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Choice of Law Provisions in Prenuptial Agreements

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Laws governing divorce vary—often wildly—from state to state. Contrary to popular belief, the law governing a couples' divorce is *not* the law of the state in which the couple were married or even necessarily the law of the state where the couple spent most of their marriage; rather, it is the state law where the couple (or even one party) live for a prescribed period before filing for divorce.

The length of time parties need to live in a state to confer jurisdiction varies (e.g., in New York, it is 1-2 years). This is important because a couple's rights and obligations can vary dramatically depending on geography. For example, many states like New York only divide assets acquired during the marriage and exclude assets received by inheritance or gift, while if a couple moves only a few miles north to Connecticut, *all* property—regardless of when or how it was acquired—will be divided in a divorce.

Avoiding Uncertainty

A validly executed prenuptial agreement (a "prenup") or postnuptial agreement (a "postnup") however, protects a couple regardless of where they live as the agreement—and not the default state law—will govern what is divided upon divorce and whether spousal support will be payable. A prenup is a contract between prospective spouses made in contemplation of marriage that determines financial rights and obligations upon divorce or death. A postnup governs the same subjects as prenups, but is executed *after* the marriage. As more couples enter into agreements and continue to move throughout the United States—and even the world—the enforceability of those agreements becomes increasingly important to both couples and courts.

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Choice of Law Provisions

Because couples are seeking predictable outcomes in their agreement, it is important to understand what will happen if either party seeks enforcement at some future date, in some future jurisdiction. First, a well-drafted agreement will include a choice of law clause that identifies the law that will govern any dispute about the validity or enforceability of the agreement.

For a contractual choice of law clause to be enforceable, a court will look first to find a substantial relationship between the state of the chosen law and the parties or contract. In the context of prenups, one connection may be

residence of both parties in the state of the chosen law at the time of signing. In *Lupien v. Lupien*, a New York court enforced a Massachusetts choice of law clause where the prenup was signed in Massachusetts when both parties resided there. 891 N.Y.S.2d. 785 (App. Div. 2009).

Other factors that may be sufficient to establish a substantial connection include the residence of one party, the location of real property or business interests subject to the agreement, the place of execution of the agreement or the place of marriage. The more factors that point to a state of the chosen law, the easier it will be to convince a court that the state of the chosen law is reasonable.

In *Elgar v. Elgar*, a Connecticut court enforced a New York choice of law clause in a prenup signed in New York where the wife was a resident of New York at the time of signing and both parties had business interests in New York, even though her late husband was a resident of Connecticut and the wedding took place in Connecticut. 238 Conn. 839 (Conn. 1996).

The second requirement a court will consider when deciding whether to enforce a choice of law clause is whether the application of the chosen law is contrary to "a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue." See Restatement (2d), §187(2)(b). If the outcome under the chosen law is contrary to a "fundamental policy" of the forum state, the choice of law clause might not be enforced. In practice, this very rarely happens. For example, a Florida court held that while a prenup under Puerto Rican law was valid, the waiver of Florida homestead protection was unenforceable because it violated a fundamental Florida public policy. *Nicole v. Nicole-Souri (In re Estate of Nicole Santos)*, 648 So. 2d 271, 281-83 (Fla. Dist. Ct. App. 1995).

The choice of law is important because the parties to the agreement must abide by the procedural formalities for execution of the agreement in that state. For example, New York law mandates that a prenup must be in writing and notarized to be enforceable. The very same procedure, however, will not suffice if the parties choose California law, where the parties must not only be represented by counsel but also observe a seven-day waiting period between finalizing and signing the prenup. See California Family Code §1615(c). It also means that a court evaluating whether an agreement should be set aside will consider the applicable standards of the chosen state (e.g., in New York, an agreement may be set aside if it was procured by fraud or duress or deemed unconscionable).

When There Is No Choice of Law Provision

New York law aligns with the Restatement Second of Conflict of Laws, which says that where there is no choice of law in a contract, the law of the state with "the most significant relationship to the transaction and the parties" governs. If a choice of law clause is not enforceable or not included in the agreement, a court with jurisdiction will apply its own state law. In *Rivers v. Rivers*, where a Missouri court considered a prenup executed in Louisiana without a choice-of-law provision, the court applied Missouri law and rendered the agreement invalid. 21 SW3d 117 (Mo. Ct. App., 2000).

When Couples Move During Marriage

Assuming an agreement includes a New York choice of law clause, the question of how the agreement will be treated in another state is important to

couples planning their lives together. With a valid choice of law clause, a state court will only evaluate whether an agreement is enforceable under the state law that expressly governs the contract. For example, if a prenup is prepared and executed in New York with a valid New York choice of law provision and the parties later divorce in California, it matters not that parties have failed to meet California requirements for executing the agreement provided New York requirements have been met.

Even when an agreement contains a valid choice of law provision and meets the procedural formalities of execution, some states, such as Massachusetts, Kentucky Connecticut, and Florida, allow for a "second look" upon divorce approximating a test for unconscionability. See, e.g., *Dematteo v. Dematteo*, 436 Mass. 18 (Mass. 2002); *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). For example, a court may ask whether the circumstances have changed so dramatically that no reasonable person would enter such a contract.

Because of these variations, it is important, no matter what choice of law or what state you are in, that the agreement be fair and not unconscionable. "Fair," however, does not meant that the agreement must mirror the default state law or put spouses on equal footing; it means only that there needs to be something in the agreement for each side. Under New York law, "[a]n unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience …" *McKenna v. McKenna*, 121 A.D.3d 864, 865 (2014) quoting *Morad v. Morad*, 27 A.D.3d 626, 627 (2006)

The "second look" also often applies to spousal support waivers. For example, some states will not enforce a complete waiver, and other states allow waivers only under certain specific conditions. For example, in New Mexico, a prenup may not adversely affect the right of a child *or spouse* to support. See N.M. Stat. §40-3A-4(B) (emphasis added). Louisiana prohibits the waiver of interim support as contrary to public policy. See *Hall v. Hall* 4 So. 3d 254 (La. Ct. App. 2009).

An Iowa court similarly found that spousal allowance could be awarded to a widow, even in the face of express provision in a prenuptial agreement waiving that right. See *Matter of Estate of Spurgeon*, 572 N.W.2d 595, 599 (Iowa 1998). The variation among states regarding the enforceability of agreements can be confounding.

Considering the Second Restatement's goal of preserving justified expectations, a duly executed prenuptial agreement which includes a choice of law clause will likely be enforced. It's important to ensure that the parties have a reasonable basis to choose or other sufficient connection to the state of the chosen law. A more cautious approach will also be mindful not to drive an unfair bargain or execute an agreement under conditions that a court might seek to overturn on public policy grounds.

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