



## PRENUPTIAL AGREEMENTS ACROSS BORDERS: A COMPARATIVE ANALYSIS

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### ABSTRACT

*Prenuptial agreements, also called premarital agreements or antenuptial agreements, are commonly referred to as prenups. They are contracts executed before the wedding by the two people getting married. After the wedding, the couple may draw up a postnuptial agreement. The contract has provisions for dividing property and support upon divorce, separation, or death.<sup>1</sup> This analysis compares prenups in the United States, Australia, and India. Prenups are widely recognized and enforceable in the US, with state-specific laws governing their validity. They typically cover property division, spousal support, and inheritance rights. Courts generally uphold prenups unless deemed unconscionable or executed under duress. Australia recognizes prenups as Binding Financial Agreements (BFAs) under the Family Law Act 1975. BFAs cover property division, financial support, and other financial matters. Courts may set aside BFAs if deemed unfair or improperly executed. India's approach differs significantly. Prenuptial agreements, commonly known as prenups, are a relatively recent and somewhat controversial concept within the Indian matrimonial landscape. Traditionally, marriage in India is regarded not merely as a contractual relationship but as a sacred and lifelong bond, deeply rooted in religious and cultural values. As a result, the idea of entering into a contract that outlines the division of assets or financial arrangements in the event of a divorce is often met with skepticism and social resistance. This analysis delves into the legal and cultural dynamics influencing the reception and enforceability of prenuptial agreements in India and compares them with practices in other jurisdictions. It explores the existing legal frameworks, prevailing societal attitudes, and enforcement mechanisms (or the lack thereof), offering a nuanced understanding of marriage, individual autonomy, and financial security.*

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<sup>1</sup> Gross JJ, 'Prenuptial Agreements' (apress 2013).

**Keywords:** Prenup, Marriage, Divorce.

## INTRODUCTION

The institution of marriage, firmly rooted in tradition and legal frameworks, has experienced considerable evolution in response to changing socioeconomic conditions. A robust legal and financial standing for both parties is typically beneficial in the event of a divorce. There is a common misunderstanding and negative perception surrounding prenuptial agreements. Within Indian culture, prenuptial agreements are commonly disregarded, as they are seen to suggest an expectation of future divorce. Alternatively, prenuptial agreements offer a structured approach to establishing security through precisely defining asset distribution parameters for tangible and intangible property. Prenups can be a source of contention for couples, especially if one partner has much more wealth than the other. A percentage of prenups wind up in court when the marriage dissolves. A judge will be asked to decide whether the agreement was fair and not coerced. Courts generally take a dim view of prenups that are sprung on a spouse on or near the wedding day.<sup>2</sup> While the rising rates of divorce are understood to be a factor influencing couples to sign prenuptial agreements<sup>3</sup>, the changing attitude towards marriage, and the increase in the independence of women<sup>4</sup> can also be viewed as responsible for the rising acceptance and use of prenuptial.

## PRENUP IN THE US

The United States, as a general matter, highly values contractual freedom—so much so that the concept of the right to contract and to have those rights enforced is enshrined in the United States Constitution.<sup>5</sup> The aspect of American prenuptial agreement law is significant, reflecting the nation's distinct history of individualism and emphasis on individual rights within its legal system and culture. Unlike other countries that prohibit or refuse to enforce prenuptial contracts, most courts and legislative bodies in the United States now take the general position that prenuptial agreements are enforceable if they meet certain formal procedural requirements and are otherwise valid contracts under general contract principles.<sup>6</sup> Given the approximate

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<sup>2</sup>Julia Kagan, 'Prenuptial Agreement: What it is, How it Works' (2024) <https://www.investopedia.com/terms/p/prenuptialagreement.asp/>

<sup>3</sup>Winston Solicitors, 'Why are prenuptial agreements becoming so popular?' (2015)

<https://www.winstonsolicitors.co.uk/blog/why-are-prenuptial-agreements-becoming-so-popular.html/>

<sup>4</sup>Torres Law, 'Why prenuptial agreements are more popular today' (2017)

<http://www.tlghouston.com/blog/2017/08/why-prenuptial-agreements-are-more-populartoday.shtml/>

<sup>5</sup>U.S. CONST., art. I, s.10.

<sup>6</sup>Hrudka v. Hrudka, (1998)

50% divorce rate, ongoing legislative efforts to strengthen the institution of marriage, and the rising complexity of marital and non-marital family structures, prenuptial agreements are gaining prominence as a means of addressing diverse needs and circumstances. In 1983, the Uniform Premarital Agreement Act (UPAA) was promulgated and has since been adopted by 25 states and the District of Columbia (all or in part). J2 Am-ood notes that 'support for the Act may be building'}<sup>3</sup>. Whilst not all states have adopted the UPAA, all US states allow enforcement of prenuptial agreements, at least in some circumstances.<sup>7</sup>

All fifty states of the US follow prenup agreements in some or another depending upon their legislation and demographic location as each state has its own laws and policies. There is a Uniform Prenuptial Agreement Act (UPAA), which approximately 26 states have adopted, but each of these states has included its modifications to the UPAA.<sup>8</sup> In *Helal v. Helal (2021)*, Gamal Helal (Husband) and Heba Helal (Wife) signed a prenuptial agreement just before their wedding, with the Wife having limited English proficiency and no independent legal counsel. The agreement omitted significant assets and was signed under conditions suggesting coercion, leading the court to invalidate it. The Court of Special Appeals dismissed the Husband's appeal regarding the invalidation of the prenuptial agreement due to lack of jurisdiction and affirmed the award of attorney's fees to the Wife.<sup>9</sup>

In *Estate of Spizzirri v. Comm'r (2023)*, Richard D. Spizzirri had a prenuptial agreement with his fourth wife, later amended to include a \$1 million bequest to each of her three daughters and a five-year residence right for her. After his death, these provisions were not included in his will, leading to a settlement where the estate paid \$3 million to the daughters and granted them residence rights. The estate claimed these payments as deductions, but the IRS denied them, arguing they were gifts, not valid claims. The Tax Court upheld the IRS's decision, imposing a late filing penalty on the estate. The U.S. Tax Court ruled in favor of the IRS, disallowing the estate's deductions for the \$3 million paid to the wife's daughters and the five-year residence right, stating they were gifts rather than enforceable claims. The court also rejected the estate's deduction for property repairs, finding them unnecessary for estate

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<sup>7</sup>Anita Mackay, 'Who gets a better deal? Women and prenuptial agreement in Australia and the USA' (2003)

<sup>8</sup>UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 48 (2001)

<sup>9</sup>*Helal v. Helal*, 2021 Md. App. LEXIS 433, \*1, 2021 WL 2000082 (Md. Ct. Spec. App. May 19, 2021)

reservation. The estate was penalized for late filing, as it failed to show reasonable cause for the delay.<sup>10</sup>

## PRENUP IN AUSTRALIA

In Australia, prenuptial agreements are referred to as "Binding Financial Agreements" (BFA), and they became legally binding in 2000 after the Family Law Amendment Act was passed. Specific guidelines regarding the supervision that family law solicitors must provide for such agreements are outlined in Part VIIIA of the Family Law Act. The Family Court gave limited recognition to prenuptial agreements at Common Law, provided the parties acted by the terms of the agreement.<sup>11</sup> Before the Reform Act, the three-part test for assessing the relevance of a prenuptial agreement involved the court examining 'the circumstances in which it was entered', the 'content' of the agreement, and 'the extent to which its terms have been carried out' by the parties.<sup>12</sup> The Matrimonial Property Report suggested that there was public support for spouses to have greater certainty, particularly in two circumstances- where there is a 'vast disparity' in assets or a business or farm that had been in the family for generations.<sup>13</sup>

In the case of *Wallace & Stelzer*, the husband sought a declaration from the Court that the prenuptial agreement (known as a Binding Financial Agreement, or "BFA") he signed with his former wife in 2005 was invalid. However, in its recent judgment, the Full Court found in favor of his former wife and confirmed that the BFA was indeed binding. The decision resulted in a cash settlement to the wife of more than \$3,000,000<sup>14</sup>The *Wallace & Stelzer* case reaffirmed the legally binding nature of BFAs, setting a strong precedent for their enforceability in Australia. The ruling emphasized that for a BFA to remain valid, it must meet the legal requirements under the Family Law Act 1975, including both parties receiving independent legal advice before signing. This requirement ensures that individuals fully understand the financial and legal implications of the agreement before committing to its terms.

Furthermore, courts have demonstrated that while BFAs offer financial certainty, they can still be challenged and set aside on grounds such as fraud, undue influence, unconscionable

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<sup>10</sup>Estate of Spizzirri v. Comm'r, T.C. Memo 2023-25, 2, 2023 Tax Ct. Memo LEXIS 25, \*1, 2023 WL 2257805 (U.S. Tax. Ct. February 28, 2023)

<sup>11</sup>McBain 'Drafting pre-marriage contra.cts' (1994)

<sup>12</sup>This test was stated by Lindenmayer in *the Marriage of Dzieczko* [1992] (Family Court of Appeal, 30 April 1992, Appeal No 125 of 1991, No PA1405 of 1990, Strauss, Linderunayer and McCall JJ, unreported)

<sup>13</sup>Australian Law Reform Commission 39 Matrimonial Property, 1987 at paragraphs 438-39.

<sup>14</sup>*Wallace v Stelzer* FamCAFC 199

conduct, or lack of full financial disclosure. For instance, in *Thorne v Kennedy*<sup>15</sup>, the High Court of Australia ruled that the BFA in question was invalid because the wife had been pressured into signing under circumstances that made it unjust to uphold. This case underscored that BFAs must be entered into voluntarily and without external pressure or coercion. Courts have also recognized the importance of balancing individual financial autonomy with fairness. While BFAs allow couples to structure asset division in a way that suits their circumstances, the judiciary retains the power to intervene if an agreement grossly disadvantages one party. This is particularly relevant in cases where there is a vast disparity in wealth, as seen in *Kennedy & Thorne*, where the wife, with limited financial knowledge, was made to sign an agreement that left her with virtually no assets after the breakdown of the marriage. While Australian law generally upholds prenuptial agreements, they must comply with strict legal procedures to ensure fairness and validity. Judges take into account factors such as the circumstances in which the agreement was signed, whether it was entered into willingly, and whether both parties had equal bargaining power. These considerations ensure that one party does not unfairly exploit the other, maintaining the fundamental principles of equity in family law.

### **PRENUP IN INDIA**

More and more women are now economically independent, with deeper self-realization of inner strength, and are thus empowered with the capability to walk out of a bad marriage.<sup>16</sup> There has traditionally been a social stigma associated with divorce, with female spouses being typically blamed for it.<sup>17</sup> However, the rapid modernization of Indian society has arguably meant that women are now more prone to rebel against regressive ethos, which is demonstrated by more women seeking for the roles of homemaker and provider to be shared between husband and wife in a marital set-up.<sup>18</sup> Prenuptial agreements, while not explicitly governed by Indian personal law, provide a full understanding of their implications.

Despite judicial scrutiny, the use of BFAs in Australia has been steadily increasing. Many couples, especially those with substantial assets or prior marriages, view these agreements as a way to protect financial interests and prevent lengthy legal disputes in case of divorce. However, courts remain cautious in enforcing agreements that may lead to unjust outcomes.

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<sup>15</sup>*Thorne v Kennedy*[2017] HCA 49; 263 CLR 85; 91 ALJR 1260; 350 ALR 1; (2017) FLC ¶93-807; 56 Fam LR 559

<sup>16</sup>Indrani Basu, what do Modern, Financially-Independent Indian Women look for in a Marriage? (2016)

<sup>17</sup>Paul R. Amato, *The Impact of Divorce on Men and Women in India and United States*, (1994)

<sup>18</sup>Reeta Sonawat, *Understanding Families in India: A Reflection of Societal Changes*, (2001)

Thus, while prenuptial agreements provide greater financial clarity and certainty, they must meet strict legal requirements to be upheld. Visions have been a part of Indian society for a long time. Within the legal framework, Section 40 of the Divorce Act of 1869, which pertains to the dissolution of Christian marriages, explicitly states that district courts might examine the presence of prenuptial contracts and reference conditions included therein upon issuing a ruling regarding the division of assets during divorce. On the other hand, the acknowledgment of prenuptial agreements concerning Hindu weddings has not been as smooth, considering that marriage among Hindus is regarded as a religious bond instead of a contract.

Prenup agreements are somewhat prevalent in India, but the twist is that these agreements are given different names according to their laws. But in the court of law, the term ‘Prenuptial Agreements’ is not considered valid. It is interesting to note that the Ketubah marriage contract intrinsic to marriage under the Jewish religion, where written commitments are given by the groom before nuptials to provide economic safeguards to the wife in case of his death or divorce, is also a type of prenuptial agreement.<sup>19</sup> Agreement to pay Mahr Mu’ajjal or Mu’akhhkar, which is to be paid to the wife after the separation or death of the husband, is a well-known example of a term of Muslim prenuptial agreements.<sup>20</sup>

It is to be noted that in *Appibai v. KhimjiCooverji*, a prenuptial agreement requiring the couple to reside in Bombay after marriage was held by the Bombay High Court as not being against public policy, this was contrary to the general perception given that it did not impose a restrictive obligation on either spouse to reside in Bombay permanently.<sup>21</sup> In another instance, a prenuptial agreement providing for separate maintenance for a Mohammedan wife was held by the Calcutta High Court as not opposed to public policy.<sup>22</sup> In the notable case of *ONGC Ltd. v. Saw Pipes Ltd.*, the Supreme Court of India observed that there is no precise definition of ‘public policy’ as it varies from “generation to generation and from time to time” and therefore, the idea of ‘public policy’ is ambiguous and its “narrow or wider meaning” depends on the situation in which it is applied<sup>23</sup>.

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<sup>19</sup>Abbot Downing, A Thoughtful Approach to Prenuptial Agreements, [https://www.abbotdowning.com/\\_asset/630bk4/A-Thoughtful-Approach-to-Prenuptial-Agreements.pdf/](https://www.abbotdowning.com/_asset/630bk4/A-Thoughtful-Approach-to-Prenuptial-Agreements.pdf/)

<sup>20</sup>Vincent J. Cornell, *Voices of Islam: Voices of Life: Family, Home, and Society*, Vol. III, 66 (2007)

<sup>21</sup>*Appibai v. KhimjiCooverji*, 1934 SCC OnLine Bom 62: AIR 1936 Bom 138.

<sup>22</sup>*Syed Abbas Ali v. Nazemunnessa Begum*, 1939 SCC OnLine Cal 133

<sup>23</sup>*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

Prenups in India have not been given legal validity, but there are some case laws in which the court has upheld the validity of prenup agreements in Hindu and Muslim marriages. In *CIT v. Mansukhrai More*, the High Court of Calcutta held that the transfer of property as per the prenuptial agreement for the accomplishment of commitments undertaken was justified and did not attract section 16(3) of the Indian Income Tax Act 1922<sup>24</sup>. The High Court of Allahabad in the case of *Mohd. Muin-Ud-Din v. Jamal Fatima ('Muin-Ud-Din')* upheld the validity of a prenuptial agreement that had provided that the husband would pay maintenance in addition to dower debt in case of dissension between the spouses.<sup>25</sup> A review of these case-law cases involving Hindus and Muslims shows that, as time passes, Indian court rulings have changed their direction slowly but surely. It should be noted that the first annulment of such agreements was based in part on the current state of public opinion as expressed by the British courts.

## CONCLUSION

A comparative analysis of prenuptial agreements across the United States, Australia, and India reveals significant variations in their legal recognition, enforceability, and societal acceptance. While all three jurisdictions acknowledge the importance of contractual autonomy in marital relationships, the extent to which prenuptial agreements are upheld varies based on legal frameworks, judicial interpretations, and cultural perspectives. In the United States, prenuptial agreements are widely recognized and enforceable, provided they meet the standards of voluntariness, full financial disclosure, and fairness. Courts generally uphold these agreements unless they are found to be unconscionable or executed under duress. The Uniform Premarital Agreement Act (UPAA) has contributed to a more consistent approach across different states, reinforcing the legitimacy of prenuptial agreements as a tool for asset protection and financial planning. Australia follows a similar legal framework, wherein prenuptial agreements, referred to as Binding Financial Agreements (BFAs), are legally enforceable under the Family Law Act 1975. However, Australian courts exercise a degree of oversight to ensure that such agreements are entered into freely and without undue influence. Legal representation for both parties is a crucial requirement, ensuring fairness and informed consent. Although Australian law upholds these agreements, courts retain the power to set them aside if they are deemed unjust or if significant changes in circumstances occur post-execution. In contrast, India presents a starkly different approach to prenuptial agreements. Indian law does not formally recognize prenuptial

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<sup>24</sup>*CIT v. Mansukhrai More*, 1988 SCC OnLine Cal 339

<sup>25</sup>*Mohd. Muin-Ud-Din v. Jamal Fatima*, 1921 SCC OnLine All 38; AIR 1921 All 152; ILR (1921) 43 All 650

agreements as legally binding under personal laws governing marriage and divorce. Since marriage is considered a sacrament rather than a contract in most religious traditions, prenuptial agreements have limited enforceability. However, with the increasing influence of global legal trends and economic considerations, there is a growing discourse on the need to formalize prenuptial agreements within the Indian legal framework, particularly under the Indian Contract Act, 1872. Overall, the enforceability of prenuptial agreements is contingent upon the legal and cultural landscape of each jurisdiction. While the US and Australia have established well-defined legal mechanisms for enforcing such agreements, India remains at a nascent stage in this regard. As societal attitudes evolve and economic complexities grow, India may witness greater acceptance of prenuptial agreements, aligning its legal framework more closely with global practices. The comparative analysis underscores the need for a balanced approach that upholds contractual freedom while ensuring fairness and equity in marital arrangements.