

International Prenuptial Agreements

Part III: Conflicts of Law in the United States

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American couples (or foreign couples residing in or moving to the United States) planning to get married often consider signing a prenuptial agreement. Prenuptial agreements are contracts that can protect the assets or income of the married couple in the event of a divorce. With increasing globalization and ease of travel, many more couples are getting married in a different state or country than where they get divorced. Many of these couples sign prenuptial agreements while in foreign countries (international prenuptial agreement). Often, these couples mistakenly believe that once the agreement is signed and the couple is married within one state, that the agreement will be effective and valid within any state within the United States. Unfortunately, this is not the case and another state court may find that their agreement is invalid or enforce the agreement in ways contrary to the parties' original expectations.

Currently, U.S. state courts do not have a uniform approach for deciding which laws should govern prenuptial agreements that are signed in a different state or country (often called international prenuptial agreements). Some courts apply the laws of the place where the agreement was signed whereas other courts will apply their own laws to the agreement. This general area of the law is referred to as Conflict of Laws. A conflict of law exists where the laws of the state handling the case conflict with the laws of a different applicable state or country. While there is no uniform approach for prenuptial agreement conflict of law issues in the United States, some patterns have developed. Which laws the court chooses to apply can dramatically affect the validity, enforcement, and construction of the prenuptial agreement. Couples should seek the advice of a competent attorney who has experience with the variety of approaches used by U.S. courts.

First Restatement Conflict of Laws

Some U.S. courts adhere to the First Restatement Conflict of Laws approach (commonly referred to as the *lex loci* approach). Under this approach, courts apply the laws of the jurisdiction in which the last act required to establish the contract rights occurred. Most

courts consider the actual signing of the prenuptial agreement the last act. Therefore, a number of *lex loci* courts will apply the laws of the jurisdiction in which the parties signed the prenuptial agreement in. However, other *lex loci* courts will refuse to do so if applying the foreign state's laws would violate their own public policies. The circumstances under which courts find their public policy is violated are highly variable. In some states, courts find that their public policy is violated if the foreign country's or sister state's laws differ at all from their state's laws. Whereas other states will only find that their public policy is violated if applying the foreign state's laws would grossly interfere with an important public policy concern of the state.

Second Restatement Conflict of Laws

Other U.S. courts follow the Second Restatement Conflict of Laws approach (commonly referred to as the significant relationship approach). Under this approach, the court determines which jurisdiction has the most significant interest in the prenuptial agreement and applies that jurisdiction's law. The court looks at a variety of factors to determine which jurisdiction has the most significant interest such as place of contracting and place of performance. When the court applies the significant relationship approach, courts still seek to uphold the Restatement's seven enumerated public policy goals: the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, the protection of justified expectations, the basic policies underlying the particular field of law, certainty, predictability, and uniformity of result, and ease in the determination and application of the law to be applied. Given that there are numerous factors to balance, courts have a great deal of flexibility under this approach. This can lead to unpredictability among courts. Furthermore, courts can (much like the *lex loci* approach) refuse to apply the foreign state's laws if it violates the forum state's public policies. The public policy exception in the significant relationship approach is unfortunately plagued by the same inconsistency as the *lex loci*'s public policy exception.

The Uniform Prenuptial Agreement Act

The Uniform Prenuptial Agreement Act (U.P.A.A.) was a response to the inconsistent and unpredictable treatment of prenuptial agreements. The U.P.A.A. offered uniform guidelines for procedural and substantive requirements for prenuptial agreements. With over 25 states

having enacted the U.P.A.A., it seems that the inconsistency should have all but disappeared. However, the U.P.A.A. does not address any of the aforementioned prenuptial agreement conflict of law issues. In other words, the U.P.A.A. does not tell a court what to do with an international prenuptial agreement. Furthermore, many of the states that have enacted the U.P.A.A. modified the existing provisions. These modifications hamper the uniformity that the drafters of the U.P.A.A. sought to achieve.

Conclusion

Although, U.S. courts are inconsistent and unpredictable in regards to prenuptial agreements which are signed in a foreign state or country, there are some general guidelines that attorneys can follow in order to protect the agreement. Couples that are considering getting married and signing a prenuptial agreement in another country or state should seek competent legal advice preferably from an attorney specializing in international or interstate prenuptial agreements and conflict of law issues. Couples should be forewarned that the legal area of prenuptial agreement conflict of law is a major blind spot for many attorneys. Failure of an attorney to address the conflict of law issues involved in a prenuptial agreement can result in the invalidation of the agreement in whole or part.