

## ENFORCEABILITY OF PRENUPTIAL AGREEMENTS

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**House Bill 4751 (H-1) reported from committee**

**Sponsor: Rep. Klint Kesto**

**Committee: Law and Justice**

**Complete to 10-24-17**

Analysis available at  
<http://www.legislature.mi.gov>

**BRIEF SUMMARY:** House Bill 4751 would amend Section 8 of Public Act 216 of 1981, concerning a contract relating to property made between persons in contemplation of marriage. This contract is also known as a prenuptial agreement. Generally speaking, the bill would render a prenuptial agreement unenforceable if certain factors can be proven, such as duress or unconscionable terms.

**FISCAL IMPACT:** The bill would have an indeterminate fiscal impact on the judiciary and local court funding units. The fiscal impact would depend on how provisions of the bill affected court caseloads and related administrative costs.

### **THE APPARENT PROBLEM:**

The Michigan Court of Appeals decided in *Allard v. Allard* that a court could interfere with a valid prenuptial agreement if the outcome was inequitable upon divorce.<sup>1</sup> Stated differently, the court determined that upon divorce, if a court finds the distribution of assets according to a prenuptial agreement is not apportioned equally, then the prenuptial agreement could be considered inequitable and not applicable.

Drafters of the bill believe that a valid prenuptial agreement should be enforced, even if it is inequitable, and that an agreement should be unenforceable only if it is found to be unconscionable. As such, these bill would produce that result.

### **THE CONTENT OF THE BILL:**

Section 8 of Public Act 216 of 1981 currently states that a contract relating to property made between persons in contemplation of marriage is enforceable after the marriage takes place. The bill would amend this section by adding specific circumstances when such a contract is unenforceable.

For a prenuptial agreement to be unenforceable, a party against whom enforcement is sought must prove either of the following:

- The parties' consent to the contract was the result of fraud, duress, or mistake;  
*OR*
- Before signing the contract, the party did not receive adequate financial disclosure, including disclosure of assets in a domestic asset protection trust. A

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<sup>1</sup> Unpublished opinion issued January 31, 2017 (No. 308194).

party has adequate financial disclosure under this subdivision if one of the following applies:

- The party receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party.
- The party expressly waives the right to financial disclosure beyond the disclosure provided.
- The party has adequate knowledge or a reasonable basis for having adequate knowledge of the estimate of value of the property, liabilities, and income of the other party.

The bill would also give deference to courts to refuse to enforce a term of the contract or the entire contract if either of the following applies:

- The term was unconscionable (or extremely unfair such that no reasonable party would agree) at the time the contract was signed.
- Enforcement of the term would be unconscionable for a party at the time of enforcement because of a material (meaning important; having influence or effect) change in circumstances arising after the contract was signed that was not reasonably foreseeable at the time the contract was signed.

The court's decision on whether a term or the entire contract is unconscionable would be decided as a matter of law. This means that the court would not investigate the facts of the case, but rather decide the issue through principles described in the applicable statutes.

The bill would be applicable to prenuptial agreements made before and after the effective date.

This amendatory act would take effect 90 days after the date of enactment.

MCL 557.28

### ***ARGUMENTS:***

#### ***For:***

Supporters of the bill worry that without a specific statute to enforce valid prenuptial agreements, a court would be able to disregard the contract and apply a “standard of living” test to distribute marital property equally. However, proponents of the bill believe that a valid prenuptial agreement should always be enforced, no matter the outcome. The only time an agreement should not be enforced is if it is unconscionable.

#### ***Against:***

Opponents of the bill argued that under principles of Michigan law, a marriage takes two properties and combines them into one. As such, a prenuptial agreement should be illegal, as it contracts around these principles.

Critics also worried that the bill could erode a court’s authority and ability to look at the totality of circumstances and decide what is fair. For instance, if one spouse owns rental property before the marriage and creates a prenuptial agreement to keep it separate, then a

court would be unable to apply any equitable relief if the other spouse helped to increase the property value over the marriage through upgrading or up keeping the property. If a spouse is not allowed to receive a share of the profits that were created through their own help, then it would create a disincentive to be helpful and supportive during marriage. Additionally, cases of domestic violence could produce a result where a victim would get nothing with which to start over. Under the bill, a court would be unable to divide property equally if there is a fair prenuptial agreement, but the abusive spouse would not let the victim work to earn money, assets, or skills outside of the marriage.

***POSITIONS:***

A representative from the Family Law Section of the Michigan State Bar opposes the bill. (9-12-17, 9-26-17, and 10-17-17)

Two attorneys from West Bloomfield testified in support of the bill. (9-26-17)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.