

Prenuptial & Postnuptial Agreements

FAMILY LAW CLE WEBINAR | FRIDAY, JANUARY 26, 2024



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Validity & Enforceability of a Prenuptial or Postnuptial Agreement

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Topics

.01 Validity

.02 Voluntariness

.03 Disclosure & Unconscionability

.01 | Validity

Statutory Requirements (part 1)

K.S.A. 23-2403

A prenuptial agreement shall be in writing and signed by both parties. Consideration is not required for it to be enforceable.

The party seeking to invalidate a premarital agreement bears the burden to prove it is invalid.

K.S.A. 23-2407

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

- (1) That party did not execute the agreement voluntarily; or
- (2) The agreement was unconscionable when such agreement was executed, and before execution of the agreement, all of the following applied to the party:
 - (A) Such party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
 - (B) Such party 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
 - (C) Such party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party

Statutory Requirements (part 2)

K.S.A. 23-2407 continues:

- (b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.
- (c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law

Statutory Requirements (part 3)

The options KSA 23-2407 sets out to determine whether an agreement is valid are:
(1) it was entered involuntarily; or, (2) the agreement was unconscionable and:

- (1) There was not sufficient financial disclosure
- (2) A party did not waive the right of disclosure; and
- (3) The party injured did not have the means to learn about the missing financial information.

.02 | Voluntariness

Factors

The court examines the surrounding facts and circumstance to determine if the agreement was voluntary.

The Kansas Supreme Court laid out relevant factors in *Davis v. Miller*, 269 Kan. 732, 7 P.3d 1223 (2000):

- The surrounding facts and circumstances, including the parties' comparative situations;
- The parties respective property;
- The parties family ties and connections;
- Circumstances preceding the agreements execution;
- Circumstances leading up to marriage;
- The parties ages, education, and business experience;
- When the agreement was presented;
- Who drafted the agreement;
- Statements of the parties prior to, or during execution of the agreement;
- Whether the parties had independent advice of counsel before entering he agreement;
- Actual comments of counsel; and
- Who was present during execution of the agreement.

Fraud or Duress

Absent a showing of undue influence or fraud, the agreement will be upheld.

Free choice must be present.

If either party has hidden or misrepresented assets, the agreement cannot have been entered into voluntarily. A party does not have the knowledge of what they gained or lost by entering the agreement.

If a court finds that an agreement was entered into under fraud or duress, it may declare the agreement is invalid and then make an equitable division of property.

- Fraud:
 - Elements of an action for fraud include an untrue statement of fact, known to be untrue by the party making it, made with the intent to deceive or with reckless disregard for the truth, upon which another party justifiably relies and acts to his or her detriment.
- Duress:
 - Duress or coercion come into play when improper pressure by one party to a contract deprives another party of the exercise of his or her free will and cause him or her to act to his or her detriment. Does not require an act of deceit. The question to ask for duress is: did the pressured party execute the contract voluntarily?

LINDA D. ELROD, KANSAS LAW AND PRACTICE: KANSAS FAMILY LAW 141 (2022) (citing *Cessna v. Cessna*, 155 Kan. 856 (1942)).

Independent Counsel

Kansas law does not require the parties to hire lawyers. Theoretically, the presence of independent legal advice assures that both parties understand the terms of the agreement, that it is voluntary, and that they know what is being waved and what is being gained by the agreement.

Practice tip: If one party to the contract refuses to obtain independent counsel, the lawyer representing one of the parties should only communicate with the unrepresented party in writing. When the agreement is reached, insert a clause in the contract that says the unrepresented person acknowledges that he or she has been instructed and encouraged to seek independent representation, knows that the agreement has been drafted by the lawyer for the other party, and that the person knowingly and willfully waives the right to independent counsel.

Michelle M. Gervais & Lauryn Coleman, *Pro Tips for Negotiating, Drafting, and Executing a Prenuptial Agreement*, 45 FAM. ADVOC. 15, 15 (Spring 2023).

.03 | Disclosure & Unconscionability

Disclosure

- There should be a full disclosure of all material facts relating to the quantity, character, and value of the property of both parties.
- Kansas courts have held that the exact dollar amount need not be stated if there is general knowledge of the nature and extent of the assets of each party.
- See *In re Broadie's Estate*, 208 Kan. 621, 493 P.2d 289 (1972); *In re Cantrell's Estate*, 154 Kan. 546, 119 P.2d 483 (1941).

How to Satisfy the Disclosure Requirement

- Have each party prepare and exchange financial statements that detail their assets and liabilities.
- Attach the financial statements to the agreement and state that each party has been fully advised of the other party's financial position.

See, e.g., KATHERINE E. STONER & SHAE IRVING PRENUPTIAL AGREEMENTS: HOW TO WRITE A FAIR & LASTING CONTRACT (NOLO 2019).

Waiver or General Knowledge

- A party can waive disclosure, but it is not advised. A lawyer should urge their client to obtain a disclosure and not sign a waiver. If a client insists on waiving disclosure, the lawyer should draft a letter or memo that is provided to the client and saved to the client file indicating he or she was advised by the lawyer to obtain disclosure.
- A party can have a “general knowledge of assets.” It has to be shown that the spouse trying to avoid the agreement knew or reasonably could have known the nature of the other party’s financial position. If this can be shown, the agreement will be enforceable.

Notes on Unconscionability

- Unconscionability is only relevant under the Kansas Premarital Agreement Act if there is inadequate disclosure of assets.
- Unconscionability is judged at the time the contract was entered into.
- Once you have inadequate disclosure, you then have to show unconscionability. This is a subjective standard.

Definition

The Davis court noted the following definition of unconscionability:

- “The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise, and in contract law. It has been used in cases respecting divorce settlements or awards. Hence [K.S.A. 23-2407(a)(2)] does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard included protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.”

What may be considered unconscionable?

- The Court in Davis went on to cite comments of the UPPA to state that the court can also look at economic circumstances of the parties resulting from the agreement and other relevant evidence like the conditions under which the agreement was made and knowledge of either party.
- In re Marriage of O'Malley, No. 123,910, 2022 WL 1596980 (Kan. App. 2022) (unpublished) – the Court found concealment and lack of knowledge factored into the unconscionability determination where wife showed there was inadequate disclosure.



What a Prenuptial or Postnuptial Agreement Can and Cannot Contain

Christine Pina Rosengreen

Topics

.01 | What Cannot Be Included in a Prenup/Postnup

.02 | What Can Be Included in a Prenup/Postnup

.01 | What a Prenup or Postnup CANNOT Contain

Illegal Provisions

A prenuptial or postnuptial agreement is a contract, and as such, illegal provisions cannot be included. Including such provisions can put the whole document or parts of it at risk of being set aside.

Example: Provision in an agreement to supply the spouse with an illegal substance or to commit a crime.

LINDA D. ELROD, KANSAS LAW AND PRACTICE: KANSAS FAMILY LAW 132 (2022).

Provisions Against Public Policy (Part 1)

The Kansas Court of Appeals has held that “[a] contract is against public policy if it is injurious to the interests of the public, contravenes some established societal interest, violates some public statute or tends to interfere with public welfare and safety. Public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together and to prevent separation.” Linda D. Elrod, *Kansas Law and Practice: Kansas Family Law 130* (2022) (citing *Frazier v. Goudschaal*, 296 Kan. 730 (1978)).

Provisions which may be considered to be against public policy include, but are not limited to:

- Provisions Encouraging Divorce (financial incentives, obligations to procure a divorce, obligates a spouse not to defend or contest a divorce)
- Provisions Limiting the Freedom of One Party to Choose an Attorney
- Provisions Which Create Significant Inequities Between the Parties Such that One Will Require State Assistance

Jennifer Riemer & Jessica C. Krouner, *What is a Prenuptial Agreement?*, 45 FAM. ADVOC. 6, 8 (Spring 2023).

Provisions Against Public Policy (part 2)

Regarding Children:

“Prenuptial agreements are unenforceable to the extent that they adversely affect a child’s right to support or otherwise modify a custodial responsibility, including custody or parenting time. There are other restrictions that vary by state, but, universally, prenuptial agreements cannot restrict any rights that affect children.”

Agreements cannot determine custody or visitation, and cannot limit the amount of child support (though an agreed increase of child support may be enforceable).

BUT, provisions may be made which keep separate and protect assets for children.

Jennifer Riemer & Jessica C. Krouner, *What is a Prenuptial Agreement?*, 45 FAM. ADVOC. 6, 7 (Spring 2023); Uniform Premarital and Marital Agreements Act, 46 Fam. L.Q. 345, 363-64 (2012)

Provisions Superseded by Federal Law

A federal district court sitting in Kansas found that a premarital waiver of a qualified pension is ineffective and that for the waiver to be effective, it must occur in the manner prescribed by ERISA and “after” the marriage.

LINDA D. ELROD, KANSAS LAW AND PRACTICE: KANSAS FAMILY LAW 134 (2022) (citing *Nellis v. Boeing Co.*, 15 E.B.C. 1651 (D.Kan.1992)).

.02 | What a Prenup or Postnup CAN Contain

The Basics

Introductory Facts

Definitions and Examples of:

- Separate Property
- Marital Property

Effective Date and Term

Interpretation, Modification, Review, and Enforcement of the Agreement

Signatures, Acknowledgements, Attorney's Certifications

KATHERINE E. STONER & SHAE IRVING PRENUPTIAL AGREEMENTS: HOW TO WRITE A FAIR & LASTING CONTRACT (NOLO 2019)

Clauses Demonstrating the Agreement is Knowing and Voluntary

Legal Representation (or waiver of independent legal advice); who drafted the agreement

Disclosures of Property and Financial Obligations

- Delineate these disclosures in an attached schedule
- Representation that these values are substantially correct and accurate and that there are no material changes in such values to the best of their knowledge

Waiting Period

Intent Clause

- Purpose of Enhancing Family Harmony

Marriage as Condition Precedent

KATHERINE E. STONER & SHAE
IRVING PRENUPTIAL AGREEMENTS:
HOW TO WRITE A FAIR & LASTING
CONTRACT (NOLO 2019)

Maintenance of Separate Property

Exclusive Rights in Separate Property

- Separate Property to Retain Character as Separate Property
- No Rights in Other Party's Separate Property
- Cooperation in Executing Documents Enabling Each Party to Deal with Their Separate Property
- Waiver of Rights to Deceased Party's Separate Property
- Parties' Intent as to Separate Property

KATHERINE E. STONER & SHAE IRVING PRENUPTIAL AGREEMENTS: HOW TO WRITE A FAIR & LASTING CONTRACT (NOLO 2019)

Provision Regarding Resolution of Conflicts Between Separate and Marital Property

Example:

“In the event there is any conflict in the definition of “separate property” and “marital property,” such that the provisions of this Agreement could be reasonably construed to include any given property as both separate property and marital property, thereby resulting in an ambiguity, the definition of separate property shall be controlling. In the further event there is any property, whether real or personal, in which either party has an ownership interest, and which is not defined as either separate property or as part of the marital property, such property shall likewise be considered as separate property.”

Spousal Maintenance

The parties can include provisions regarding spousal maintenance, such as:

- Time periods, amounts, calculations
- Cost of Living Increase for Maintenance
- Waiver of Modification of Spousal Maintenance
- Modification of Maintenance Due to Decrease in Payor's Income

KATHERINE E. STONER & SHAE IRVING PRENUPTIAL AGREEMENTS: HOW TO WRITE A FAIR & LASTING CONTRACT (NOLO 2019);

David N. Hofstein & Ellen Goldberg Weiner, *Alimony and Maintenance Considerations in Prenuptial Agreements*, 45 FAM. ADVOC. 35, 38 (Spring 2023)

Other Considerations & Clauses

Termination Clauses

Waiver of Compensation

Waiver of Additional Financial Information

Choice of Law Provision

.02 What Can be Included
in a Pre/Postnup

David N. Hofstein & Ellen Goldberg Weiner, Alimony and Maintenance Considerations in Prenuptial Agreements, 45 FAM. ADVOC. 35, 38 (Spring 2023); Restatement (Second) of Conflict of Laws §§ 187, 188 (1971)

Postnups

Seen more often in cases where there has been infidelity or where one party has come into a large inheritance during the marriage that they wish to protect



Financial Planning and Prenuptial and Postnuptial Agreements

Kaylin Dillon, CFP

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Topics

.01 Client goals

.02 Preparing for a Prenup

.03 Serving clients with Prenups

.01 | Client Goals

What is the client's goal?

Prenup

Transparency/open communication

Protect future assets, retirement plan v.

Protection from debt

Set obligations during the marriage

Requires a couple to plan for the future

Trust

May be able to remain hidden

Less risk of commingling

Family can maintain control

Can be set up unilaterally

Ongoing admin work, tax filings, etc.

See generally Allison Tait, Custom of the Country: Trusts and Marriage Planning in High-Wealth Families, 34 J. AM. ACAD. MATRIMONIAL LAWS. 219 (2021).

.02 | Preparing for a Prenup

**Everyone has something
worth protecting.**

Create a Positive Framework

All professionals involved can:

- Encourage the couple to discuss a shared future vision.
 - i.e. Create a financial plan
- Use supportive language
 - “Both of you,” “together,” “your future”
- Be direct

Prenup Prep Checklist

- ☒ Prepare financial schedules for your prenup disclosures. *This service is available only through Kaylin Dillon Financial Planning LLC.*
- ☒ Define your goal for your prenup. *See Prenup Goals below.*
- ☒ Discuss what items you want to address in your prenup. *See Items to Address section below.*
- ☒ Hire attorneys

Prenup Goal(s)

- ☒ Protect existing assets.
- ☒ Protection from existing debt.
- ☐ Minimize cost/ simplify any potential divorce.
- ☐ Behavior incentives/ disincentives
- ☐ Blended family considerations.
- ☐ Estate planning considerations.
- ☒ Consider non-financial contributions (i.e. family care)
- ☒ Business ownership considerations.
- ☒ Custom: Keep future individual debt separate

Provide additional goal details here:

Matt has significant proceeds from a business sale.
Lisa is a resident to be an orthopedic surgeon.

They plan to have children soon, and to retire in their early 50s. Lisa's highest earning years will be during their marriage, and their plans will shorten her career. They would like to include some consideration of this for Lisa in their prenup. Their idea is to fund a marital account annually from his separate assets but they're seeking guidance on this.

KAYLIN DILLON FINANCIAL PLANNING, <https://www.kaylindillonfinancial.com> (last visited Nov. 20, 2023);
KATHERINE E. STONER & SHAE IRVING PRENUPTIAL AGREEMENTS: HOW TO WRITE A FAIR & LASTING CONTRACT (NOLO 2019).

The Financial Neutral

Financial professionals can help during the drafting process

- Collaborate with attorneys
 - Commit to neutrality by always communicating with both clients
 - Remind clients of the attorney's role during the process
- Prepare financial statements
- Ask questions

.03 | Serving Clients with Prenups

Your Business Model



**New Client
Forms**



**Account
Titling**



**Help Prevent
Commingling**



**Track Ongoing
Terms**