a. PREMARITAL, POST-NUPTIAL, SEPARATION, AND MARITAL SETTLEMENT AGREEMENTS

i. Antenuptial/Premarital Agreements

(1) Statutes and Court Rules

In 1989, Nevada enacted the Uniform Premarital Agreement Act (the "Act"). 1989 Nev. Stat. ch. 472. The Act expressly applies to any premarital agreement executed on or after October 1, 1989, and the enabling legislation further provided that "any premarital agreement made before that date is enforceable it if conforms to the common law, as interpreted by the courts of this state before that date, or the requirements of [the Act]." *See* NRS 123A.080(3); *see also Sogg v. Nevada State Bank*, 108 Nev. 308, 312, 832 P.2d 781, 784 (1992).

Pursuant to NRS 123A.040, a premarital agreement must be in writing and signed by both parties. It is enforceable without consideration. The Act provides guidance on the contents of the agreement in NRS 123A.050:

> (1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
>
> (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
>
> (3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
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> (4) the modification or elimination of alimony or support or maintenance of a spouse;
>
> (5) the making of a will, trust or other arrangement to carry out the provisions of the agreement;
>
> (6) the ownership rights in and disposition of the death benefit from a life insurance policy;
>
> (7) the choice of law governing the construction of the agreement; and,
>
> (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

In preparing a premarital agreement, the following interrelated statutory guidelines and requirements should be considered and evaluated:

(1) All marriage contracts must be in writing and executed and acknowledged or proved in like manner as a conveyance of land is required to be executed and acknowledged or proved. *See* NRS 123.270.

(2) Every promise or undertaking made upon consideration of marriage, except mutual promises to marry, is void unless it is in writing and subscribed by the party to be charged. *See* NRS 111.220. *But see* NRS 41.370 to 41.420, inclusive, also abolishing the cause of action in Nevada of breach of promise to marry.

(3) The agreement may eliminate alimony or support or maintenance of a spouse. *See* NRS 123A.050(1)(d). If the elimination of alimony would make the person who is being denied alimony eligible for public assistance, however, a court can disregard the provision eliminating alimony "to the extent necessary to avoid that eligibility." NRS 123.080(2).

(4) The agreement may provide for or require the execution of wills to carry out the terms of the agreement. *See* NRS 123A.050(1)(e).

(5) The right of child to support may not be adversely affected by a premarital agreement. *See* NRS 123A.050(2).

(6) A premarital agreement may expressly override the otherwise-applicable duty of a court to make an equal distribution of community property and corresponding distribution of property held in joint tenancy. *See* NRS 125.150.

These considerations bear directly upon the ultimate enforceability of a prenuptial agreement. NRS 123.080(1) provides that a premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

> (a) That party did not execute the agreement voluntarily;
> (b) The agreement was unconscionable when it was executed; or
> (c) Before execution of the agreement, that party:
>
> (1) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
> (2) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
> (3) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

NRS 123A.180(3) provides that the question of unconscionability is to be decided by the reviewing court as a matter of law.

If the marriage is determined to be void, any premarital agreement between the parties is enforceable "only to the extent necessary to avoid an inequitable result." NRS 123A.090. The statute of limitation is tolled during the marriage, but any equitable defenses relating to enforcement, including laches and estoppel, are available to either party. NRS 123A.100.

(2) Cases

In *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972), the Nevada Supreme Court noted the existence of a prenuptial agreement between the parties. Without squarely addressing

the validity or enforceability of the agreement, the Court impliedly upheld it by proceeding from the presumption that all the assets belonged to the husband, while noting that the agreement was apparently executed on the date of marriage, and that the wife did not understand its terms.

Under Nevada common law, a premarital agreement should be enforced and is not void as against public policy if its provisions are fair and reasonable, the agreement is understandable, and it was not procured through fraud, misrepresentation, or non-disclosure. *See Buettner v. Buettner*, 89 Nev. 39, 45, 505 P.2d 600, 604 (1973). As with all contracts, the courts of this state retain power to refuse to enforce a particular premarital agreement if it is unconscionable, obtained through fraud, misrepresentation, material non-disclosure, or duress. *Id*. If issues of fraud, misrepresentation and mistake as to value were raised at trial, however, a later independent action to reform the agreement may be dismissed on the ground of *res judicata*, since the claim in question had already been directly considered. *Spilsbury v. Spilsbury*, 92 Nev. 464, 465-66, 553 P.2d 421, 422 (1976).

Premarital agreements executed in another state are controlled by the law of that state at the time of the execution of the agreement. *Braddock v. Braddock*, 91 Nev 735, 542 P.2d 1060 (1975) (whether a premarital agreement was entered into knowingly, freely, and voluntarily is a question of fact, and parties engaged to be married have a "confidential relationship").

As with all contracts, parties to a premarital agreement may orally modify the agreement, unless the agreement requires that modifications be made in writing. *See Jensen v. Jensen*, 104 Nev. 95, 98, 753 P.2d 342, 344 (1988). Moreover, the parties' consent to modification can be implied from their conduct if it is consistent with the asserted modification. 104 Nev. at 98, 753 P.2d at 344.

In *Daniel v. Baker*, 106 Nev. 412, 414, 794 P.2d 345, 346 (1990), the Nevada Supreme Court found a premarital agreement to be invalid, without any significant analysis. The Court simply affirmed a district court ruling that an agreement by which the wife purportedly gave up all community property and alimony rights in exchange for $5,000.00 was unenforceable. Implicit in the Court's recitation of the husband's accumulation of millions of dollars of wealth during a fifteen year marriage, while the wife accumulated almost nothing of value, was a finding that such a financial outcome was simply unconscionable.

In *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992), the Court considered a premarital agreement that had been entered into prior to Nevada's adoption of the Uniform Premarital Agreements Act, and had been upheld by the trial court as having been voluntarily and knowingly entered into by both parties.

The Court began its review by stating that in such circumstances, it would review the validity of the agreement *de novo*, and that since the agreement was drafted prior to adoption of the Act, it would be upheld if it either conformed to the Act or to prior Nevada common law. 108 Nev at 312, 832 P.2d at 783.

The Court held that there is a presumed fiduciary relationship between fiances, and a

presumption of fraud exists where the agreement greatly disfavors one of the parties. That presumption, however, can be overcome by a finding that the party claiming disadvantage "was not in fact disadvantaged." 108 Nev. 312, 832 P.2d at 784. The agreement at issue here stripped the wife of all resources and means of support, and she would certainly have received more under community property law, so the agreement was presumably fraudulent. The Court adopted and discussed a series of elements for its review from cases decided in Oregon and Washington.

First is whether the disadvantaged party had ample opportunity to obtain the advice of independent counsel. *See Muscelli v. Muscelli*, 96 Nev. 41, 604 P.2d 1237 (1980). The Court distinguished a situation in which a prospective wife was given a proposed agreement seven or eight months before the marriage and repeatedly advised to consult with counsel, but refused. 108 Nev. at 312-13, 832 P.2d at 784. In this case, the husband's attorney selected "wife's attorney" and set up her appointment, which took less than an hour and was incomplete (because the husband interrupted them), and the wife's attorney refused to certify that he had independently advised her. The Court held that the agreement was procedurally defective since the wife never reviewed the entire agreement with independent counsel. 108 Nev. at 313, 832 P.2d at 784.

Next is whether the disadvantaged party was coerced into making rash decisions. Included in this factor is any time pressure the party given the agreement was put under; the Court approvingly cited cases from elsewhere in which the first meeting to review a sample agreement was three days prior to its signature, the night before the wedding, and the wife did not have a copy of the agreement in the interim, or in which the wife found out about the agreement the day the parties left to get married. 108 Nev. at 313-14, 832 P.2d at 785. In this case, the wife had a brief meeting with counsel the day before the initial wedding date, which was interrupted by the husband, and he canceled the wedding when she did not sign the agreement immediately. She did not see it again until after the parties had reconciled, on the date of the reset wedding, "when she was again under pressure to sign it because her wedding would be called off if she did not" do so. The Court found those circumstances to be coercive. 108 Nev. at 314, 832 P.2d at 785.

A factor to be considered is whether the disadvantaged party had "substantial business experience and acumen." Having run a business, and accumulating substantial assets, can be evidence sufficient to rebut the presumption of unfairness, but here the Court found that the wife's management of her own finances while a singer, having worked demonstrating phones, and having engaged in a business deal that the Court termed "a swindle in which she was the unwary prey," did not qualify. 108 Nev. at 314-15, 832 P.2d at 785-86.

The final factor referenced is whether the disadvantaged party was aware of the financial resources of the other, and understood the rights that were being forfeited. The Court translated this into a duty of "full disclosure," that if not met independently invalidated the premarital agreement: "premarital agreements will be enforced only where the party seeking to enforce the agreement fully disclosed his or her assets to the other party prior to signing." 108 Nev. at 315, 832 P.2d at 786. Listing assets without values is not good enough to satisfy this condition, nor can it be met by asserting that the disadvantaged party "was familiar with his home, and that he

had driven her around to see some of his other properties," because although the wife knew the husband was wealthy, she apparently underestimated that wealth, and so did not permit the wife "to make an informed decision with respect to the premarital agreement," which was therefore invalid. *Id*.

The next year, in *Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993), the Court started with the position that a premarital agreement relating to the division of property and the payment of support in the event of divorce is not void as contrary to public policy; however, the Court held that it does not defer to trial courts' interpretation of such agreements, but instead repeated that the standard of appellate review is "*de novo*." 109 Nev. at 463, 851 P.2d at 449.

The Court held that a prenuptial agreement is unenforceable if it was unconscionable at execution, involuntarily signed, or the parties did not fully disclose assets and obligations before the agreement was executed. Furthermore, because of the presumed fiduciary relationship existing between parties who are engaged to be married, a presumption of fraud is found where the agreement entered into greatly disfavors one of the parties. 109 Nev. at 463, 851 P.2d at 449.

Condensing its recitation of factors from *Sogg*, the Court held that the presumption of invalidity can be overcome by proving that the disadvantaged party: (1) had ample opportunity to consult an attorney, (2) was not coerced, (3) possessed substantial business acumen, and (4) understood the financial resources of the other party and the rights being forfeited under the agreement.

Here, the trial court's invalidation of an alimony waiver was affirmed since the husband did not attach his schedule of assets until a year ***after*** the agreement was signed, even though the Court concluded that the wife had an opportunity to consult with legal counsel, was not coerced, and "possessed the acumen to understand the transaction." 109 Nev. at 463-64, 851 P.2d at 449.

Explaining, the Court held that fiances share a confidential, fiduciary relationship, and each has a responsibility to act with good faith and fairness to the other, which includes full disclosure ***prior*** to executing a premarital agreement. 109 Nev. at 464, 851 P.2d at 449-450. That duty was not satisfied by the husband's post-marital completion of a list of assets, which he had the wife initial, nor by the fact that the parties cohabited and started a business together. The Court held that given the extensive list of assets, the wife "could not have known the full magnitude of [the husband's] assets and obligations before marriage." *Id*.

Where a premarital agreement limited the alimony payable to a wife in the event of a divorce to a specific sum, but did not explicitly address the matter of temporary spousal support during the ***pendency*** of a divorce, the Nevada Supreme Court ruled that it was a matter outside of the scope of the agreement and the trial court was free to make an award for interim support. *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996). The case did not explicitly say whether or not a premarital agreement ***could*** restrict a party's right to make a claim for support during the pendency of a divorce.

The Nevada Supreme Court described its opinion in the opening line of *Kantor v. Kantor*,

116 Nev. 886, 8 P.3d 825 (2000), as being a "multimillion dollar divorce case involving a premarital agreement." The decision itself, however, turned on procedural issues involved in the wife's attempt to amend her pleadings too close to the trial date.

The premarital agreement at issue provided that the husband's earnings from his practice as a medical doctor were to be community funds, any other funds earned were to be separate property. The wife alleged on appeal that the trial court had erred by applying the terms of the premarital agreement without determining its validity and substantive fairness. The Court rebuffed that attack, however, holding that since the party disputing the validity of a premarital agreement has the burden of proving that an agreement is invalid and the wife's amended answer had admitted to the validity of the premarital agreement, the district court was under no obligation to independently determine the validity and substantive fairness of the agreement. 116 Nev. at 893-94, 8 P.3d at 830.

(3) Discussion

The statute's use of "may" as to what an agreement can legitimately address leaves the parties free to negotiate and arrange their affairs in almost any order, except in ways that would violate law or public policy.

However, no attorney should either prepare or approve a premarital agreement without first scrutinizing *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992), which provides a veritable checklist of things to ***not*** do if the desire is to create an enforceable premarital agreement: The husband's attorney drafted the agreement and selected the wife's attorney for review. The disadvantaged party was never advised that she should select her own attorney. The agreement did not have an asset list attached. The selected attorney for the disadvantaged party had a brief conference with the wife and refused to sign the advice certificate on the agreement. The disadvantaged party was not given a copy of the agreement to take to another attorney prior to signing. Thereafter, the disadvantaged party was not presented the agreement for review by independent counsel until the wedding day, and was not given time to consult independent counsel. The disadvantaged party was pressured into signing the agreement by, for example, being told that the imminent wedding would be called off if the disadvantaged party refused or failed to sign the agreement.

It is unclear how many of these actions would have had to have been not present (or perhaps less egregious) to have changed the result. The general tenor of the Court's analysis in *Sogg* indicates that ***any*** of those actions would have been sufficient to invalidate the agreement. On the other hand, the Court's analysis is *Kantor* mentions the wife's allegation that there had been an insufficient disclosure, but readily dismissed it on the procedural ground that her attorney had admitted to validity of the agreement there at issue. Given its peculiar procedural context, it is unclear whether *Kantor* indicates that the Court may be more deferential to enforcement of premarital agreements in the future than its existing case law would indicate.

Fick, in dicta, throws into the mix the question of how much "ability to consult an attorney" is "ample." From the cases approvingly cited in *Sogg*, it seems pretty clear that any

premarital agreement executed within days of a pre-planned wedding is at least vulnerable, if not presumptively invalid, even if the spouse does get access to an attorney in that time. The Nevada Supreme Court has weighed in on the side of courts that find a threat to cancel the wedding if the agreement is not signed to be "coercive." Therefore, the closer the planned wedding date, the greater the presumptive pressure on the disadvantaged spouse to avoid embarrassment and financial loss, and the greater is the pressure on that spouse to sign whatever is put in front of her (to date, all such cases in this state have involved the wife as the disadvantaged party).

As noted above, Nevada common law permits oral modifications to premarital agreements, like all other contracts, unless the agreement requires that modifications be made in writing, and the Nevada Supreme Court has even provided that consent to the modification can be implied by conduct. *Jensen v. Jensen*, 104 Nev. 95, 98, 753 P.2d 342, 344 (1988). Counsel seeking to avoid litigation regarding alleged oral modifications should therefore provide that any modification must be by written instrument executed with the same formality as the original.

A premarital agreement should provide that the effective date of the agreement is the date of marriage, and acknowledge and set forth the provisions of NRS 123A.050 in the preamble (to prevent any later claim that these content requirements were unknown). The agreement should incorporate the recitals and should contemplate the following non-exclusive list of considerations:

(1) the property owned by each;

(2) each party's income and earnings;

(3) the obligations owed by each;

(4) the intent of the parties as to the future status of their existing separate property, including any modifications sought as to the common law rules relating to transmutation and commingling of that separate property with future community property as explained in the case law, and any limitations on the ability of each party to invest, re-invest, or dispose of that separate property;

(5) whether and how there can be any transmutation of community property into separate property, and what happens if community property is commingled with separate property;

(6) the characterization or other treatment of wages and salaries after marriage;

(7) provisions for support during marriage;

(8) the provision for or waiver of support if there be separation or divorce (with an eye toward the exception for cases in which the disadvantaged spouse is forced to rely upon public assistance, *see* NRS 123A.080(2));

(9) a provision for life insurance policies already existing or contemplated for the future;

(10) a provision as to retirement benefits accrued after marriage, including the survivorship benefits relating to any such retirement benefits, and acknowledging that under ERISA or other law, post-marital documents might have to be executed to carry into effect provisions of premarital agreements relating to retirement benefits or survivorship benefits;

(11) the treatment of future acquisitions of property (as community, jointly-owned, or separate), and any rules governing that treatment if at variance with common law;

(12) a designation of what if anything is to be deemed or treated as community property after marriage;

(13) whether to provide for the future filing of tax returns, and whether such filings should have any impact on the characterization of any property;

(14) a provision for the execution of required or necessary documents;

(15) a provision stating that the terms of the agreement are intended to govern in the event of divorce;

(16) provisions contemplating the death of each spouse before the other, including a provision for execution of wills or other estate planning documents if necessary to carry out terms of the agreement;

(17) the binding effect of the agreement on heirs, administrators, personal representatives and assigns;

(18) the governing law being that of the State of Nevada;

(19) the enforcement of the agreement and provision for attorneys' fees and costs, including consideration of clauses imposing such fees and costs on any person unsuccessfully challenging the provisions of the agreement;

(20) verification that both parties have received advice of independent counsel in the execution of the agreement, including separate certificates acknowledging legal advice given by each attorney;

(21) the acknowledgment that neither party is deemed the drafter of the agreement, if appropriate;

(22) the provision for payment of costs of drafting or negotiating the agreement; and

(23) the signatures of each party with an acknowledgment before a notary.

The agreement should conclude with the acknowledgment that, before executing the agreement, both parties have investigated, and acknowledge and agree that the agreement is in compliance with the provisions of NRS Chapter 123A, and specifically NRS 123A.080, and that each party acknowledges that he or she:

(1) executed the agreement voluntarily;

(2) agrees that the agreement, by its terms, is not unconscionable;

(3) was provided a fair and reasonable disclosure of the property and financial obligations of the other party and/or waives the right to disclosure beyond that disclosure provided;

(4) has, or reasonably could have had, an adequate knowledge of the property and/or financial obligations of the other party; and

(5) has had the benefit of advice from independent legal counsel in the preparation and execution of the agreement.

(4) Local Rules

There are no local rules specifically applicable to premarital agreements.

ii. Postnuptial and Separation Agreements

Agreements made between couples ***after*** marriage fall into two categories: (1) postnuptial agreements; and (2) separation agreements (also sometimes called property settlements, marital settlements, and marital termination agreements). In the case of the ***former***, the parties intend to remain married and living together, while in the case of the ***latter***, the parties intend to separate. The distinction is important because real and different consequences flow from the type of agreement the parties execute. Whether an agreement is a postnuptial agreement or a separation agreement depends on the intention of the parties.[1]

(1) Statutes and Court Rules

A husband and wife may enter into agreements with each other respecting property following their marriage. *See* NRS 123.070. NRS 123.080 provides:

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[1] 1 Alexander Lindey and Louis I. Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 1.21[1] (1998). *See*, *e.g.*, *Combs v. Sherry-Combs*, 865 P.2d 50, 54 (Wyo. 1993). ("A postnuptial must be distinguished from a separation agreement. A separation agreement, entered into by parties in anticipation of immediate separation or immediate separation or after separation, is favored in the law.")

> 1. A husband and wife cannot by any contract with each other alter their legal relations except as to property, and except that they may agree to an immediate separation and may make provision for the support of either of them and of their children during such separation.
>
> 2 The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in subsection 1.
>
> 3. In the event that a suit for divorce is pending or immediately contemplated by one of the spouses against the other, the validity of such agreement shall not be affected by a provision therein that the agreement is made for the purpose of removing the subject matter thereof from the field of litigation, and that in the event of a divorce being granted to either party, the agreement shall become effective and not otherwise.
>
> 4. If a contract executed by a husband and wife, or a copy thereof, be introduced in evidence as an exhibit in any divorce action, and the court shall by decree or judgment ratify or adopt or approve the contract by reference thereto, the decree or judgment shall have the same force and effect and legal consequences as though the contract were copied into the decree, or attached thereto.

Every promise or undertaking made upon consideration of marriage, if not in writing and subscribed by the person charged therewith, is void, except the mutual promise to marry. *See* NRS 111.220. *But see* NRS 41.370 to 41.420, inclusive, ***also*** abolishing the cause of action in Nevada of breach of promise to marry.

All marriage contracts or settlements must be in writing and executed and acknowledged or proved in the same manner as conveyances of land. NRS 123.270. That provision has been labeled the "Statute of Frauds regarding marriage contracts." *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 n.1, 625 P.2d 568, 569 n.1 (1981). The agreement should be recorded in each county where any conveyed or affected real property is located. NRS 123.280. Such recordation is deemed to impart notice to all persons. NRS 123.290.

Divorce or annulment of marriage of a testator revokes a beneficial devise, legacy, or interest given to a former spouse in a will executed before entry of the decree, unless otherwise provided for in a property or separation agreement which is approved by the court in a divorce or annulment proceeding and not merged in the decree. *See* NRS 133.115; *but see Riesterer v. Dietmeier*, 98 Nev. 279, 281, 646 P.2d 551, 553 (1982) (successfully rebutting the presumption of revocation created by NRS 133.110); *Todara v. Todara*, 92 Nev. 566, 568-69, 554 P.2d 738, 739-40 (1976) (finding that revocation of a will by divorce revokes as to property but does not revoke as to naming former spouse as executrix).

(2) Cases

Separate property can be transmuted into community property by agreement of the parties, and the agreement to do so may be oral. *See Mullikin v. Jones*, 71 Nev. 14, 27, 278 P.2d 876, 882 (1955); *but see Verheyden v. Verheyden*, 104 Nev. 342, 757 P.2d 1328 (1988) ("the mere oral expression by a spouse that [property] purchased during the marriage is a 'gift' to the

other spouse" does not overcome the community property presumption); *also see Anderson v. Anderson*, 107 Nev. 570, 816 P.2d 463 (1991) (Concurring opinion of J. Springer) (protesting that the Court should have taken that opportunity to articulate that a writing is not required to transmute property after it is acquired).

An agreement can provide for support and the division of property and survive the decree of divorce. The decree, however, must provide the agreement is not merged but survives the decree. *Day v. Day*, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964).

The parties may remove the subject matter of the agreement from litigation in divorce and they may agree to merge the agreement into the decree. *Ballin v. Ballin*, 78 Nev. 224, 230-31, 371 P.2d 32, 36 (1962). Further, the parties may provide that the agreement survives the decree. *Id*., 78 Nev. at 230-31, 371 P.2d at 36.

Even if the parties distributed property existing at the time of an agreement, ***future*** contributions from community property create a community property interest, even in properly transmuted property. *Sly v. Sly*, 100 Nev. 236, 679 P.2d 1260 (1984); *Verheyden v. Verheyden*, 104 Nev. 342, 757 P.2d 1328 (1988). Where funds earned during marriage are used to make mortgage payments on a home, the non-titled spouse accumulates a *pro tanto*, pro rata share with each additional payment. *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990). Although title is in the name of only one party, the other has a half interest in the community property payments, and therefore also possesses an interest. *Verhyden*, *supra*, 104 Nev. at 344, 757 P.2d at 1330; *but see Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998) (without substantial analysis, finding "substantial evidence" to support the lower court's finding that a valuable property lot had been transmuted into the husband's separate property by means of a quit-claim deed executed by the wife in favor of the husband a considerable time before divorce, despite a continuing series of payments on that property after execution of the quit-claim).

An agreement conveying a real property interest must be in writing. *See* NRS 111.210; *Occhiuto v. Occhiuto*, 97 Nev. 143, 147, 625 P.2d 568, 570 (1981). However, an oral agreement supported by documents of note and deed of trust can satisfy the statute of frauds and NRS 111.210(1). *See Daniel v. Hiegel*, 96 Nev. 456, 457, 611 P.2d 207, 208 (1980).

Parties are estopped to assert the requirement that an agreement be in writing where an oral agreement at the time of separation dividing assets has been fully performed. *See Schreiber v. Schreiber*, 99 Nev. 453, 455, 663 P.2d 1189, 1190 (1983).

An agreement for support may be consideration for an integrated agreement relating to property division and will therefore not be subject to modification. *See Renshaw v. Renshaw*, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980); *Barbash v. Barbash*, 91 Nev. 320, 322-23, 535 P.2d 781, 782-83 (1975).

However, a husband and wife may ***not*** enter into a postnuptial agreement limiting one spouse's duty of support to the other where they continue to live together as husband and wife. *See Cord v. Neuhoff*, 94 Nev. 21, 24 n.3, 573 P.2d 1170, 1172 n.3 (1978). If the agreement

purports to be an integrated agreement, that invalidity renders the entire agreement unenforceable. 94 Nev. at 24, 573 P.2d at 1172.

Postnuptial and antenuptial agreements executed in another state are controlled by the law of that state at the time of the execution of the agreement. *See Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989); *Barbash*, *supra*, 91 Nev. at 322, 535 P.2d at 782; *Braddock v. Braddock*, 91 Nev 735, 738, 542 P.2d 1060, 1062 (1975).

As with antenuptial agreements, separation agreements cannot be unconscionable, obtained through fraud, misrepresentation, material non-disclosure, or duress. *See Braddock*, *supra*, 91 Nev. at 739-40, 542 P.2d at 1062.

Further, where one of the parties to a separation agreement or property settlement agreement is an attorney, and drafts the agreement, the Nevada Supreme Court essentially ***presumes*** fraud and holds the drafting party to the fiduciary duty of an attorney-client relationship if the other spouse was unrepresented. *Cook v. Cook,* 112 Nev. 179, 912 P.2d 264 (1996) (when a lawyer-husband drafts a property settlement agreement, he has a fiduciary relationship to his wife, in addition to the fiduciary relationship formed by the marriage itself; all such agreements subject to close scrutiny on appeal; the attorney has a duty of full and fair disclosure; and "the attorney must demonstrate by a higher standard of clear and satisfactory evidence that the transaction was fundamentally fair and free of professional overreaching"); *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992) (same).

(3) Discussion

It is important for the practitioner to distinguish whether a particular agreement is a post-nuptial agreement (the parties intend to remain together) or a separation agreement (the parties intend to immediately separate). Some commentators and case law from elsewhere require the ***actual separation of the parties*** in order for a "separation agreement" between them to be considered valid, going so far as term any agreement a "nullity" if they do not in fact separate. 1 Lindey and Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 12.20 at 12-4. *Accord* Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 1.02. Thus, if the facts show that the parties did not separate after executing a "separation agreement," the agreement can be attacked as void.

If the parties executed a ***postnuptial*** agreement, then they occupied a "confidential relationship" as in the context of prenuptial agreements,[2] and full and fair disclosure must be made, the parties must have a opportunity to consult counsel, and the agreement cannot be

[2] It could be argued that the parties to a post-marital agreement have a ***greater*** fiduciary obligation to one another than do fiances, since they are already in a statutorily-defined "confidential relationship" by virtue of the marriage alone. *See Rush v. Rush*, 85 Nev. 623, 460 P.2d 844 (1969) (noting "confidential relations" between spouses); *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992); *Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335 (1995) (a confidential relationship "is particularly likely to exist when there is a family relationship or one of friendship," *citing Kudokas v. Balkus*, 26 Cal. App. 3d 744, 103 Cal. Rptr. 318, 321 (Ct. App. 1972)).

unconscionable.[3] On the other hand, if the parties have executed a ***separation*** agreement, the parties may be held to ***not*** occupy a confidential relationship, and some cases permit a finding that the burden is on each party to discover the other party's income and assets in preparation for divorce.[4] *See Applebaum v. Applebaum*, 93 Nev. 382, 385, 566 P.2d 85 (1977), discussed at length *supra*. Thus, the type of agreement at issue dictates the factors to be reviewed in determining its validity.

NRS 123.080 appears to be unique in the United States. There does not appear to be any statute in any other state under which a property settlement agreement as to existing property can take place at any time, but a property settlement agreement as to property to be acquired in the future or as to "support" can take place only on immediate separation. *Cf.* N.Y. Dom. Rel. Law § 170(6); N.C. Gen. Stat. § 52-10.1; Ohio Rev. Code § 3103.06; Okla. Stat. Ann. tit. 32, § 6 (requiring immediate separation for agreement as whole to be valid). There are those that read NRS 123.080 expansively, to prohibit post-nuptial agreements entirely, but the Nevada Supreme Court has never given an indication of such a reading in their interpretations of the statute.

In drafting a separation and property settlement agreement, care should be given to the determination as to whether alimony is intended to be modifiable or non-modifiable and thus, whether or not the agreement should be merged into the Decree of Divorce.

Merger or non-merger of a marital settlement agreement into the decree of divorce also impacts the ability and procedure for enforcing the marital settlement agreement. Pursuant to NRS 123.080(4), if a marital settlement agreement is introduced in evidence as an exhibit, and the court ratifies or adopts or approves it by reference, the decree has the same force, effect and legal consequences as though the contract were copied into the decree or attached thereto. Thus, enforcement of the terms of the marital settlement agreement is readily available through contempt proceedings, and no independent action is required.

On the other hand, if a marital settlement agreement is not merged with the decree, the agreement maintains its viability as an independent contract, and a party may sue the other party for breach of that agreement under general contract principles. However, this requires the filing of an independent action, outside the scope of the divorce case, and the option of filing a contempt motion in the divorce action is, at least theoretically, not available. It is possible that this analysis has been superseded by the legislative enactment of changes to NRS 3.025(3), EDCR 5.42 (the "one family, one judge" rule); *see also Barelli v. Barelli*,[5] 113 Nev. 873, 944 P.2d 246 (1997).

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[3] 2 Lindey and Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 120.50; Laura W. Morgan & Brett R. Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 16.01 at 455 fn. 2 (2001).

[4] 1 Lindey and Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 13.31; Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 4.03.

[5] A "purely contractual dispute between two unmarried people." *Id.*, 944 P.2d at 248. The Court held that the Family Court properly heard an action in which an ex-wife originally sued her ex-husband in the civil/criminal division.

Cord v. Neuhoff, *supra*, 94 Nev. 21, 573 P.2d 1170 (1978), makes clear that any prenuptial or postnuptial agreement that purports to limit support of the parties during the time the parties are still married is void ab initio. *See also Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996). As in *Cord*, if the agreement purports to be an ***integrated*** agreement, the invalidity of the support provisions voids the property terms, as well.

In preparing a separation and property settlement agreement, the attorney should think through all provisions that would normally be made the subject of a divorce decree, and should consider inclusion of provisions dealing with all of the following:

(1) Whether the provisions for support are reciprocal consideration for property division, and therefore an integrated agreement which may not be modified.

(2) If the agreement is to be merged into and made a part of the decree.

(3) That the parties are separated or are to immediately separate and whether the agreement is intended as a full and final resolution of all claims each may have against the other (if so, whether that is intended to include matters sounding in tort, and unknown or latent claims).

(4) Settle questions of custody and child support (provide that such provisions are not binding on the court and remain subject to the jurisdiction of the court during minority). Provide for health care, insurance and each parties' obligation beyond insurance coverage.

(5) Whether there is to be alimony, or if it is waived. If provided, the sum, duration and security for payment should be included.

(6) Provision for the distribution of community and joint tenancy assets. As discussed above (relating to partition actions), indicate the parties' intention regarding later-discovered assets and debts that were overlooked for any reason.

(7) The assumption of debts.

(8) The separate character of all property subsequently acquired.

(9) The right to dispose of property by will, trust, or estate plan and the waiver of inheritance rights, along with any existing executor nominations.

(10) The mutual release of obligations in the future.

(11) The execution of documents to effectuate the transfer of assets and require compliance with the provisions of the agreement.

(12) Acknowledgment of full disclosure by each party, and of full knowledge of assets

and financial status (note the interplay of such provisions with those dealing with possible partition of omitted assets).

(13) The acknowledgment that each party had representation of independent counsel, or at least the opportunity to consult with such counsel, if that opportunity was declined. If there was counsel for each party, consider including a certification by independent legal counsel of each party, stating that the attorney advised the client and the client acknowledges receiving such advice and understands the contents of the agreement and its legal consequences, and freely and voluntarily executed the agreement in the presence of such legal counsel.

(14) Payment of taxes, delinquencies, and penalties.

(15) Whether there is to be any provision for the payment of attorneys fees.

(16) Whether the agreement represents the entire agreement and (usually) that it may not be modified except by written agreement executed with the same formality.

(17) Provisions for enforcement, if necessary, and payment of costs and attorneys fees incurred.

(18) Provision that neither party is deemed the drafter, if true.

(19) Whether the law of Nevada shall govern validity, construction, performance, and effect of the agreement.

(20) Provision for acknowledgment of the agreement by each party before a notary public.

(4) Local Rules

There are no local rules specifically applicable to post-nuptial or separation agreements.