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Negotiating and Drafting Marital Agreements

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VIRGINIA LAWYERS PRACTICE HANDBOOK

Negotiating and Drafting Marital Agreements

Ninth Edition

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CHAPTER 2

NONMARITAL, PREMARITAL, AND RECONCILIATION AGREEMENTS

2.1 NONMARITAL AGREEMENTS

2.101 In General. Nonmarital cohabitation agreements are not commonly used in Virginia. Virginia courts historically did not support "meretricious" relationships, and therefore mere cohabitation conferred no legal rights. In fact, cohabitation remained a codified crime in the Commonwealth of Virginia until July 1, 2013. The effect of the repeal of the statute prohibiting cohabitation on contract validity and interpretation will be seen in time. A liberal view, not previously adopted in Virginia, is that a party may have a right to recovery arising from a nonmarital relationship under a theory of implied contract.[1] Even if the parties first cohabited and then married, the period of cohabitation before marriage, by itself, counted for nothing in equitable distribution and had to be tied to an impact on marital property values.[2] Virginia's statutory exclusion of common law marriage supports the traditional view that cohabitation is expressly not recognized as a way to gain the same rights as marriage would confer.[3]

2.102 Theories of Recovery. Five theories have emerged concerning the resolution of property disputes arising from the relationship of couples who cohabit:

1. Recovery under both express and implied contract;

2. Recovery under express agreement but not under implied contract;

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[1] *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

[2] *See Floyd v. Floyd*, 17 Va. App. 222, 226, 436 S.E.2d 457, 459 (1993) (equitable distribution) ("We hold that a trial court may properly consider the parties' premarital contributions, both monetary and nonmonetary, insofar as those contributions affected the value of the marital property but that cohabitation alone—absent a showing of its impact on marital property values—is not an appropriate consideration."); *see generally* Dale M. Cecka, Craig W. Sampson, & James R. Cottrell, *Virginia Family Law: Theory and Practice* § 1:11 (2022) (discussion of premarital and nonmarital contributions and the rights accrued to the parties) [hereinafter Cecka *et al.*].

[3] Va. Code § 20-13 *et seq.*

3. No recovery under any contract theory;

4. Recovery based on title, as through a partition suit; and

5. Bar to recovery by statute or constitutional amendment.

The fifth category of resolution has been a rapidly evolving area, with the ruling in favor of marriage equality striking the most obvious of the statutory prohibitions.[4] This chapter discusses only express written agreements and not implied contracts or actions predicated upon title.

2.103 Express Contract Theory. In the jurisdictions in which an express contract theory has been approved, the underlying philosophy is that because social mores have changed and many more people cohabit without the sanction of marriage, they must have the protection of contract law to govern their property and financial rights.[5]

2.104 Cohabitant Claims in Virginia.

A. In General. The Virginia Supreme Court has not yet squarely faced the issue of the degree to which an unmarried cohabitant has rights, or conversely gains no rights, based on the relationship. Claims based on particular contributions to the purchase of assets, as for example those advanced in partition suits, are options when a cohabitant's relationship fails. No claim for "palimony"—support based on a nonmarital relationship—can be found in a search of reported Virginia cases. Therefore, claims based on agreements between cohabitants should ordinarily be presented in a way that will avoid triggering judicial review based on the parties' relationship, and instead should focus on the terms of a written contract or some other legal theory to accomplish these ends.

B. Cohabitants with Children. The parents of a child born out of wedlock are permitted to agree to terms concerning the child's custody, visitation, and support without offending public policy. As with any scenario involving children, however, agreements that attempt to resolve custody, visitation, and support issues that have not yet arisen but that might develop in the future are unlikely to be enforced.[6] Therefore, as with premarital agree-

[4] *See Obergefell v. Hodges*, 576 U.S. 664 (2015).

[5] *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980); Cecka *et al.*, *supra* note 2, § 3-3. (In their treatise, Cecka, Sampson, and Cottrell argue that Virginia case law supports such a claim by analogy while also noting that no case on point has reached the Virginia Supreme Court.)

[6] *See, e.g., Wilson v. Wilson*, 12 Va. App. 1251, 408 S.E.2d 576 (1991).

ments, apart from acknowledging the child's parentage or perhaps establishing college funds and the like, a written nonmarital agreement as a practical matter is unlikely even to attempt to cover issues relating to children.

2.105 Written Agreements Between Cohabitants.

A. Consideration for Agreement. When discussing a written agreement between parties who choose to cohabit, one can deal only in probabilities. The likelihood of success in enforcing such an agreement is unresolved. Based on trends destigmatizing those relationships, it seems that enforcement is increasingly likely, but the General Assembly and appellate courts have yet to make a clear statement. Formerly, it could depend on whether the agreement appeared to promote the illegal acts of cohabitation and sexual intercourse outside of marriage, but now that the Virginia statute criminalizing those acts has been repealed,[7] agreements that appear to address financial and property rights of the parties could potentially be upheld as they have been in other states. The Nebraska Supreme Court has held, for example, that "[a] bargain in whole or in part for or in consideration of illicit sexual intercourse or a promise thereof is illegal; but subject to this exception such intercourse between parties to a bargain previously or subsequently formed does not invalidate it."[8]

B. Advantages of a Written Agreement. A written agreement spells out the precise expectations of each party if the relationship ends, so that regardless of whether the terms are legally enforceable, the parties have guidance on how to divide assets and liabilities.

A written agreement also protects a party from inventive claims that might arise absent any agreement and from a claim that a different, oral agreement exists. Although a written agreement may be of questionable enforceability, an oral agreement is even less likely to be enforceable and adds all of the evidentiary problems associated with proving any oral agreement.

If the agreement is made between cohabitants with a child, it may serve as an acknowledgment of paternity.[9]

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[7] Section 18.2-345 of the Virginia Code entitled "Lewd and lascivious cohabitation" was repealed by Act of March 20, 2013, 2013 Va. Acts ch. 621.

[8] *Kinkenon v. Hue*, 301 N.W.2d 77, 80 (Neb. 1981) (quoting *Taylor v. Frost*, 276 N.W.2d 656, 658 (Neb. 1979)).

[9] *See* Cecka *et al.*, *supra* note 2, § 13:5; *see also T. v. T.*, 216 Va. 867, 224 S.E.2d 148 (1976) (discussing the effect of private contract and paternity); *Alexander v. Morgan*, 19 Va. App. 538, 452 S.E.2d 370 (1995)

C. Appropriate Subjects for Agreement. Assuming that a written agreement between cohabitants would be enforced, the range of subjects appropriate for resolution is the same as those that might be covered by a premarital or postmarital agreement.[10] Such topics may include:

1. How income and property will be used during the cohabitation period or divided afterward;

2. How household expenses will be shared;

3. Whether there will be any postrelationship support, direct or indirect;

4. How property acquired will be titled or transferred;

5. How debts will be shared or paid;

6. How current issues relating to a child will be handled;

7. How certain future issues relating to a child, such as college costs, will be handled;

8. Who will retain the cohabitation residence if the relationship ends; and

9. Other miscellaneous issues, such as treatment of gifts or custody of pets.

D. Tax Considerations. Transfers between spouses are tax free, but transfers between unmarried cohabitants, even if made pursuant to a written contract, give rise to potential income, capital gains, gift, and estate tax considerations not covered in this chapter.

E. Estate Planning Issues. By itself, cohabitation does not create inheritance rights. Wills, trusts, and jointly titled accounts may accomplish some estate planning goals. The details of such estate planning are beyond the

(discussing the effects of paternity agreements); *see also L.F. v. Breit*, 285 Va. 163, 736 S.E.2d 711 (2013) (biological father of child conceived through in vitro fertilization was allowed to establish parentage pursuant to a voluntary written agreement and an executed acknowledgment of paternity when parents had previously been in a long-term relationship).

[10] A sample nonmarital partnership agreement is set forth as Appendix 2-1. The premarital agreement form in Appendix 2-2 is also a source for clauses.

scope of this chapter, but a lawyer advising cohabitants must be mindful of the issue and bring these matters to the client's attention.

2.2 PREMARITAL AGREEMENTS

2.201 The Virginia Premarital Agreement Act. In the past parties entered into premarital agreements with a level of uncertainty about their validity. Today, however, the presumptive validity and enforceability of such agreements in Virginia is no longer in question. The Virginia Premarital Agreement Act (the Act),[11] first adopted in 1985, not only clarified the validity of agreements created after its enactment but also specifically validated all prior agreements that were otherwise valid as contracts.[12]

2.202 Case Law Under the Premarital Agreement Act. In the past three decades, a number of cases have been decided under the Act. The cases tend to be fact-specific and, therefore, tend not to be reported decisions.[13] Because the Act is a uniform act, cases decided under the laws of other states that have adopted it may also be useful resources to practitioners.

Case law and statutory amendments intersected at *Richardson v. Richardson*[14] and section 20-155 of the Virginia Code. Because the Act requires all settlements to be in writing, and because section 20-155 makes the Act applicable to marital agreements as well, oral settlements read into the record were, for a time, invalidated as not in compliance with the Act.[15] Subsequent amendments to this section revitalized the ability of parties to settle "on the record."[16]

[11] Va. Code § 20-147 *et seq.*

[12] Va. Code § 20-154.

[13] *See, e.g.*, *Wilson v. Wilson*, No. 1958-03-02, 2004 Va. App. LEXIS 17, at *10, 2004 WL 51009 (Va. Ct. App. Jan. 13, 2004) (unpublished) (handwritten document was found valid under the Act); *see also Remillard v. Remillard*, No. 1063-21-2, 2022 Va. App. LEXIS 417, 2022 WL 4073320 (Va. Ct. App. Sept. 6, 2022) (unpublished) (agreement was found unconscionable and, if enforced, would entail gross disparity of division of assets; oppressive influences also at play at the time of signing).

[14] 10 Va. App. 391, 392 S.E.2d 688 (1990), *superseded by statute.*

[15] *Flanary v. Milton*, 263 Va. 20, 23, 556 S.E.2d 767, 768 (2002), *superseded by statute.*

[16] In 2003, the General Assembly added to section 20-155, "[i]f the terms of such agreement are (i) contained in a court order endorsed by counsel or the parties or (ii) recorded and transcribed by a court reporter and affirmed by the parties on the record personally, the agreement is not required to be in writing and is considered to be executed."

2.203 Reasons for Premarital Agreements. Although any couple intending to marry may enter into a premarital agreement if they so desire, typical reasons for entering into such agreements include:

1. Marriages between older parties whose assets have largely been secured by efforts before the marriage;

2. Marriages in which either party has children from a prior relationship;

3. Marriages in which one party who has acquired wealth through an actively managed business or investment portfolio wishes to ensure that the wealth remains separate property;

4. Marriages in which the parties wish to clarify which items of property are marital and which are separate;

5. Marriages in which one party wishes to limit or eliminate altogether the possibility of spousal support; and

6. Marriages in which the parties wish to limit future contested litigation.

2.204 Consideration. The Act states that a premarital agreement is enforceable without consideration,[17] but in fact the marriage itself is consideration.[18]

2.205 Requisites for Validity. The Act states the following requirements for a valid premarital agreement:

1. The agreement must be in writing;

2. The agreement must be signed by both parties; and

3. The parties must actually marry for the agreement to become effective.[19]

[17] Va. Code § 20-149.

[18] *See* Peter N. Swisher & Victoria Bucur, *Domestic Relations*, 19 U. Rich. L. Rev. 731, 732 n.8 (1985).

[19] Va. Code § 20-149.