The New Era of Marital Agreements and Cohabitation Agreements

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Premarital and Marital Agreements

1. **History**

   a. Up until 1972, parties most often used premarital agreements to waive certain rights on the death of the spouse, for example, the right to a homestead allowance, the right of election as a surviving spouse, or the right to a property or family allowance. *See* Homer C. Clark, *Antenuptial Contracts,* 50 Colo. L. Rev. 141, 155 (1979).

   b. Parties also frequently used premarital agreements to arrange for security for children of a previous marriage, to provide life insurance, and to circumvent community property or equitable division laws by reclassifying certain named property.

   c. Parties were not able, however, to enter into an antenuptial contract that contemplated the divorce or separation of the parties. Such an agreement, the courts held, was contrary to public policy. *IRM Franks,* 542 P.2d 845 (Colo. 1975).

   d. In 1983, the Uniform Law Commission ("ULC") drafted the Uniform Premarital Agreement Act (UPAA 1). It addressed only premarital agreements. Colorado did not adopt the UPAA, instead creating the Colorado Marital Agreement Act in 1986.

   e. In 2012, the ULC drafted the Uniform Premarital and Marital Agreement Act (UPMAA), which was intended to cover marital agreements as well. Colorado adopted some form of the UPMAA in 2013, but did not adopt all provisions. *See* C.R.S. § 14-2-301 *et seq*. (Colorado is only one of two states to have adopted the UPMAA; South Dakota is the other.)

   f. In 2013, the Colorado Legislature enacted the Uniform Premarital and Marital Agreements Act ("Uniform Colorado Act"). The Uniform Colorado Act repealed and reenacted with amendments the CMAA in C.R.S. § 14-2-301 *et seq*. It became effective July 1, 2014. The Uniform Colorado Act memorialized procedural due process requirements for premarital agreements to be deemed enforceable. These requirements for procedural due process were already being used in the best practices of Colorado estate planning and domestic relations attorneys, and were also consistent with many other states' requirements regarding premarital agreements.

These best practices and the requirements under the Uniform Colorado Act are discussed in more detail below. Underpinning the Uniform Colorado Act, CMAA, and the common law is the expectation that parties signing a premarital agreement are in a "confidential relationship" and are fiduciaries to one another.[1]

g. Today, premarital agreements are valid and enforceable in every state, so long as they are, at a minimum, not violative of public policy and voluntarily entered into between parties. Further, at a minimum, they must be either entered into with full and fair financial disclosure.

2. **Confidential Relationship**

a. The law protects parties to a premarital agreement more than it protects parties to other types of contracts. There are solid reasons for this special protection. When two parties sign a business contract, each party's primary goal is to make as much money as possible from the transaction. Because each party knows the profit is the primary goal, the parties can take adequate precautions to protect their interests. Since it is obviously in the public interest to encourage businesspeople to protect their own welfare, the law interferes in the parties' relations only when one party deliberately intimidates or deceives the other.

b. Engaged couples have a "confidential relationship." *Linker v. Linker*, 470 P.2d 921 (Colo. App. 1970).

c. The duty focuses on procedural fairness, which might be best translated as complete and informed honestly.

d. Engaged persons need some degree of special protection because of their tendency to think in terms of mutual interest rather than self-interest, which makes engaged persons uniquely vulnerable to overreaching.

e. Because of the confidential relationship, the courts insist that the agreement be "voluntary" in a way that is somewhat different from and more difficult to define than the common law contract doctrines of duress and undue influence.

f. Several Colorado cases addressing premarital agreements have noted the special "confidential relationship" involved in signing a premarital agreement. In *Newman v. Newman*, the Colorado Supreme Court stated that parties to a premarital agreement are in a fiduciary relationship with one another and "must act in good faith, with a high degree of fairness and disclosure of all circumstances which materially bear on the premarital agreement." *Newman v. Newman*, 653 P.2d 728 (Colo. 1982). Disclosure

[1] *See Colorado's New Uniform Premarital and Marital Agreements Act*, Susan L. Boothby and Kim Willoughby, Colorado Lawyer, Mar. 2014 (The Appendix: Colorado Marital and Premarital Agreements breakdown of analysis of Pre-July 1986; July 1986 – June 30, 2014; and July 1, 2014, forward is very helpful).

is important because it underscores that each party is exercising a meaningful choice when he or she agrees to give up certain rights found in statutes protecting married persons. In another Colorado case, *Lewis v. Lewis*, the Court stated, "Such a [confidential] relationship exists when one party justifiably reposes confidence in another such that the parties drop their guard and assume that each side is acting fairly." *Lewis v. Lewis*, 189 P.3d 1134, 1143 (Colo. 2008). A confidential relationship between dealing parties may "impel or induce one party to relax the care and vigilance one would and should ordinarily exercise in dealing with a stranger." *Todd Holding Co. v. Super Valu Stores, Inc.*, 874 P.2d 402, 404 (Colo. App. 1993).

3. **Uniform Premarital and Marital Agreement Act (effective July 1, 2014, forward)**

   a. **C.R.S. § 14-2-302. Definitions**
      i. (1) "Amendment" means a modification or revocation of a premarital agreement or marital agreement.

      ii. (2) "Marital agreement" means an agreement between spouses who intend to remain married which affirms, modifies, or waives a marital right or obligation during the marriage or at legal separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement.

      iii. (4) "Marital right or obligation" means any of the following rights or obligations arising between spouses because of their marital status:
         (a) Spousal maintenance;
         (b) A right to property, including characterization, management, and ownership;
         (c) Responsibility for a liability;
         (d) A right to property and responsibility for liabilities at legal separation, marital dissolution, or death of a spouse; or
         (e) An award and allocation of attorney's fees and costs.

      iv. (5) "Premarital agreement" means an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at legal separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed before the individuals marry, of a premarital agreement.

   b. **Separation Agreement vs. Martial Agreement Issue:**

      i. ***IRM Bisque*, 31 P.3d 175 (Colo. App. 2001)**: In *Bisque*, the appellate court ruled that the parties' agreement executed shortly before the parties sought a

mail-order Mexican divorce constituted a separation agreement rather than a marital agreement because it was entered into attendant upon dissolution. Therefore, when an agreement between present spouses is entered into "attendant upon" separation or dissolution, the agreement must be considered a separation agreement, rather than a marital agreement, even if it was signed prior to filing for dissolution or legal separation; this statutory interpretation furthers the policy of safeguarding the interests of a spouse contemplating and preparing for the emotionally stressful step of dissolution of marriage.

ii. ***In re Marriage of Lafaye*, 89 P.3d 455 (Colo. App. 2003):** In *Lafaye*, the parties negotiated and executed an agreement during the pendency of a divorce action, which action was dismissed because of the agreement. The Colorado Court of Appeals upheld the ruling that the agreement was not a separation agreement, even though the attempted reconciliation failed by the end of the same month it began and the wife subsequently filed a second dissolution action.

iii. ***In re Marriage of Salby*, 126 P.3d 291, 294-96 (Colo. App. 2005):** In September 2000, the parties entered into an "Agreement of Marital Separation." The agreement was to "govern their separation under marriage, and, unless revoked . . . the dissolution of that marriage." A petition for dissolution of the marriage was filed in July 2001. The court found that agreement was a separation agreement because it was attendant upon dissolution.

iv. **Note on Pubic Policy in *IRM Manzo*, 659 P.2d 669 (Colo. 1983):** We realize that the standard we apply for court review of the division of property in a separation agreement allows the court more discretion than the standard we recently enunciated in *Newman v. Newman, supra,* for court review of the division of property in an antenuptial agreement. At the time an antenuptial agreement is entered, "there is an assumption in the law that the parties are essentially able to act independently and rationally concerning their present and future property interests in relation to their prospective marriage." *Id.* at 733. In *Newman* we held that antenuptial agreements with respect to property division are "subject to a fairness review within the common law context of review for fraud, overreaching, or sharp dealing. Such an analysis must take place as of the time of execution of the contract and not as of the time of the separation...." *Id.* at 733. Courts reviewing separation agreements prior to entry of a decree of dissolution need more latitude than is allowed for review of antenuptial agreements because of the public policy concern for safeguarding the interests of a spouse whose consent to the agreement may have been obtained under more emotionally stressful circumstances, especially if that spouse is unrepresented by counsel. *See Marseno v. Marseno,* 7

Fam.L.Rep. (BNA) ¶ 2110, Del.Fam.Ct. Newcastle Cty., (Nov. 14, 1980) ("Agreements between spouses have characteristics not possessed by ordinary business contracts. More often than not, they are conceived and executed in an emotionally charged atmosphere."). Moreover, separation agreements are made in contemplation of the dissolution of marital status and are incorporated in a final judgment of the court terminating the marriage and settling joint obligations of the parties.

c. **C.R.S. § 14-2-303. Scope**
   i. (1) This part 3 applies to a premarital agreement or marital agreement signed on or after July 1, 2014.
   ii. (2) This part 3 does not affect any right, obligation, or liability arising under a premarital agreement or marital agreement signed before July 1, 2014.

d. **C.R.S. § 14-2-303.5. Applicability of Part and Case Law to Agreements Relating to Civil Unions**
   i. Prospective parties to a civil union and present parties to a civil union may contract to make an agreement relating to the civil union that includes any of the rights and obligations that may be included in a premarital agreement or marital agreement pursuant to this part 3. The provisions of this part 3 and any case law construing this part 3 apply to any agreement made by prospective parties to a civil union or between present parties to a civil union.

e. **C.R.S. § 14-2-304. Governing law**
   i. (1) The validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement are determined:
      (a) By the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party at the time the agreement was signed and the designated law is not contrary to section 14-2-309 or to a fundamental public policy of this state; or
      (b) Absent an effective designation described in paragraph (a) of this subsection (1), by the law of this state, including the choice-of-law rules of this state.

f. **Formation Requirements**

   i. **C.R.S. § 14-2-306. Formation requirements:** A premarital agreement or marital agreement must be in a record and signed by both parties. The agreement is enforceable without consideration.

   ii. ***IRM Zander,* 480 P.3d 676 (Colo. 2021)**

1. Parties' oral agreement to exclude their retirement accounts and inheritances from the marital estate was not a valid agreement because, at the time agreement was entered, Colorado statutory law required that all agreements between spouses be in writing and signed by both parties.
2. Parties' conduct after entering into the oral agreement to exclude their retirement accounts and inheritances from the marital estate could not be treated as partial performance that satisfied statutory writing and signature requirements at time agreement was entered.

iii. ***IRM Blaine,* 480 P.3d 691 (Colo. 2021):**

1. Interspousal transfer deed executed by husband, which conveyed a home to wife as her separate property, was not a "valid agreement" under Uniform Dissolution of Marriage Act (UDMA), and, thus, home remained subject to presumption of marital property in marriage dissolution proceeding; although deed was "marital agreement" signed by husband, it was not signed by wife, as required by Uniform Premarital and Marital Agreements Act (UPMAA).

g. **C.R.S. § 14-2-307. When Agreement Effective**

i. A premarital agreement is effective on marriage. A marital agreement is effective on signing by both parties.

h. **C.R.S. § 14-2-308. Void Marriage**

i. If a marriage is determined to be void, a premarital agreement or marital agreement is enforceable to the extent necessary to avoid an inequitable result.

i. **C.R.S. § 14-2-309. Enforcement**

i. (1) A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves:
    1. (a) The party's consent to the agreement was **involuntary** or the **result of duress**;
    2. (b) The party **did not have access to independent legal representation** under subsection (2) of this section;
    3. (c) Unless the party had independent legal representation at the time the agreement was signed, **the agreement did not include a notice of waiver of rights** under subsection (3) of this section or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or
    4. (d) **Before signing the agreement, the party did not receive adequate financial disclosure** under subsection (4) of this section.

ii. (2) A party has access to independent legal representation if:

1. (a) **Before signing** a premarital or marital agreement, **the party has a reasonable time to**:
    a. (I) Decide whether to retain a lawyer to provide independent legal representation; and
    b. (II) Locate a lawyer to provide independent legal representation, obtain the lawyer's advice, and consider the advice provided; **and**

2. (b) The other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.

iii. (3) A **notice of waiver of rights under this section requires language, conspicuously displayed, substantially similar to the following**, as applicable to the premarital agreement or marital agreement:
    1. If you sign this agreement, you may be:
        a. Giving up your right to be supported by the person you are marrying or to whom you are married.
    2. Giving up your right to ownership or control of money and property.
    3. Agreeing to pay bills and debts of the person you are marrying or to whom you are married.
    4. Giving up your right to money and property if your marriage ends or the person to whom you are married dies.
    5. Giving up your right to have your legal fees paid.

iv. (4) A **party has adequate financial disclosure** under this section if the party:
    1. (a) **Receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party**; or
    2. (b) [Reserved]
    3. (c) **Has adequate knowledge or a reasonable basis for having adequate knowledge of the information described** in paragraph (a) of this subsection (4).

v. (5) A premarital agreement or marital agreement or amendment thereto or revocation thereof that is otherwise enforceable after applying the provisions of subsections (1) to (4) of this section is nevertheless unenforceable **insofar, but only insofar as**, the provisions of such agreement, amendment, or revocation relate to **the determination, modification, limitation, or elimination of spousal maintenance or the waiver or allocation of attorney fees, and such provisions are unconscionable at the time of enforcement of such provisions. The issue of unconscionability shall be decided by the court as a matter of law.**

vi. (6) [Reserved]
vii. (7) [Reserved]
viii. (8) A **premarital or marital agreement, or an amendment of either, that is not in a record and signed by both parties is unenforceable.**

j. **Enforcement In General:**

i. The enforceability of marital and premarital agreements is the same under Colorado statute. *See* C.R.S. § 14-2-302 *et seq.*

ii. The party against whom enforcement is sought bears the burden to prove a premarital or marital agreement is unenforceable. C.R.S. § 14-2-309(1).

iii. ***IRM Seewald*, 22 P.3d 580 (Colo. App. 2001):** A marital agreement is enforceable only if it has been executed voluntarily and there has been fair and reasonable disclosure of the property and financial obligations of the party seeking to enforce the agreement.

iv. ***IRM Rahn,* 914 P.2d 463 (Colo. App. 1995):** Under case law in effect prior to enactment of the CMAA, if prenuptial agreement was entered into in good faith, with full and fair disclosure, and without fraud or overreaching, agreement was valid and enforceable.

k. **Full Disclosure:**

i. ***IRM Seewald*, 22 P.3d 580 (Colo. App. 2001):** Evidence supported trial court's determination that prenuptial agreement was not enforceable due to insufficient disclosure of husband's assets, even though wife signed agreement after consulting with attorney, where wife and attorney testified that an attachment to the agreement labeled as the husband's balance sheet was blank at the time it was signed by wife.

ii. ***IRM Rahn,* 914 P.2d 463 (Colo. App. 1995):** To achieve full and fair disclosure in connection with execution of prenuptial agreement, as required by case law in effect prior to effective date of the CMAA, parties must disclose general and approximate value of their assets and debts, but are not required to produce detailed, written financial statements. Under law in effect prior to effective date of the CMAA, prenuptial agreement was valid as based on fair disclosure; written disclosure was not required, even though prenuptial agreement contemplated that parties would attach lists of their assets, as neither party complied.

iii. ***In re Estate of Lebsock*, 618 P.2d 683 (Colo. App. 1980):** Generally, due to the confidential relationship of the parties, the burden is to disclose, not to inquire. *In re Estate of Lebsock*, 618 P.2d 683 (Colo. App. 1980).

l. **Independent Knowledge:**

i. The knowledge requirement may be satisfied if the party has independent knowledge of the other party's estate. One common source of knowledge is through personal exposure to the other spouse's property, as when the parties live together or visit each other's property. *Newman v. Newman,* 653 P.2d 728 (Colo. 1982).

ii. Another common way for a party to obtain independent knowledge is by working in the other spouse's business before marriage. The employee spouse's position, however, must be one that gives that spouse some degree of exposure to financial information. *See Newman,* 653 P.2d 728 (wife worked as bookkeeper for husband before marriage).

m. **Voluntariness:**

i. It is important that the party has knowledge of the rights he or she is giving up and the obligations he or she is undertaking.
ii. "Voluntary consent cannot be the result of duress, coercion, or any other form of undue influence." *People v. Walter*, 890 P.2d 240, 244 (Colo. App. 1994).
iii. "A contract is voidable on the grounds of duress if a party's manifestation of assent is induced by an improper threat that leaves no reasonable alternative." *Vail/Arrowhead, Inc. v. Dist. Court*, 954 P.2d 608, 612 (Colo. 1998).
iv. *IRM Ross*, 670 P.2d 26 (Colo. App. 1983):
    1. In dissolution of marriage action, evidence that wife had and took an opportunity for reflection and counseled with and had benefit of her attorney's advice before signing antenuptial agreement supported finding that agreement was not signed under duress.
    2. In dissolution of marriage action, evidence supported trial court's findings concerning each party's disclosure of assets and wife's general knowledge concerning the extent of husband's assets; thus, wife could not have antenuptial agreement set aside on basis that husband had failed to make full and fair disclosure of his assets.
v. *IRM Ingels*, 596 P.2d 1211(Colo. App. 1979):
    1. Antenuptial agreement was not invalid because husband failed to supply wife with a detailed list of his assets; the evidence showed that she had a general knowledge of the extent of his assets, and even

though she may have been unaware of their exact value, that fact alone was insufficient to meet her burden of proving constructive fraud through material nondisclosure.

n. **Unconscionability:**

i. ***Newman v. Newman*, 653 P.2d 728, 735 (Colo. 1982):**
   1. The right to enforce a premarital waiver of spousal support exists pursuant to judicial determination.
   2. The Colorado Supreme Court noted unconscionability exists "when enforcement of the terms of the agreement results in the spouse having insufficient property to provide for his/her reasonable needs and who is otherwise unable to support herself/himself through appropriate employment."

ii. ***IRM Bisque*, 31 P.3d 175 (Colo. App. 2001):** Conscionability standard applicable to separation agreements is different from that applicable to a marital agreement because of the public policy concern for safeguarding the interests of a spouse whose consent to the agreement may have been obtained under more emotionally stressful circumstances, especially if that spouse is unrepresented by counsel.

iii. ***IRM Christen*, 899 P.2d 339 (Colo. App. 2005):**
   1. Even if a marital agreement is otherwise enforceable, its maintenance provisions are unenforceable insofar as they are unconscionable at the time of enforcement, and the issue of unconscionability shall be decided by the court as a matter of law.
   2. For purposes of Colorado Marital Agreement Act, a marital agreement is "unconscionable" if it is not fair, reasonable, and just.
   3. Provision of marital agreement awarding lifetime maintenance to wife in an annual amount sufficient to equalize her income and husband's annual, after-tax income, which was presumed to be at least $60,000, was not unconscionable in light of parties' personal and financial circumstances and expectations and their employment histories and prospects where parties had been married approximately 26 years, husband's financial affidavit did not suggest that he would be impoverished by the obligation, husband's speculation about possible future events did not indicate that agreement was presently unconscionable, and court retained jurisdiction to reconsider issues of maintenance if necessary.

iv. ***IRM Ikler*, 161 P.3d 663 (Colo. 2007):** The purpose of an award of spousal maintenance is to provide the lesser-earning spouse with food, clothing, and shelter.

o. **Attorney Fees:**

i. ***IRM Ikler*, 161 P.3d 663 (Colo. 2007):** Under the CMAA, a waiver of attorney fees in a marital agreement was subject to review for unconscionability at the time of enforcement, despite provision in CMAA that on its face only allowed unconscionability review of marital agreement provisions that related to maintenance, as such provision conflicted with another provision in the CMAA which prohibited the parties from contracting to terms that violated public policy, CMAA was intended to codify the common law, case law both prior and subsequent to the passage of the CMAA recognized that awards of spousal maintenance and attorney fees were based on the same public policy considerations, and public policy precluded the enforcement of a waiver of attorney fees that had become unconscionable just like a maintenance provision that had become unconscionable.

ii. The ruling in *IRM Ikler* is effectively codified in the current version of C.R.S. § 14-2-309(5).

p. **Prevailing Party**: It is not uncommon to encounter prenuptial agreement provisions which indicate that the "prevailing party" will be entitled to recover his or her attorney fees from the other in the event either retains counsel for enforcing, or preventing the breach of an agreement, or for other judicial actions relating to the agreement. Clients should be counseled that such a provision may not always be useful in actual practice. At least one court has indicated that it would not mandate the application of such a provision in a dissolution of marriage case since there is no "prevailing party" in the traditional sense. *IRM Fiffe*, 140 P.3d 160 (Colo. App. 2005).

q. **ERISA Rights**: *IRM Rahn*, the parties executed an antenuptial agreement whereby they agreed that "all of the property now owned or hereafter acquired by husband will remain his sole and separate property throughout the marriage. Wife shall not claim or acquire any interest in any of his property if it increases in value during the marriage, jointly held property being excepted." The Colorado Court of Appeals upheld the waiver of rights other than survivor benefits, reasoning ERISA provides the explicit requirements for a spouse's waiver of rights to the qualified joint and survivor annuity and the qualified preretirement survivor annuity in a qualified ERISA plan. Regulations interpreting ERISA's statutory authority specifically state, "An agreement entered into prior to marriage does not satisfy the applicable requirements, even if the agreement is executed within the applicable election period." Thus, a waiver of a right to survivor benefits in an ERISA-qualified plan in an antenuptial agreement is ineffective and the surviving spouse is entitled to the survivor benefits. A valid waiver can be enforced through a QDRO. *IRM Rahn,* 914 P.2d 463 (Colo. Ct. App. 1995).

r. **C.R.S. § 14-2-310. Unenforceable Terms**

i. (1) In this section, "custodial responsibility" means parental rights and responsibilities, parenting time, access, visitation, or other custodial right or duty with respect to a child.
ii. (2) **A term in a premarital agreement or marital agreement is not enforceable to the extent that it**:
    1. (a) **Adversely affects a child's right to support**;
    2. (b) **Limits or restricts a remedy available to a victim of domestic violence** under law of this state other than this part 3;
    3. (c) **Purports to modify the grounds for a court-decreed legal separation or marital dissolution available under law of this state** other than this part 3;
    4. (d) **Penalizes a party for initiating a legal proceeding leading to a court-decreed legal separation or marital dissolution**; or
    5. (e) **Violates public policy**.
iii. (3) **A term in a premarital agreement or marital agreement which defines the rights or duties of the parties regarding custodial responsibility is not binding on the court**.

s. **C.R.S. § 14-2-311. Limitation of Action**
    i. A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement or marital agreement is tolled during the marriage of the parties to the agreement, but equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

4. **Duress:**

a. ***IRM Ross*, 670 P.2d 26, 28 (Colo. App. 1983):** In this case, the Colorado Court of Appeals approved the test of *Wiesen v. Short* for duress: To establish duress as grounds for the avoidance of a contract, conveyance, or other act, it is not alone sufficient to show the exertion of pressure by threats or even by physical compulsion, but it must also clearly appear that the force or threats employed actually subjugated the mind and will of the person against whom they were directed, and were thus the sole and efficient cause of the action which he took…And it is a general rule that a transaction cannot be held to have been induced by duress, notwithstanding any threats which may have been made, where the party had and took an opportunity for reflection and for making up his mind, and where he consulted with others and had the benefit of their advice, especially where he was advised by his counsel. *Wiesen v. Short*, 604 P.2d 1191, 1192 (Colo. App. 1979).

5. **Abandonment/Rescission:**

    a. Antenuptial agreements, like other contracts, may be abandoned if the parties mutually intend to do so. *See generally* Annotation, *Parties' Behavior During Marriage as Abandonment, Estoppel, or Waiver Regarding Contractual Rights,* 56 A.L.R. 4th 998 (1987).

    b. The general contract law test for abandonment of contracts has been expressed as follows:
        i. [A] contract may be abandoned by mutual consent and…such consent may be implied from the acts and conduct of the parties…A contract will be treated as abandoned when the acts of one party, inconsistent with its existence, are acquiesced in by another…Where acts and conduct are relied upon to constitute abandonment, however, they must be positive, unequivocal, and inconsistent with intent to be further bound by the contract. *H.T.C. Corp. v. Olds*, 486 P.2d 463 (Colo. App. 1971).

    c. Therefore, because parties to antenuptial agreements should be allowed to modify or abandon their agreements in the same manner as parties to garden-variety commercial contracts, courts have generally accepted the idea that parties to antenuptial agreements may mutually abandon their contracts.

    d. It is difficult to discern from court opinions when parties have abandoned the agreement by their actions. *IRM Zimmerman,* 714 P.2d 927 (Colo. App. 1986) (although agreement stated parties would maintain separate assets, parties pooled assets into joint business); *IRM Young*, 682 P.2d 1233 (Colo. 1984) (parties abandoned agreement to keep separate assets by pooling assets through 28-year marriage); *IRM Zimmerman*, 714 P.2d 927 (Colo. App. 1986) (wife invested time and her credit into husband's separate corporation).

6. **Waiver of Rights Upon Death:**

    a. A waiver of all rights upon death will include a waiver of all rights to the elective share, exempt property allowance, family allowance, and homestead exemption of the spouse.
    b. The waiver operates as a waiver of all benefits that would have passed pursuant to intestate succession or pursuant to the provisions of any will executed prior to the marital agreement.
    c. ***Schwartz ex rel. Estate of Schwartz v. Schwartz*, 183 P.3d 552 (Colo. 2008):** Like other contracts, an antenuptial agreement remains binding on the estate after a party's death.
    d. ***In re Estate of Smith*, 674 P.2d 972 (Colo. App. 1984):** "The right to statutory allowances . . . is strongly favored in Colorado, and that right may not be held to

have been waived or relinquished except in cases where the specific intent to waive or relinquish is established by the evidence."

Premarital & Marital Agreements Practical Analysis[2]

1. **Three Standards for construction and enforceability based on timing when premarital or marital agreement was drafted:**
    a. **Pre-1986:** No Colorado statutory authority.
    b. **1986 - June 30, 2014:** Colorado Martial Agreement Act (CMAA) located in C.R.S. § 14-2-301, *et seq*.
    c. **July 1, 2014, forward:** Colorado adopted the Uniform Premarital and Marital Agreements Act (UPMAA).

2. **In Writing.** A marital agreement must be in writing and signed by both parties.

3. **Permissible vs. Impermissible Agreements.** May contract regarding rights upon divorce/death, defining what is separate and marital property, waive spousal maintenance/attorney fees. However, the determination, modification or elimination of spousal maintenance and attorney fees is subject to the court's review for unconscionability. Impermissible to contract around child support, parenting time, and parental responsibilities.

4. **Public Policy:** Cannot be in violation of public policy or any statute imposing a criminal penalty.

5. **Enforcement:** Marital agreements are presumed to be valid if they meet the statutory requirements.

    a. **Not enforceable:**
        i. 1986 – June 30, 2014, under CMAA:
            1. if the party against whom enforcement is sought proves either involuntariness (i.e., the party did not execute the agreement, amendment, or revocation voluntarily) or nondisclosure (i.e., before execution of the agreement, amendment, or revocation, such party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party).
            2. Spousal maintenance and attorney fees waivers not enforceable if such provision is unconscionable at time of enforcement. Attorney fees waiver issue not covered by CMAA, however by caselaw.
        ii. July 1, 2014, forward under UPMAA:
            1. Under § 9 of the UPMAA, C.R.S. § 14-2-309, if a party challenging the agreement proves any of the following four independent showings, the agreement is unenforceable:
                a. Involuntariness/duress: The "duress" provision was added to the existing "involuntary" provision contained in both the UPAA and CMAA.

[2] Refer to: *The Practitioner's Guide to Colorado Domestic Relations Law*, Third Edition (Supplemented September 2019) Premarital and Marital Agreements, Chapter 2, By: Catherine Puttmann, Esq. & Courtney McConomy, Esq.

b. Access to Independent Legal Representation: The party did not have access to independent legal representation under subsection (2). C.R.S.§ 14-2-309(1)(b). This is a new provision in the UPMAA that was not included in the UPAA or the CMAA. This is not a requirement that both parties be represented by counsel when entering into a prenuptial or marital agreement, but rather that each party had the opportunity to consult legal counsel.
c. Waiver/Explanation: A specific notice and waiver must be included as set forth in C.R.S. § 14-2-309(3).
d. Adequate Financial Disclosure: Adequate financial disclosure and disclosure of income.

2. Waivers of Attorney Fees: Includes this in the UPMAA provision, not just in Colorado case law.

b. **Voluntariness:** Totality of the circumstances – must examine the circumstances around the execution of the agreement to determine whether it was done by free will:
   i. Opportunity to review and understand the agreement.
   ii. Advice from independent counsel.
   iii. Sophistication of the parties (legal and financial matters).
   iv. A knowledge of the nature and value of the rights being waived by the agreement.

c. **Non-disclosure:** A party may avoid enforcement of an entire marital agreement if that party is able to demonstrate that the other party did not provide a fair and reasonable disclosure of his or her property or financial obligations.

6. **Consideration of Miscellaneous Provisions**
   a. Abandonment and Recission
   b. Breach of a Contract
   c. Construction and Interpretation

7. **Waiver of Rights Upon Death.** Like other contracts, a premarital agreement remains binding on a party even in death. Determine if there was a clear waiver of rights upon death regarding elective share, exempt property allowance, family allowance, and homestead exemption of the spouse.

8. **Choice of Law Provision.**

   a. 1986 – June 30, 2014, under CMAA:
      i. C.R.S. § 14-2-304(1)(h) (1986-2014), the parties may select the choice of law governing the construction of the marital agreement but not necessarily the enforcement of the agreement. However, Colorado courts are not required to honor the parties' choice of law selection if "the chosen state has no

substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." *Restatement (Second) of Conflict of Laws* § 187(2)(a).

b. July 1, 2014, forward under UPMAA:
    i. Colorado added the phrase "at the time the agreement was signed" to the model Act's language.
    ii. Colorado's choice of law provision in the UPMAA is a reversal of prior Colorado law and is contrary to the intent of the model Act and the Restatement's conflict of laws principles.

9. **Amendments**
    a. July 1, 2014, forward under UPMAA: The new Act includes amendments (including modifications and revocations) of premarital and marital agreements made after the date of marriage within the scope of the definition of marital and premarital agreements. C.R.S. §§ 14-2-302(1), (2), and (5).

Cohabitation Agreements

1. Background:
    a. Cohabitation agreements are contracts. They are governed by principles of contract law, not by statute. Cohabitation agreements are more common in states in which common law marriage exists because of the risks associated with inadvertently creating a common law marriage. Cohabitation agreements have also become more common with people who choose not to marry but want to establish rights with their significant other during their relationship and to have a mechanism to wind up their financial affairs at the end of their relationship.

    b. In Colorado, as well as in other states that recognize common law marriage, there is no such thing as a common law divorce. Parties to a common law marriage are legally married and must go through a legal divorce pursuant to Title 14 to dissolve their common law marriage.

    c. Colorado has recognized common law marriage since the 1800s and is one of only 8 states that still recognize common law marriage. States that recognized common law marriage are:

        i. Alabama (if created before Jan. 1, 2017);
        ii. Colorado;
        iii. District of Columbia;
        iv. Florida (if created before Jan. 1, 1968);
        v. Georgia (if created before Jan. 1, 1997);
        vi. Idaho (if created before Jan.1, 1996);
        vii. Indiana (if created before Jan. 1, 1958);
        viii. Iowa;
        ix. Kansas;
        x. Montana;
        xi. New Hampshire (for inheritance purposes only);
        xii. Ohio (if created before Oct. 10, 1991);
        xiii. Oklahoma;
        xiv. Pennsylvania (if created before Jan. 1, 2005);
        xv. Rhode Island;
        xvi. South Carolina (if created before July 24, 2019); and
        xvii. Texas.

2. Definitions:
    a. Statutory marriage - the requirements for a statutory marriage are set forth in the Uniform Marriage Act ("UMA"), C.RS. §§ 14-2-101-113.

b. Common law marriage – a common law marriage is a marriage recognized by the State of Colorado even though the requirements of the statutes have not been met by the spouses in the marriage.

3. Case Law: Case law in Colorado is virtually non-existent with respect to cohabitation agreements; however, the Colorado Supreme Court as recognized the significance of these contracts.

    a. Graham v. Graham, 274 P.2d 605 (Colo. 1954) (common law marriages are recognized in Colorado).

    b. Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000) (holding that a cohabiting couple may legally enter into a contract with one another and enforce the contract in court, so long as sexual relations are not the sole consideration for the agreement).

    c. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (Famous California palimony case holding that contracts between non-married parties can be enforceable, so long as they are not solely based on the consideration of meretricious sexual services.)

4. Cohabitation Agreement Common Provisions:

    a. Statement of intent
    b. Repudiation of Common law marriage
    c. Sharing of property; titling of joint assets
    d. Allocation of assets in the even the relationship ends.
    e. Sharing of expenses
    f. Effect of contributions to other's party's property
    g. Death provisions (estate planning)
    h. Mediation /Arbitration provisions