ACKNOWLEDGMENTS xix

ABOUT THE AUTHOR xxi

PART I THE LAW OF PREMARITAL AGREEMENTS 1

1 INTRODUCTION 3
§1.01 Definitions and Terminology 3
§1.02 Overview 4
§1.03 Role of Counsel 5
§1.04 History of the Law of Premarital Agreements 7
  (a) Premarital Agreements Before Posner v. Posner 7
  (b) Posner v. Posner and Premarital Agreements at Divorce 7
  (c) The Uniform Premarital Agreement Act 8
  (d) Evolution of the Law of Validity of Premarital Agreements 9
  (e) Evolution of the Law of Validity of Postmarital Agreements 9
  (f) Trend Toward Enforceability of Virtually All Premarital and Postmarital Agreements Under Virtually All Circumstances 10
  (g) A Possible Counter-Trend? The Uniform Premarital and Marital Agreements Act 11
§1.05 Scope of Premarital and Postmarital Agreements 12
§1.06 Subjects on Which Parties’ Rights to Contract Are Limited 13
SECTION 2

2 CRITERIA FOR AN ENFORCEABLE PREMARITAL AGREEMENT

§2.01 Scope of This Chapter

§2.02 Essential Contractual Elements

(a) Consideration

(b) Formalities

(c) Legal Capacity

§2.03 Approaches to Determining Validity: Process Versus Substance

§2.04 Fiduciary or Confidential Relationship

§2.05 Burden of Proof of Enforceable Premarital Agreement

(a) Proof of Existence and Terms of Agreement

(b) Burden of Proof of Validity

§2.06 Legal Advice as a Prerequisite to Validity

(a) Actual Legal Advice

(b) Access to Legal Advice

§2.07 Requirements for Validity: Procedural Fairness States

(a) UPAA and Procedural Fairness States

(b) UPAA Plus

(c) The Uniform Premarital and Marital Agreements Act (UPMAA)

§2.08 Requirements for Validity: Substantive Fairness States

(a) Overview

(b) Fairness as of Execution

(c) The Second Look at Divorce

(d) The Second Look at Death

§2.09 Conclusion

SECTION 3

3 GENERAL VALIDITY AND CRITERIA FOR AN ENFORCEABLE POSTMARITAL (OR MARITAL) AGREEMENT

§3.01 Scope of This Chapter; Terminology

§3.02 Uses of Postmarital Agreements

§3.03 General Validity of Postmarital Agreements

(a) Overview

(b) Authority for Comprehensive Postmarital Agreements

(c) The Uniform Premarital and Marital Agreements Act and (Post) Marital Agreements
(d) Statutory Authority for Postmarital Agreements
   Regarding Property Rights at Death or Divorce 37
(e) Minority Position: Ohio 39
(f) Permissible Scope Undetermined 40

§3.04 Criteria for Validity of Postmarital Agreements 41
   (a) Overview 41
   (b) Same Validity Criteria as Premarital Agreements 42
   (c) Close Scrutiny; Confidential or Fiduciary Relationship 42
   (d) Financial Disclosure 44
   (e) Consideration 45
   (f) Fairness of Terms 46
   (g) Public Policy 47
   (h) Independent Advice as a Prerequisite to Validity 48
   (i) Court Approval 49
   (j) Execution Formalities 49
   (k) Recordation 50

§3.05 Conclusion 50

4  CREATING A VALID PREMARITAL OR POSTMARITAL AGREEMENT 51
§4.01 Overview 51
§4.02 Legal Capacity 51
§4.03 Voluntariness 54
   (a) Criteria to Determine Voluntariness 54
   (b) Actual Negotiation or Opportunity to Negotiate Terms 56
§4.04 Duress, Coercion, Undue Influence, and Overreaching 58
   (a) What Constitutes Duress, Coercion, Undue Influence, or Overreaching, and What Does Not 58
   (b) Timing of Presentation of Premarital Agreement 61
   (c) Threat Not to Marry 63
   (d) Pregnant Bride 64
   (e) Language Barrier; Immigration Visa Set to Expire 65
   (f) Emotional Distress (Didn’t Want to Do It) 66
   (g) Unequal Bargaining Power 67
   (h) Pre-Execution Oral Promise or Unexpressed Intent 67
   (i) Threat to Divorce 68
(j) Confidential or Fiduciary Relationship and Undue Influence 71
(k) Deliberate Ignorance (Didn’t Read Before Signing) 73
(l) Passion 74
(m) Domestic Violence 74

§4.05 Independent Counsel 75
(a) Actual Advice of Independent Counsel 76
(b) Signing Against Legal Advice 77
(c) Access to Independent Counsel—Time and Money 77
(d) Role of Proponent’s Counsel in Selection of Lawyer for Other Party 80

§4.06 Knowledge of Marital Rights 81

§4.07 Financial Disclosure 85
(a) Overview 85
(b) Mechanics and Content of Financial Disclosure 86
(c) Disclosure Regarding Closely Held Business 92
(d) Disclosure of Future Inheritance, Bonus, or Other Expectancies 93
(e) Disclosure of Interest in a Trust 94
(f) Disclosure of Hard-to-Value Assets 95
(g) Disclosure of Debt 95
(h) Waiver of Financial Disclosure 96
(i) Misrepresentation or Fraud in Disclosure 99
(j) Relationship Between Financial Disclosure, Waiver of Disclosure, and Independent Counsel 101
(k) Addressing Privacy Concerns in the Disclosure of Financial Data 102

§4.08 Substantive Fairness or Conscionability of Terms 103
(a) Overview 103
(b) Unconscionability or Unfairness at Execution 105
(c) The Second Look: Unfairness or Unconscionability of Agreement at Divorce 109
(d) Too Generous—Too Bad 113

§4.09 Summary—Best Practices 115
5  Spousal Support 117

§5.01 Overview 117

§5.02 Enforceability of Premarital Agreement Provisions Fixing or
Waiving Post-Divorce Spousal Support 118
   (a) Minority Position: No Premarital Waiver Permitted 118
   (b) Majority Position: Premarital Agreement Fixing or
   Waiving Post-Divorce Spousal Support Generally
   Enforceable 119

§5.03 Enforceability of Postmarital Agreement Term Fixing or
Waiving Spousal Support 119

§5.04 Circumstances Under Which Court May Refuse Enforcement
of Post-Divorce Spousal Support Waiver in Otherwise Valid
Agreement 122
   (a) Enforceability of Premarital Support Waiver
   Undetermined 126

§5.05 Enforceability of Support Waiver with Respect to Resident
Alien Spouse or Former Spouse 127

§5.06 Enforceability of Spousal Support Waiver in a Domestic
Violence Proceeding 129

§5.07 Enforceability of Provision Fixing Post-Divorce Support When
It Is the Support Payor Who Seeks Relief from the Terms of
Agreement 130

§5.08 Enforceability of Provisions Fixing or Waiving Support During
Marriage 130
   (a) Overview 130
   (b) Enforceability of Support Waiver in Suit for Separate
   Maintenance or During Pendency of Divorce
   Proceeding 131
   (c) Premarital Support Waiver as Affecting Spousal Liability
   to Third Parties: The Necessaries Doctrine 134
   (d) Premarital Support Waiver as Affecting Liability for
   Medicaid Recoupment 136

§5.09 Insulating a Waiver of Spousal Support from Successful
Attack 136
6 Lawyers’ Fees and Costs

§6.01 Overview 139
§6.02 Fee Shifting in the Absence of Contract 140
§6.03 Enforceability of Contractual Waiver of Fees in Divorce 141
§6.04 Enforceability of Fee Waiver for Custody and Child Support 143
§6.05 Prevailing Party (Loser-Pays) Fees 144

7 Child Provisions, Other Nonfinancial Provisions, and Provisions Governing the Ongoing Marriage, Marital Misconduct, and Grounds of Divorce 147

§7.01 Overview 147
§7.02 Parentage, Parental Rights, and Child Rearing During Marriage and After Divorce 148
(a) Custody of Minor Child After Divorce or Dissolution 148
(b) Religious Upbringing of Children 149
(c) Parentage, de Facto Parenthood, and Parental Rights 151
(d) Disposition of Stored Embryos 152
§7.03 Financial Provisions for Children 153
(a) Overview 153
(b) Limits on Courts’ Authority Regarding Financial Provisions for Children in the Absence of Contract 154
(c) Enforceability of Contractual Financial Provisions for Children Generally 155
(d) Subjects for Financial Agreements Regarding Children 156
(e) Support for a Stepchild 157
(f) Estate Planning Obligations or Other Provisions for a Child After Parent’s Death 159
(g) Modification of Contractual Obligations 159
(h) Enforcement Issues 160
§7.04 Provisions Regarding Religious Divorce 161
§7.05 Grounds of Divorce 161
(a) Penalty for Marital Misconduct 161
(b) Terms Limiting Grounds of Divorce 163
Contents

8 Post-Marriage Issues 165

§8.01 Overview 165

§8.02 Formal Amendments, Postmarital Agreements, and Other Formal Acts 167
   (a) Formal Amendment to Premarital Agreement 167
   (b) Revocation of Premarital or Postmarital Agreement 169
   (c) Postmarital Agreements 169

§8.03 Conduct Giving Rise to Claim Agreement Has Become Unenforceable 170
   (a) Termination of Engagement Followed by Reconciliation 170
   (b) Purported Oral Amendment to Premarital Agreement 170
   (c) Purported Oral Revocation; Destruction or Loss of Original 171
   (d) Postmarital Conduct Arguably Inconsistent with Continued Viability of Agreement 172
   (e) Parties Become Business Partners 173
   (f) Separation or Divorce Followed by Reconciliation 174
   (g) Provision of More Generous Benefits Under Will or Inter Vivos Transfer 174
   (h) Breach of Agreement 175
   (i) Disadvantageous Change of Position 175
   (j) Conduct That Renders Agreement Unfair at Enforcement 177
   (k) Change of Fortunes 177
   (l) Marital Misconduct, Adultery, Domestic Violence 178

§8.04 Conduct That Enhances Enforceability—Ratification and Estoppel 180

§8.05 Conduct That May Alter Rights, Obligations, or Expectations Under the Agreement, or Create Opportunity for Dispute 183
   (a) Commingling 183
   (b) Effect of Creation of Jointly Titled Property or of Transfer to Sole Title on Parties’ Rights at Divorce 185
(c) Effect of Joint Title with Right of Survivorship at Death 187
(d) Use of Funds from Joint Bank Account 188
(e) Failure to Keep Adequate Financial Records 188
(f) Commingling to the Detriment of One Party Where the Other Party Controls Finances 188
(g) Provisions for Surviving Spouse at Variance with Provisions Required by Agreement 189
(h) Claim That Parties Became Business Partners 189
(i) Use of Separate Assets to Benefit Spouse’s Separate Property; Nonconforming Payments 190
(j) Bona Fide Sale; Transfer to Third Party or to Trust 191
(k) Gifts to and Support for Children, Former Spouses, and Other Family Members 192
(l) Remarriage After Death of Other Spouse 193
(m) Post-Death Transfer in Derogation of Contractual Obligations 193
(n) Financial Mismanagement, Bad Investments, Frivolous Expenditures, Dissipation, and Other Financial Misconduct 194
(o) Bankruptcy 196

PART II ROLE OF COUNSEL, ETHICS, NEGOTIATION, AND DRAFTING THE AGREEMENT 199

9 ETHICAL ISSUES IN THE REPRESENTATION OF CLIENTS IN PREMARITAL AND POSTMARITAL AGREEMENTS 201

§9.01 Overview 201
§9.02 Dealing with a Client Whose Capacity to Contract May Be Diminished 203
§9.03 Role of Counsel for the Proponent in Dealing with an Unrepresented Party 206
   (a) Advice to Unrepresented Party to Get Independent Counsel 206
   (b) Assistance to Unrepresented Party in Selection of Counsel 208
   (c) Payment of Fees of Unrepresented Party 209
(d) Meeting with Unrepresented Party; Providing Explanation of Rights 210
(e) Dealing with an Unrepresented Party with Whom the Lawyer Has a Prior Relationship 212
§9.04 Ethical Issues and Counsel for the Economically Weaker Client 214
§9.05 Joint Representation 215
   (a) Overview 215
   (b) Directly Adverse Joint Representation and Waiver 217
   (c) Joint Representation: Lawyer as Mere Scrivener 221
   (d) Avoiding Unintentional Joint Representation 222
§9.06 Lawyer as Mediator 224
§9.07 Summary: Best Practices 226

10 INFORMATION GATHERING, PREPARATION FOR, AND NEGOTIATING THE TERMS 227
   §10.01 Overview 227
   §10.02 New Client Intake 228
   §10.03 The Initial Consultation 229
      (a) Information Gathering 229
      (b) Client Questions About Premarital Agreements 231
      (c) Discussion of Applicable Law in the Absence of Agreement 235
      (d) Determining Proponent’s Objectives 235
      (e) Premarital Agreement Versus Other Methods of Protecting Assets 237
      (f) Assessing the Client’s Bottom Line 238
   §10.04 Conduct of Negotiations 239
      (a) Presentation of the Terms 239
      (b) Process Options for Conduct of Negotiations 239
   §10.05 Communications 243

11 DRAFTING THE AGREEMENT: OVERVIEW 247
   §11.01 Basic Models 247
   §11.02 Title Controls Model 248
   §11.03 Shared Property Model 249
   §11.04 Drafting to Avoid Litigation 252
12  Model Title Controls Agreement with Provisions for Weaker Party 255

Recitals: Comment 255
Recitals: Model Text 258
Definitions, Property and Income: Comment 260
Definitions, Property and Income: Model Text 261
Definitions, Separate and Marital Property: Comment 263
Definitions, Marital and Separate Property: Model Text 267
Other Terms Relating to Determination of Separate and Marital Property: Comment 271
Other Terms Relating to Determination of Separate and Marital Property: Model Text 273
Definitions, Separate and Marital Debt: Comment 276
Definitions, Separate and Marital Debt: Model Text 277
Definitions, Marital Separation; During the Marriage: Comment 278
Definitions, Marital Separation; During the Marriage: Model Text 280
Rights and Obligations During the Marriage: Comment 282
Rights and Obligations During the Marriage: Model Text 283
Payment of Expenses During the Marriage: Comment 285
Payment of Expenses During the Marriage: Model Text 289
Cash Gifts: Comment 290
Cash Gifts: Model Text 290
Taxes: Comment 291
Taxes: Model Text 291
Property Rights upon Death of a Party and Waivers: Comment 292
Property Rights upon Death of a Party: Model Text 294
Portability Election: Comment 299
Portability Election: Model Text 300
Disposition of Retirement and Survivor Benefits: Comment 301

Content of the Consent 305
Formalities 305
Timing 305
Participant’s Responsibility 306
Advice to Client 306
Disposition of Retirement Benefits: Model Text 310
Special Provisions for Primary Marital Home: Comment 312
Special Provisions for Primary Home: Model Text 314
| Property Rights upon Dissolution: Comment       | 319 |
| Property Rights upon Dissolution: Model Text  | 323 |
| Spousal Support upon Dissolution: Comment    | 326 |
| Spousal Support upon Dissolution: Model Text  | 329 |
| Lawyers’ Fees and Costs: Comment             | 333 |
| Lawyers’ Fees and Costs: Model Text          | 335 |
| Voluntary Execution and Disclosures: Comment  | 337 |
| Voluntary Execution and Disclosures: Model Text| 338 |
| General Provisions: Comment                  | 341 |
| Complete Agreement: Model Text               | 341 |
| Furnishing Other Instruments: Comment        | 342 |
| Furnishing Other Instruments: Model Text      | 342 |
| Third-Party Beneficiary Rights: Comment      | 343 |
| Third-Party Beneficiary Rights: Model Text    | 344 |
| Severability: Comment                        | 345 |
| Severability: Model Text                     | 346 |
| Effect of Agreement on Separation or Divorce: Comment | 347 |
| Effect of Agreement on Separation or Divorce: Model Text | 347 |
| Consideration: Comment                       | 348 |
| Consideration: Model Text                    | 348 |
| Revocation and Amendment: Comment            | 349 |
| Revocation and Amendment: Model Text         | 349 |
| Governing Law: Comment                       | 349 |
| Governing Law: Model Text                    | 354 |
| Provisions Binding: Comment                  | 354 |
| Provisions Binding: Model Text               | 355 |
| Construction Against Drafter: Comment        | 355 |
| Construction Against Drafter: Model Text     | 355 |
| Recitals Incorporated: Comment               | 356 |
| Recitals Incorporated: Model Text            | 356 |
| Nondisclosure and Confidentiality: Comment   | 356 |
| Nondisclosure and Confidentiality: Model Text| 357 |
| Binding Arbitration: Comment                 | 358 |
| Binding Arbitration: Model Text              | 362 |
| Waiver of Statute of Limitations During Marriage: Comment | 363 |
| Waiver of Statute of Limitations During the Marriage: Model Text | 363 |
| Execution Formalities: Comment               | 363 |
| Execution Formalities: Model Text            | 364 |
13 TERMS FOR SHARED PROPERTY AGREEMENT 367
Definitions, Separate and Marital Property: Comment 367
Definitions, Separate and Marital Property: Model Text 369
Definition, Mixed (or Hybrid) Property: Comment 372
Definition, Mixed Property: Model Text 373
Definitions, Separate and Marital Debt: Comment 374
Definitions, Separate and Marital Debt: Model Text 374
Disposition of Property at Death: Comment 375
Disposition of Property at Death: Model Text 375
Disposition of Retirement Benefits at Divorce: Comment 377
Disposition of Retirement Benefits at Divorce: Model Text 377

APPENDIX A(1) 379
Text of Uniform Premarital Agreement Act 379

APPENDIX A(2) 383
Text of Uniform Premarital and Marital Agreements 383

APPENDIX B(1) 391
State Law Summary—Premarital Agreements 391

APPENDIX B(2) 433
State Law Summary—Postmarital Agreements 433

APPENDIX C 463
Personal Information Worksheet and Questionnaire 463

APPENDIX D 481
Basic Title Controls Agreement 481

APPENDIX E 509
Additional and Optional Terms 509
Transfers During Marriage 509
Payment of Expenses During the Marriage 510
Provisions for Spouse at Death 512