laws of your state would generate a more favorable outcome, check your state authorities to see whether the choice-of-law provision will be honored or exceptions will be made. Also find out whether laws in effect when the agreement was signed allowed the parties to contract as to choice of law. The UPAA allows for such terms in agreements, but if it did not apply at the time of execution and the state in question had no other supporting case law, you may get around choice-of-law provision enforcement.

Statute of frauds

The statute of frauds generally provides that no suit or action can be maintained on certain types of contracts unless the parties have so agreed in writing. The UPAA specifies that a premarital agreement must be in writing and signed by both parties and, in effect, implements the requirements of the statute of frauds. However, when litigating an agreement not subject to the Uniform Premarital Agreement Act, find out whether a form of the statute of frauds is in effect in your state. This would be relevant only if a party were to claim that the parties had an oral

agreement or an oral modification to a written premarital agreement.

Statute of limitations

States adopting the UPAA enjoy a tolling of the claim for relief during the marriage, but this will not necessarily eliminate equitable defenses of laches and estoppel. One could argue that enforcing statutes of limitations on challenges to these types of agreements runs counter to public policy (i.e., not wanting a spouse to end up on welfare due to an inability to challenge an agreement.)

Effect of the UPAA

Review the UPAA as adopted in the jurisdiction in which you will litigate. The uniform act provides clear guidelines regarding claims of fraud and delineates that the execution of a written waiver of additional disclosures will be accepted. However, because factual circumstances may differ, the uniform act specifies only that an agreement will be invalid if not executed voluntarily. This is analogous to a claim of duress or coercion under common law, but is virtually impossible to define with specificity.

To anticipate how an opponent may undermine the act, pay attention to how other laws, public policy considerations about spousal support, and the like have been treated in decisions rendered under the act.

Contract principles

If the court has not prohibited the application of general contract principles to premarital agreements, such principles may be used to support or undermine an opponent's position. For example, a presumption that contractual terms will be construed against the drafter may help when language is imprecise. Knowing what presumptions can be raised, whether they are rebuttable, and what facts should be proven to negate them will ensure that you are prepared for all trial issues.

Public policy considerations

Premarital agreements may run counter to public policy considerations. Most states have common-law or statutory safety valves that allow a judge to void the effect of a premarital agreement if enforcing it would leave a spouse without support. Knowing what they are and having a feel for how judges apply such "outs" could save your client considerable time and expense.

Common law comes into play when no statute governs premarital agreements. In some states, one may challenge premarital agreements on traditional common law grounds of fraud, duress, and coercion even though a form of the UPAA is in effect. If your state has not specifically precluded such challenges, explore whether common law claims apply. In states where there is a dearth of authority on the application of the premarital agreement act, bolster the black letter of your statute by relating common law principles to your situation.

Jury trials

If a jury trial is not an option in a dissolution action in your state, it is unlikely to be available when litigating the validity of a premarital agreement within the dissolution action. If your state's code of civil procedure provides for independent actions for declaratory judgment (where evidence may be adduced), consider filing such an action prior to instituting dissolution proceedings if having a jury would help your cause.

A fiduciary duty

Determine whether any authority establishes that engaged persons have a confidential or fiduciary relationship giving rise to certain duties. Do not presume that a fiduciary duty exists. Research what, if any, duties outside disclosure requirements of a statute will alert you to other argu-

ments that can be made for or against your position.

Decide what your client will gain or lose if an agreement is upheld or set aside. Analyze the outcome of enforcing the agreement versus what is likely to happen at dissolution. Doing the analysis before taking a position could save you embarrassment later.

Discovery strategy

Begin your discovery strategy after you have assembled the facts of the case and applied them to the authorities. At this juncture, create a chart. The first column should list factual elements you must prove. For each, list the witnesses and documents available as proof. Contact friendly witnesses to ascertain whether their recollections are the same as your client's. Ask them to sign an affidavit or statement memorializing their recollections, which can be attached to a dispositive motion. These statements or affidavits will prevent witnesses from later professing ignorance and thus avoiding testifying. They also may assist you in determining whether, on the basis of affidavits and other information, you can move for a summary judgment on any or all issues relating to the agreement, or whether you can move for a declaratory judgment regarding the agreement's validity.

In most cases, you will need information from the attorney who represented your client in negotiating and drafting the agreement. Have your client execute an instruction directing the former attorney to release his or her file to you. Indicate that absent a written waiver, the client will assert the attorney-client privilege with respect to all confidential communications. This will prevent inadvertent

waivers that could moot trial objections based on privilege. The best information to be obtained from the former lawyer is a detailed description of why and at whose insistence each revision to the agreement was made. A party's claims of duress, coercion, or a lack of bargaining power can be undermined by a showing of his or her attorney's intervention, which resulted in favorable changes to the agreement. The easiest way to make this point is through the testimony of a friendly witness.

Premarital agreement litigation often involves documents created long before the client appears in your office. If the client suggests that a page of an agreement or a signature is not familiar, insist on seeing original documents. If your client has questions or concerns about the authenticity of his or her signature or initials, engage experts to review the suspect documents. Such experts generally fall into two categories: handwriting experts or ink-and-paper authorities who can tell you whether the document's ink and paper were in existence at the time the documents were purported to have been signed. In discovery depositions and interrogatories question the custody of documents from signing to date, and be prepared to make foundation objections.

Requests for the admission of facts and genuineness of documents can narrow issues early in the suit. Put facts that should not be controverted in a request early in discovery. Then closer to trial, issue a second request to cover additional facts learned during discovery. Make your lists clear and easy to read so that you can object to the introduction of contrary evidence at trial.

After assembling all available

information (without issuing subpoenas and taking depositions), list arguments counter to those you will make at trial. Add a column to your chart listing contrary evidence next to each point of evidence you will introduce so as to identify problem areas.

In deposing the opposing party and his or her former attorney, be sure to ascertain the names of any other individuals who advised them or consulted with them and identify those individuals' expertise. Even though an accountant may not have been retained, a client may have conferred with a family member who is a CPA.

Depose any witnesses to be called by opposing counsel and request any documents pertinent to their testimony. Be sure to ask about any subsequent contact the witness had with opposing counsel or your client's spouse since the drafting and negotiations so that you can gauge whether testimony has been suggested to them and introduce evidence of bias or prejudice.

Pendente Lite orders

Your jurisdiction may provide that a presumption of validity is established upon the proving that an agreement has been executed. This can be a basis for restricting temporary support orders, orders for attorney's fees, and discovery that would not be needed if the agreement were enforced. However, some jurisdictions will not allow otherwise valid agreements to waive spousal support or fees during the pendency of the litigation. Beware of pendente lite orders and be sure to insist that the judge make such orders without prejudice to review upon a determination that the agreement is valid so that the agree-

ment is not made moot by such orders.

If disputed issues include whether evidence is admissible based on claims of privilege or parol evidence and it will affect your trial testimony, seek rulings via motions in limine before trial. Also seek a ruling on any burden-of-proof dispute.

Evidentiary issues

Anticipating possible evidentiary problems at trial gets easier the more you have done to chart precisely what your evidence will be. For each fact you will introduce, consider whether the other side can interpose any of the objections listed below. Look to assert one of the evidentiary objections listed below for information your opponent may attempt to introduce. Following are common evidentiary objections encountered in premarital agreement litigation.

- 1. Parol evidence rule.** Unless and until an agreement is proven ambiguous or unclear, you cannot admit prior contemporaneous evidence to challenge its terms.
- 2. Best evidence rule.** This rule obligates a party to produce an original document or account for its whereabouts before introducing a copy. Determine whether you have any issues regarding the authenticity of critical documents.
- 3. Privileged communications.** Because attorneys assisted in negotiating most premarital agreements, either party can claim privilege. Have a solid grasp of your jurisdiction's law on waivers of privilege because some states deem any disclosure leads to a total waiver while others allow

for selective disclosure. Be prepared to argue why your opponent has made waivers and why your client has not. In determining whether your client should waive the attorney-client privilege, determine whether his or her attorney can make any disclosures that would be harmful. If no harmful disclosures are forthcoming, waiving the privilege to introduce helpful evidence will likely have no adverse consequences.

- 4. Dead man's act.** Some states prohibit testimony from deceased individuals. Although generally parties to an action for dissolution are alive, sometimes a premarital agreement is litigated in probate court when a deceased spouse's relatives seek to deprive a surviving spouse of benefits of the agreement. In this context, you will be limited in introducing oral admissions.
- 5. Admissions.** Be current on the law of your jurisdiction pertaining to admissions and which agents can make admissions on behalf of a principal. In the premarital agreement setting, admissions could come from the opposing client, his or her attorney, or accountant, and anyone else who falls within the definition of an agent under state law. Be sure to question your own client carefully about whether he or she may have made harmful admissions that could come to light during the trial.
- 6. Exception to the hearsay rule.** The state of mind exception is by far the most helpful exception to the hearsay rule in premarital agree-

ment litigation. If your client can reasonably testify that his or her state of mind was the result of hearsay statements, you may be able to introduce statements to explain why your client made certain assumptions. For example, if a husband tells his wife that they are signing a premarital agreement but that he never intends to enforce it and that she should keep this a secret from the lawyers, this can be used to explain her state of mind in signing an agreement that gives her virtually no protection.

- 7. Admitted by virtue of a request to Admit.** If a fact or document was admitted to be genuine in response to a request to admit, the opponent cannot argue against admission at trial.

Conclusion

Because premarital agreement litigation involves variables not commonly encountered in a dissolution of marriage, preparation is critical. A comprehensive and well-conceived litigation strategy will reduce the likelihood of surprise at trial or failure to meet the burden of proof and will deal effectively with evidentiary considerations.



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