

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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This is an initial, preliminary draft, with the basic language making premarital agreements binding, to use as a starting point.

The cases addressing the issue of whether a premarital agreement is binding on the court construe s. 767.61 (3) (L) and deal specifically with property division. None of the cases that I found addresses maintenance or child support. Section 767.61 (3) (L) specifies that a premarital agreement (or an agreement made during marriage) is binding on the court *unless it is inequitable to either party*. The case law elaborates on what is inequitable, and provides that a premarital agreement must satisfy all of the following criteria or it will be considered inequitable:

1. There must be fair and reasonable disclosure of the financial status of each party at the time the agreement is made.
2. Both parties must have entered into the agreement voluntarily and freely.
3. The substantive provisions of the agreement must be fair to each of the parties.

The first two factors above are assessed by the court as of the time the agreement is made, and the third factor above is assessed both as of the time the agreement is made and as of the time of the action if circumstances have changed. The way in which I have drafted the provision could be construed to eliminate all of the criteria (although to eliminate the criteria with certainty, it may have to be specified that the agreement is binding regardless of whether it is inequitable to either party). I do not know if that is what you want. If you wish, the provision could be drafted so that the first two factors must be satisfied, as well as the agreement's being fair at the time it was made. That way there are some protections, but if the agreement becomes unfair later due to a change in circumstances, it is still binding on the court.

Additionally, in the draft I have limited the binding parts of a premarital agreement to property division and maintenance, first because I doubt that many premarital agreements address child support and second because I don't think a court would be bound by a premarital agreement that provided for child support that was not in compliance with the statutory requirements for support or that was unfair to the child. If you are concerned that a court would modify the amount of child support to compensate for what the court felt was an unfair premarital agreement on property division or maintenance, that can be prohibited in the draft.

I have not amended s. 767.61 (3) (L) because it also applies to agreements made during the marriage. It may need to be amended to harmonize with the new provision, depending on what you decide to do.

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