Supporting Premarital Agreements

Author : Brian Bix

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Elizabeth R. Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 **N.M. L. R.** 354 (2016).

Premarital agreements (also known as “antenuptial agreements” and “prenuptial agreements”) are agreements entered by spouses-to-be just before marriage. Typically, such agreements involve waivers or modifications of the parties’ legal rights at divorce or at the death of one of the spouses. Premarital agreements do not have a good reputation among academics; such agreements are generally considered exploitative and criticized for frequently leaving ex-spouses impoverished (practitioners, especially those for whom preparing such agreements is part of their practice, may have different views). Contrarian views in this area—as in all areas—are a welcome catalyst for new analysis, and perhaps new prescriptions. So Elizabeth Carter’s “rethinking” of premarital agreements—both how they should be valued and what procedures should surround them—is most welcome.

Carter’s initial point is that both scholarly commentary and legal analysis of premarital agreements is based on unsupported empirical claims that premarital agreements generally involve richer would-be husbands imposing exploitative one-sided terms on poorer would-be wives. Like Carter, I do not know of any reliable data regarding how many people enter premarital agreements, what their motivations are, and how frequently one-sided terms are included in those agreements. However, the view of premarital agreements as instruments of oppression is not entirely mythical: it comes from reading the published opinions involving them (where this scenario is in fact common). But why should we assume that the reported cases accurately reflect the general practice of premarital contracting? Perhaps only the unconscionable agreements get litigated (and appealed)? Agreements that are entered in good faith and are substantively fair are unlikely to be challenged, and if challenged, they will probably not raise the sort of issues that result in reported decisions.

Taking stock of the scant empirical evidence, Carter disputes the conventional wisdom regarding premarital contracting. She notes that more and more couples have comparable sophistication and bargaining power. In any event, she observes, the value of the default rights waived under premarital agreements are frequently overstated: e.g., spousal support (alimony) is rarely granted, the value of dower or elective share is often diminished by careful estate planning, and the combination of equitable division and the state definition of marital/community property can lead to small yields.

Carter also takes issue with the rules associated with premarital agreements. For example, almost all states invalidate premarital agreements where the party seeking to enforce the agreement had not made an adequate financial disclosure prior to entering the agreement. Carter argues that this is a strange emphasis, given that assets owned prior to the marriage are (in most jurisdictions) not subject to division at divorce. It is income received during the marriage that will become part of the marital or community property subject to (equal or equitable) division at divorce. While disclosure of current income and assets may give prospective spouses a good indication of income during the marriage, Carter’s point that the current rules over-emphasize the value of disclosure still has some bite.

The article’s argument for premarital agreements is roughly the same argument offered both for limited review of separation agreements and (in commercial agreements) for enforcing liquidated damages

provisions: by creating a certain, predictable outcome, senseless and expensive litigation is avoided and the parties can better plan their future. With this in mind, Carter posits that couples should be encouraged to enter premarital agreements; and that this should be done through a collaborative process, using a single lawyer. In this regard, premarital agreements would be like estate planning: collective decision-making with the assistance of a legally trained advisor (no need for the expense of two). To be clear, Carter is no disinterested observer here. As she notes (P. 354), she and her husband have taken this path themselves.

As with any piece of legal scholarship, there is room for quibbles about the article: at times it could have been more precise in distinguishing rules that require separate legal representation from rules (like those in the Uniform Premarital and Marital Agreement Act, and in some states) that require *an opportunity for* separate representation (time enough to consult a lawyer, and resources for doing so, provided by the other partner if necessary); and the article could be clearer on the standard set by Uniform Premarital Agreement Act and adopted by many states (under the UPAA, agreements can be challenged on the basis of either (a) a lack of voluntariness; or (b) proof that the agreement was unconscionable *and* that there was a failure of financial disclosure).

The more important concern would be that while there is certainly value to Carter's collaborative approach, there are still concerns about more one-sided, exploitative agreements. Although a growing number of couples have comparable income and education levels, there remains the distinct possibility that a significant portion (even if not a majority) of premarital agreements may involve significant imbalances in sophistication and bargaining power. How can we encourage Carter's collaborative approach to premarital contracting while still responding appropriately to more oppressive agreements? In some ways, Carter's insightful article indirectly raises the same set of issues that other scholars have raised: that the social norms and legal rules that work well for some segments of the population may ill serve others.[1]

1. *See, e.g.*, June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 **Mich. St. L. Rev.** 1185; Charles Murray, **Coming Apart** (Crown Forum, 2012).

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