

SENATE JUDICIARY

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Bill No. HB 368

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Attachments: [Goheen Senate Testimony HB 368.pdf](#)

Details:

Bill: HB-368: Adopt Uniform Premarital and Marital Agreements Act 2021-03-23 08:00 AM - (S) Judiciary

Position: Proponent

Representing an Entity/Another Person: Yes

Organization: Family Law Section of the Montana State Bar

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Written Statement: Not Provided

Files: [Goheen Senate Testimony HB 368.pdf](#)

Testify via Zoom: Yes

Zoom Method: Computer

Testimony HB 368

Before Senate Judiciary Committee

March 19, 2021

By Gail H. Goheen (Proponent)

Thank you Chairman and Members of the Judiciary Committee, for allowing me to appear before you today. My name is Gail Goheen (G-O-H-E-E-N), and like some of the other Bill proponents here today, I am a member of the Legislative Committee of the Family Law Section of the Montana State Bar. I have been an attorney in Hamilton, Montana for over 40 year, primarily specializing in the practice of family law, representing a wide range of Montanans--from pro bono clients to wealthy folks, about equally men and women)—throughout a number of judicial districts in this state. Over the years, I have drafted and reviewed several “prenuptial agreements,” and as well have dealt with clients who have been affected by them. My goal in appearing here today is to improve the law relating to the creation and enforcement of both premarital agreements and marital agreements.

In my testimony, I hope to provide you with a little more detail about what this Bill is designed to do. In addition to adding marital agreements and treating them in a uniform fashion with premarital agreements, there are several more “fairness” safeguards built into HB 368, both as to procedures relating to the creation of the affected agreements, in addition to enforcement limitations.

- All too often, one party pulls out the proposed premarital agreement after the invitations to the wedding are sent out and often near in time to being on the courthouse/church steps. Likewise, in the case of a marital agreement, it would not be unusual to have the party more dominant in a relationship to present the agreement with little notice and demand it be signed by their spouse. To be enforceable, HB 368 would require a party’s consent must have been both voluntary and not under duress. A party can challenge enforceability if he/she did not have access to independent legal representation when the agreement was signed (and that would include reasonable time to decide whether to retain independent representation as well as locate such an attorney and obtain and consider such advice). If a party can’t afford an independent attorney and the other party has an attorney, then that other party must pay the legal fees for party without adequate monies to pay for an attorney.
- Before signing an agreement, to be enforceable, a party must receive a “financial disclosure” from the other party, setting out his/her assets, liabilities, and income; be reasonably aware of the same; or sign a waiver of the right to a financial

disclosure—in which event there must be a clear warning of rights being waived or obligations being assumed if the agreement is signed.

- HB 368 also allows a court to refuse to enforce a term of a premarital or marital agreement, if in the context of the agreement taken as a whole, the term was unconscionable at the time of its signing, or the enforcement would result in a substantial hardship for a party because of a material change in circumstances arising after the agreement was signed. Although “unconscionability” is a question left for the court to determine, presumably it would be of a nature that is extremely unjust, overwhelmingly one-sided in favor of the party who has the superior bargaining power, or contrary to good conscience. It is especially noteworthy that under current law, a premarital agreement can be enforced even if it is unconscionable when signed, provided certain advance disclosures are made or waived. Also under the existing law, there are no exceptions for substantial hardship resulting from a material change in circumstances after an agreement is signed.
- A premarital agreement or marital agreement eliminating or modifying spousal support is unenforceable to the extent it would cause a party to be eligible for public assistance. Likewise, provisions affecting child support are also forbidden.
- HB 368 clearly disallows provisions in a premarital or marital agreement that: restrict remedies available to domestic violence victims; purport to modify the grounds for separation or marital dissolution; penalize a party for initiating a legal proceeding for separation or marital dissolution; or that define the rights or duties of the parties regarding custody/parenting responsibilities for children. Existing law on these matters relating to premarital agreements is MUCH more vague.
- Agreements in anticipation of a divorce or legal separation are not authorized by this Act, and thus marital agreements are effective only if both spouses intend to stay married at the time when an agreement is entered into.

There are other provisions of HB 368 that clarify the effect of marital and premarital agreements which I won't go into further, but with that, I'll open myself up for any questions you may have. I urge you to support HB 368, and thank you for allowing me to testify before you today.