



**Online CLE**

# **Estate Planning with Relationship Agreements**

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## Chapter 2

# Estate Planning with Relationship Agreements

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Estate Planning with Relationship Agreements

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A significant number of clients have premarital, domestic partnership, community property, or cohabitation agreements (collectively, “relationship agreements”). Relationship agreements can be used to alter or waive legal rights and duties that parties would otherwise acquire. A relationship agreement may define each party’s rights and responsibilities in three areas: end of the relationship based on the request of one or both parties, death of a party, and financial or other domestic arrangement during the relationship.

The goal for an attorney involved in the creation of a relationship agreement should be to ensure that there is a process in place to help ensure that the relationship agreement will be a valid and enforceable agreement if ever contested and to ensure the relationship agreement is easy for the parties to understand and live by.

The purpose of these materials is to identify key aspects of, reasons for, and requirements of relationship agreements in order to be valid and enforceable, highlight how flexible relationship agreements can be, and provide best practice tips for estate planning attorneys who work with clients who have relationship agreements.

Best practice is to have a question on your intake questionnaire about whether your client has a relationship agreement and to obtain a copy so that you may review its terms. Not only is the relationship agreement an insight into your clients’ asset situation, but it informs the estate plan you will create.

I. Most Common Relationship Agreements.

A. Prenuptial/premarital agreements.

- i. Prenuptial agreements in Oregon are governed by the Uniform Premarital Agreement Act (“UPAA”), which was adopted in 1987. ORS 108.700–.740.
- ii. The validity of a prenuptial agreement in Oregon depends on the circumstances of each particular case, and all circumstances, including those attending to an agreement’s execution, must be rigidly scrutinized. *In re Rudder*, 230 Or App 437 (2009). The relationship between the parties in contemplation of marriage is fiduciary in nature. *Kosik v. George*, 253 Or 15, 22 (1969). The fiduciary relationship between the parties to a prenuptial agreement “requires the utmost good faith and a full and frank disclosure of all circumstances materially bearing on the contemplated agreement, generally including full disclosure of assets.” *Bauer v. Bauer*, 1 Or App 504 (1970).

B. Amendment to prenuptial/premarital agreements (specifically contemplated by the UPAA and codified in ORS 108.720).

C. Postnuptial agreements.

- i. The UPAA applies only to an agreement between prospective spouses to be effective on marriage. ORS 108.715. It does not address the question of whether married parties can enter into the equivalent of a prenuptial agreement. Oregon courts have never explicitly approved “postnuptial” agreements.
- ii. Case law suggests that postnuptial agreements are valid as there are cases that essentially assume validity; however, no case has directly addressed whether postnuptial agreements are valid.

Best Practice: Advise clients contemplating a postnuptial agreement that there is uncertainty surrounding enforceability as compared to premarital agreements, which are expressly authorized by statute.

D. Cohabitation and domestic partnership agreements.

- i. Upon termination of a domestic partnership, the standard of review with respect to property is division based on the intent of the parties when they acquired the property. *Beal v. Beal*, 282 Or 115 (1978) (division of property accumulated during cohabitation must begin by inquiring into parties’ intent; if no express agreement between parties exists, “courts should closely examine the facts in evidence to determine what the parties implicitly agreed upon”).
- ii. Unmarried parties cannot be forced to pay “spousal” support.

II. Requirements for Valid Agreement & Process (ORS 108.725).

A. Voluntariness – not defined by statute. However, case law provides that in determining voluntariness, the court can consider the following non-exhaustive factors:

- i. Lack of coercion, intimidation, or undue pressure;
- ii. Some modicum of knowledge of the terms of the agreement and the property affected;
- iii. The timing of the agreement in relation to the wedding;
- iv. An adequate opportunity to consult with independent counsel;
- v. The relative sophistication of the parties; and
- vi. Sufficient disclosure of assets. *Rudder*, 230 Or App at 455; see also *In re Porter*, 281 Or App 169, 178 (2016) (“[T]he factors relevant to determining the element of voluntariness in the execution of a premarital agreement include the proximity of the document’s presentation to the time of the

wedding; any surprise in its presentation; the presence or absence of legal counsel; an inequality of bargaining power; disclosure of assets; an understanding of rights waived under the agreement; and, an awareness of the intent of the document.”).

B. Reasonableness – unconscionable when executed? If so, was there sufficient disclosure or did a party otherwise have adequate knowledge of the nature and extent of the assets and liabilities? Did a party waive disclosure?

**Practice Tip:** To create a valid and enforceable relationship agreement, each party must identify his and her assets, liabilities, and income information. At a minimum, to memorialize that sufficient disclosure has occurred and to avoid confusion over what was versus what was not disclosed at the time, a relationship agreement should include exhibits referencing each party’s assets, liabilities, and income information. Better practice is to provide information to the other party in support of the financial statement. For example, include the most recent statement for bank or retirement accounts listed on the asset list and include copies of any recent appraisals to real property or a business. Regardless of the level of disclosure, it is key that a party confirm his or her agreement that sufficient disclosure has occurred and that additional disclosure is not necessary. This should be reflected in the terms of the agreement and in a separate writing if possible, for example, in a confirming letter independent from the agreement itself.

### III. Common Reasons for Agreements.

A. Protect earned wealth or protect against a party with substantial debt.

B. Protect family wealth in future generations.

1. Clients often demand premarital agreements for children. Estate planning attorneys are often asked by existing clients, particularly parents, to draft relationship agreements for younger generations. If it is not in your common practice to draft relationship agreements, you should refer the client to an attorney with experience drafting them. Referring out to independent counsel experienced and knowledgeable of the circumstances that lead to a relationship agreement being valid and enforceable, if ever contested, may end up being the best decision if you wish to keep your existing client happy, gain the trust and business of the next generation, avoid conflicts, and avoid the appearance of bias toward one party.

2. Trust provisions requiring relationship agreement. Clients with earned or family wealth are increasingly requesting attorneys to include a provision in the trust agreements drafted for the client that requires a beneficiary to execute a relationship (usually premarital) agreement prior to making distributions to beneficiary. While drafting such a provision seems easy enough, not all trustees (especially institutions) will enforce this provision. What constitutes an acceptable relationship agreement? Who will enforce whether the relationship agreement is being followed? What if the beneficiary revokes the

agreement? Does the trustee face potential liability for making a distribution to a beneficiary who does not have an acceptable relationship agreement who or fails to follow it? Should example language be included in the trust agreement or as a schedule, and what happens if the laws change substantially?

Estate planning attorneys and their clients should think carefully about whether to include a provision requiring a relationship agreement and who should enforce it. If a family member is serving as trustee, it may be sufficient to direct the trustee to consider whether a beneficiary has a relationship agreement in place before making distributions to that beneficiary. If a trust company is serving as trustee, it may be necessary to include an indemnification provision or, if allowed in the jurisdiction, name a trust protector or special trustee who may make these determinations.

3. Should a relationship agreement be limited to inherited wealth?

Relationship agreements are not an “all or nothing” proposition. The parties need to identify which assets they wish to remain separate and which assets will be considered joint. This includes considering premarital assets and any income derived therefrom, as well as consideration of income from all sources and assets received during the marriage, whether a result of a party’s efforts or as a future inheritance.

The impetus for signing a relationship agreement may be to protect future inheritance of the family business or wealth. The parties may be content with waiving rights to that property and treating future accumulated wealth and income as a marital asset or asset of the cohabitating couple. Be clear in the agreement about exactly which assets the parties wish to consider separate and which assets may be commingled. When it comes to drafting the estate plan, be specific about which assets are subject to the agreement. Care should be taken when drafting limitations on trust distributions. If the trustee must take into account a relationship agreement before making a distribution to a beneficiary, be specific about whether the agreement must cover family wealth, assets held in the subject trust, or all assets.

Practice Tip: To the greatest extent possible, specifically define which property is joint and which property is separate. For example, if parties enter an agreement solely to protect inherited property and income derived therefrom, best practice is specifically to define such property as separate, and also to specifically define all other assets and income as joint.

- C. Not first marriage – avoid repeat of prior challenging dissolution, preserve assets for non-joint children, etc.
- D. Confirm mutual financial understanding with intended spouse.
  - i. How expenses will be made during the marriage.

- ii. Deciding on the terms of dissolution in advance when parties are on the same page, rather than leaving it undetermined for a later time that could lead to conflict.
- iii. Parties to a premarital agreement are statistically less likely to get divorced than parties without a premarital agreement, because they provide a sense of certainty about what will happen in the event of a divorce or one party's death.

#### IV. Common Misperceptions Regarding Premarital/Cohabitation Agreements.

##### A. Traditional transactional approach vs. collaborative approach.

One of the inherent goals in entering into a relationship agreement is creating a process that does not make the other party feel like a document is being unilaterally forced upon them. In the traditional business transaction approach, there is a higher likelihood for conflict and long-term resentment. In contrast, when working together to create a timeline and plan of action for the process and to arrive at a meeting of the minds before exchanging drafts, there is less conflict and residual resentment.

##### B. Agreement not set in stone; can be amended.

Don't throw the agreement in a drawer to collect dust. A relationship agreement is a living and breathing document that the parties should review periodically to ensure that the agreement still meets their joint needs. For example,

1. Laws change. One example is the change to the Internal Revenue Code regarding deductibility of spousal support. A change of this magnitude will have significant effects on the parties and may require a change to the agreement.
2. People's lives change. There may be changes to the couple's assets, needs, and wishes. The agreement may be modified to reflect those changes.
3. People make mistakes. Couples don't always live by the terms of their agreements.

An amendment to the relationship agreement is a great way to "clean up" any of these issues.

Often times people recognize that certain life events would likely result in a change in perspective. A very common example is what will happen if the parties have children. However, it can be difficult to predict what will occur and what changes in perspective might occur in advance. With a relationship agreement, you can revisit issues in the future once the circumstances have played out, rather than trying to predict every possible scenario.

C. Relationship agreements cannot predetermine rights with respect to custody and parenting time.

Parties can agree to provisions with respect to child support, which exceed the amount of child support, but cannot agree in advance to child support less than what would otherwise be ordered. For example, a relationship agreement can provide that one party will pay anticipated college expenses for a child in addition to child support.

V. Relationship Agreements Are an Integral Part of Estate Planning.

A. What is each spouse waiving, exactly?

In addition to certain statutory and common law rights upon dissolution of marriage (which is outside the scope of these materials), relationship agreements affect and often waive certain rights upon death.

1. Elective share rights. ORS 114.600 through 114.725 provide a surviving spouse the right to an elective share of the estate of his or her spouse. The elective share is calculated as a percentage share of the augmented estate, which includes the decedent's probate and non-probate assets as well as the surviving spouse's assets. The percentage increases as the length of the marriage increases with a minimum of 5% for fewer than two years and 33% for 15 years of marriage and beyond.

2. Survivorship rights. A common provision in relationship agreements is for spouses to continue to own both real and personal property separately or as tenants-in-common without right of survivorship. Some agreements contemplate that one spouse will add the other as a joint tenant of the marital home or convey title to themselves as tenants by the entireties. It is good practice to review not only the deed but recorded lien information to determine title on real property and also to review account statements for ownership.

3. Right to serve as personal representative. In an intestate estate or absent a provision in the will nominating a personal representative, the surviving spouse, if he or she is a distributee of the estate, is first in line to serve. ORS 113.085. Many premarital agreements specifically waive this preference of appointment. Even if waived in the premarital agreement, the parties may wish to nominate each other as personal representatives.

4. Rights to occupy dwelling and support. By Oregon statute, surviving spouses have certain support rights upon the death of a spouse, including the right to occupy the decedent's principal dwelling for a year (if a fee interest) or upon sooner termination of a non-fee interest (ORS 114.005), necessary and reasonable support of the spouse (ORS 114.015), and temporary support (ORS 114.035). ORS 114.085 provides that the court may order the entire estate to be set aside for support if after four months of publication of

notice and payment of claims, taxes, and expenses, if reasonable provision for support of the spouse and dependent children, or any of them, warrants. These rights are generally waived in premarital agreements.

Rights of dependent children may not be waived in relationship agreements. It is possible, however, that commitments which exceed the minimum obligations required by law can be enforced. For example, one party could agree to be responsible for college expenses for a child in a relationship agreement.

B. Relationship agreements do not preclude going beyond the minimum terms of the agreement to provide more for surviving spouse upon death.

1. Different outcomes at death vs. dissolution. Many couples create relationship agreements that provide for different outcomes if the relationship were to end due to dissolution versus due to the death of either party. It is not uncommon for the provisions in a relationship agreement that address the end of the relationship at death to be far more generous than the provisions that address the end of the relationship at dissolution.

Regardless of whether the terms at death are the same or different than those that would apply at dissolution, it is important to remind parties that the terms of an agreement are the minimum requirements to plan around. Parties consistently ask if an agreement prevents him or her from being more generous than the agreement itself contemplates.

2. Review of assets and flexible planning are key. Good planning involves a thorough review of the agreement and understanding of the assets prior to drafting wills, trusts, and beneficiary designations in order to ensure that a party is meeting his or her minimum obligations and also to ensure that there are no unintended consequences, should a party elect to be more generous than required of him or her in their estate planning.

If assets are protected by a relationship agreement, there is likely a good reason (see below), so care should be taken when formulating the estate plan.

**Practice Tip:** When possible, the terms of the relationship agreement itself should allow as much flexibility as possible for estate planning purposes. If a client has multiple options on how to structure their estate plan, avoid prescribing a certain plan in the relationship agreement itself to allow the parties greater flexibility over time, without necessarily having to amend the relationship agreement.

3. Use of trusts. In order to provide more benefit to a spouse with a premarital agreement, trusts may be used. Assets may pass in trust for the surviving spouse's lifetime benefit with remainder to specified beneficiaries. Such an arrangement provides a benefit to the surviving spouse while also protecting the assets for the remaining beneficiaries.

Care should be taken to determine who may serve as trustee and what rights the surviving spouse may have under the terms of the relationship agreement and any agreement affecting ownership of the underlying assets. This is also a good time to ensure that no unintended consequence arises by a particular plan or change in plan to confirm that the relationship agreement and estate plan are consistent. Practitioners should be mindful of the reasons behind the relationship agreement and the desire to obtain the most favorable estate tax treatment. It is not always possible to achieve both goals.

If protecting family wealth or business interests was not the primary reason for the relationship agreement, and especially in long-term marriages or relationships, the parties may choose to overlook the relationship agreement altogether and provide outright distributions to the surviving party. As discussed below, best practice is to consult with a family lawyer prior to amending or terminating any agreement.

VI. Best Practices for Estate Planning Attorneys.

A. Inquiry – do clients have a relationship agreement?

As stated previously, one of the first questions the estate planning attorney must ask is whether the clients have a relationship agreement. If so, obtain a copy and read it carefully. Get to know what the agreement requires before formulating an estate plan.

B. Follow it – not respecting the terms of the agreement could have unintended results for clients.

1. What are requirements upon death?

a. Disposition of marital/community assets. Typical relationship agreements provide for some property to be joint assets of the parties and label such property as “marital property” or “community assets” or something similar. These assets generally pass to the surviving party upon the first death. These assets may or may not be titled in a way that vests title in the surviving party as a matter of law, so take care to include a specific distribution of such assets to the surviving party in the will or trust agreement. For example, the residence may be held in the name of the parties as tenants-in-common. A tenancy-in-common does not include a survivorship right, and if the residence is to pass to the survivor, there must be a specific devise in the will or distribution in the trust agreement.

b. Specific amount to surviving party? The relationship agreement may provide for specific assets to pass to the surviving party such as the residence, a vacation home, a particular business interest, or a sum certain of cash or liquid assets. These items should be included as

specific bequests or distributions in the will or trust. Be aware that some agreements allow for specific amounts guaranteed on death to be paid from life insurance or from the deceased party's estate, but not both. Other agreements identify the need for both life insurance and specific bequests.

c. What are requirements for disposition of insurance policies and retirement assets? The relationship agreement may contain specific provisions addressing life insurance and retirement assets. For example, is life insurance on the life of one party required in order to provide support to children? Care should be taken not to change the beneficiary for tax planning purposes if the insurance is required for another purpose. Similarly, the parties may have agreed to name individuals other than their spouse or partner as beneficiary of a retirement plan. For example, a party who was previously married may have a qualified domestic relations order ("QDRO") in place over the retirement plan requiring it to be paid to a former spouse. Review the agreement prior to changing beneficiary designations.

d. Does the client wish to provide more for spouse than agreement requires? Since many parties view the relationship agreement as a protection against dissolution, the parties may wish immediately to draft estate planning documents that leave everything to the surviving party. Many in long-term relationships reach a point that they wish to benefit each other notwithstanding the terms of the agreement. Before amending or terminating a relationship agreement, consult with a family law attorney.

For those wishing to provide more for each other than the relationship agreement requires, first consider the reasons for the agreement (family business interests, insurance requirements, QDRO) and then consider using a trust arrangement to facilitate the transfer. A trust may provide the surviving party with income and access to principal as needed (and if available) for maintenance and support. If the primary reason for entering the relationship agreement was to protect the family business, it may be possible for the business interest to pass to a trust for the survivor's lifetime benefit while still retaining control in the family and preserving the asset for the next generation or generations. Be creative in your plan and be prepared to work with the family law attorney and possibly business attorney to reach a solution that works for everyone.

See Section C. below for updating the relationship agreement when circumstances change.

2. How will estate plan affect the terms of the agreement?

a. What effect does asset division for estate planning purposes have on parties' rights under the agreement upon divorce? Estate

planning attorneys strive to balance asset ownership between spouses in order to obtain the maximum benefit from estate tax exemptions. If the parties have a relationship agreement, it may not be possible to separate assets in an estate tax efficient manner. Care should be taken to determine what options are available consistent with the relationship agreement prior to making recommendations about asset division.

For example, spouse 1 owns interests in several closely held family businesses that, by the terms of the shareholder or operating agreements, cannot be transferred to a spouse. As a result of the success of the family businesses, spouse 1 also owns significant assets outside of the business, including brokerage accounts. Spouse 2 owns very few assets individually. Spouse 1 is prevented from transferring family business interests to spouse 2, and before recommending transferring a portion of the brokerage accounts to spouse 2, the estate planning attorney should ask whether that transfer would result in converting separate property to joint property under the terms of the relationship agreement and whether that is consistent with the parties' intentions. If not, will spouse 1 be forfeiting certain rights under the relationship agreement by making an inter vivos transfer of the assets to spouse 2?

b. Important to loop in family lawyer before separating assets or adopting an investment plan that could affect outcome upon divorce. Violating the terms of the relationship agreement may invalidate provisions of the agreement. In the example above, the transfer of interests in spouse 1's brokerage accounts may result in commingling of the assets that might benefit spouse 2 upon a divorce to the detriment of spouse 1. It is important to weigh the benefit of tax planning against the goals of the relationship agreement. Before making recommendations, consult with the family law attorney.

- C. Amend agreements when estate plan is updated (ORS 108.720).
- D. Exercise caution when drafting powers of attorney, advance directives, and other common documents to avoid unintended consequences upon divorce.

# OSB Advanced Estate Planning Seminar

ESTATE PLANNING WITH RELATIONSHIP AGREEMENTS

Presented by

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Friday, November 13, 2020

## Relationship Agreements – a common component of estate planning

Relationship Agreements define parties' rights in three areas:

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- End of the relationship
- Death of a party
- Financial and/or domestic arrangements during the relationship

Goals for attorneys:

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- Ensure that there is a process in place so agreement is valid and enforceable
- Make the agreement easy for parties to understand and follow

# Types of relationship agreements

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## Prenuptial/Premarital Agreements

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- Governed by Uniform Premarital Agreement Act (UPAA); adopted in ORS 108.700-108.740
- Validity depends on circumstances of each case

## Amendments to Premarital/Prenuptial Agreements

- Contemplated by UPAA
- ORS 108.720

## Postnuptial Agreements

- UPAA applies only to prospective spouses
- Case law suggests postnuptial agreements are valid
- Advise clients that law is uncertain

## Cohabitation and Domestic Partnership Agreements

- Standard of review is based on intent of parties
- No “spousal” support

Lack of coercion, intimidation, or undue pressure

Some modicum of knowledge of terms and property affected

Timing in relation to wedding

Independent counsel

Relative sophistication of the parties

Sufficient disclosure of assets

Requirements  
for valid  
agreements

# Common Reasons for Agreements

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Protect earned wealth

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Or protect against debt of other party

## Protect family wealth (second or further generation)

- Clients often demand premarital agreements for children
- Common practice to include provision in trust agreements requiring premarital agreement
- Is premarital agreement to be limited to inherited wealth?

## Not first marriage

- Avoid repeat of prior dissolution
- Preserve assets for non-joint children

## Confirm mutual understanding

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Determine how expenses will be shared

Decide in advance on terms of dissolution when there is no conflict

Statistically less likely to divorce if prenup in place

## Common Misperceptions

Transactional vs  
Collaborative

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Agreement is not  
forced upon one party

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Lawyers and clients  
together as a team

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Follow a timeline

## Agreement is flexible

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Agreements may need to change to ensure they meet clients' goals:

- Laws change
- People's lives change
- People make mistakes

Great way to clean things up

## Not all matters can be covered

- Cannot predetermine custody rights and parenting time
- Child support can be agreed upon but only if over and above what would be otherwise ordered, e.g., paying for college

## How agreements affect estate plan

## Waiver of statutory rights

Elective share rights

Survivorship rights

Right to serve as personal representative

Rights to occupy dwelling, support allowance, and temporary support

## Spouses may provide more than minimum terms of agreement

- Common to provide more at death
- Common to provide less upon dissolution

Be sure that estate plan meets minimum requirements of relationship agreement

## What are requirements upon death?

Specific amount to surviving spouse?

What are requirements for disposition of insurance policies and retirement assets?

Does the client wish to provide more for spouse than agreement requires?

How to draft for incremental adjustments to spouse's inherited share?

## How will the estate plan affect the terms of the agreement?

- Asset division for estate planning purposes may affect parties' rights upon divorce
- Important to involve family law attorney before separating assets or adopting an investment strategy

Other common estate planning documents may have unintended consequences upon divorce:

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- Powers of attorney
- Advance directives
- Insurance documents

Consider amending agreement when estate plan is updated



Questions?

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