

MATRIMONIAL AGREEMENTS: REQUIREMENTS FOR VALIDITY¹

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INTRODUCTION

Nevada allows for pre- and post- marriage contracts by statute. “Roadmap” case law exists, but comprehensive litigation research requires a review of law from other states to supplement existing Nevada law. This Symposium dovetails with the needs of litigators in Nevada to review law from other states on this topic.

Generally, the agreements or contracts need the basic requirements of full disclosure of all assets, a writing, and both parties signing. In order for a prenuptial agreement to be held valid, the marriage must occur. If it does not, then the agreement is held valid only to the extent of avoiding an inequitable result. From this short synopsis, we can see that contract law and equity principles apply in the context of the domestic relations case.

We note that Nevada has a Family Division Court which operates as an arm of the District Court. Family Division judges have the same authority to decide civil cases as the Civil Division judges, and when warranted, must combine civil cases in with the domestic cases for full resolution of all issues.²

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² In passing NRS 3.223(1)(a), the Nevada Legislature gave Family Division Courts original exclusive jurisdiction over family law issues. Pursuant to the Nevada Supreme Court’s holding in *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997), the Family Court has the discretion to act upon issues in excess of its subject matter jurisdiction in a case involving “a purely contractual dispute between two unmarried people.” *Id.*, 944 P.2d at 248. This case is used by the courts to combine matters when it becomes judicially efficient or mandatory to afford complete relief to the parties in concurrent actions.

ANTENUPTIAL/PREMARITAL AGREEMENTS

GENERALLY

Nevada became an adopting state of the Uniform Premarital Agreement Act (the “Act”) in 1989. All antenuptial/prenuptial agreements are governed by the Act as codified in Nevada Revised Statutes (“NRS”) 123A.010 et seq. *See Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993). Although not stated as part of the statute, the legislative history provides for pre-October 1, 1989 agreements:

The provisions of this act apply to any premarital agreement executed on or after October 1, 1989, but any premarital agreement made before that date is enforceable if it conforms to the common law, as interpreted by the courts of this state before that date, or the requirements of sections 2 to 11 [NRS 123A.010 to 123A.100], inclusive, of this act.

Ch. 472, § 22(2), Stats. 1989. Further, either postnuptial or antenuptial agreements executed in another state are controlled by the law of that state at the time of the execution of the agreement. *Barbash v. Barbash*, 91 Nev. 32, 535 P.2d 781(1975), *Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975), and *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1980).

By definition, a premarital agreement is one between prospective spouses made in contemplation of marriage and to be effective upon marriage. NRS 123A.030(1). It affects property, broadly defined as an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. NRS 123A.030(2).

A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration on the condition that the parties actually marry. NRS 123A.040 and 123A.060. The court will apply equitable relief if the marriage is later held to be void, and relief will be in the form of enforcement of the agreement to the extent required to avoid an inequitable result. NRS 123A.090, *see also* NRS 123A.100.

FORM AND CONSENT

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;
- (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.

The statute's use of "may" leaves the parties free to negotiate and arrange their affairs in almost any order, except violating law or public policy. We note in passing that the matter of temporary spousal support during the pendency of a divorce, if not addressed by the agreement, is a matter outside of the scope of the agreement and the court is free to make awards for interim support. *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996), *see* NRS123A.050(1)(d).

The Nevada Revised Statutes provide additional guidance on formation. All marriage contracts must be in writing and executed and acknowledged or proved in like manner as a conveyance of land and is required to be executed and acknowledged or proved. *See* NRS 123.270. An agreement is void unless it is in writing and subscribed by the party to be charged. *See* NRS 111.220. This includes every promise or undertaking made upon consideration of marriage, except mutual promises to marry. The right of a child to support may not be adversely affected by a premarital agreement. *See* NRS 123A.050(2).

The parties may amend the agreement after marriage or revoke it, in whole or in part, by a later signed written agreement. No consideration is required for a revocation to be enforceable. NRS 123A.070. *But see Jensen v. Jensen*, 104 Nev. 95, 753 P.2d 342 (1988) (In a pre-Act decision where the prenuptial agreement was modified orally in an agreement which expressly provided that its terms could be changed. The parties' consent to modification was implied from their conduct consistent with the asserted modification.)

REPRESENTATION

The rules of professional conduct for lawyers to practice in Nevada are found in the Supreme Court Rules ("SCR"), beginning with SCR 150. That rule adopts both the Model Rules of Professional Conduct, as well as the rules established in SCR 150 through SCR 203.5. These same rules are substantially incorporated by reference in the local rules of practice at the United States District Court for the District of Nevada, §120–8. The Supreme Court has adopted rules for dealing with cases of alleged lawyer misconduct in SCR 99 through 203.5. Both the SCRs and ABA Model Rules of Professional Conduct establish detailed guidelines for attorney conduct and provisions for enforcement of those guidelines. As additional guidance for the family law practitioner, the local rules for the Eighth Judicial District Court, which includes Las Vegas, encourages aspiring to compliance with the American Academy of Matrimonial Lawyer's standards of conduct, the Bounds of Advocacy (1991 Edition). EDCR 5.04.

As part of our representation on the preparation of agreements, we must first choose a client

and determine the scope of our efforts. SCR 157(1).³ We avoid the conflict completely by only allowing one party into the office for consultation (the first caller) and then encouraging the other to seek legal counsel. Often at the request of the client, the attorney is asked to prepare an agreement and “get” the other to sign it. It is an innocent enough request for a layperson, but fraught with problems for the attorney. Communications with unrepresented parties is best done only in writing in order to avoid the allegation of dispensing advice. SCR 183,⁴ *see* Bounds of Advocacy §3 Conflict of Interest.

No attorney should either prepare a premarital agreement, or should an attorney approve a premarital agreement for his client, without first scrutinizing the “shaggy dog story” in *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992). Essentially, the facts provide a model for all things not to do in a case, including choosing the attorney for the other party, leaving no time to review the document, interrupting the independent counsel appointment and barging in yelling “What’s taking so long!”, etc.⁵

As a first step in drafting, we need to gather information from our clients. The 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. The agreement should incorporate the recitals and should set forth the following:

- (1) The property owned by each;
- (2) the obligations owed by each;
- (3) the intent of the parties as to the status of the property of each remaining separate;
- (4) that there is no transmutation of separate property;
- (5) the treatment of wages and salaries after marriage;
- (6) the provision for support during marriage;
- (7) the provision or waiver of support if there is to be separation or divorce (except in cases in which the disadvantaged spouse is forced to rely upon public assistance, *see* NRS

³ **Rule 157. Conflict of interest: General rule.**

(1) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (a) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (b) each client consents, preferably in writing, after consultation.

⁴ **Rule 183. Dealing with unrepresented person.**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

⁵ Where the wife did not receive the benefit of advice from counsel of her *own choosing* regarding premarital agreement, the circumstances surrounding the signing of the agreement prevented the wife from protecting her rights. The wife was unsophisticated with respect to business matters, and the husband failed to make the financial disclosures necessary to permit her to make an informed decision with respect to the agreement. The initial presumption that the agreement was fraudulent was not overcome and the agreement was held invalid. *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992).

- 123A.080(2));
- (8) a provision for life insurance policies-existing and contemplated;
 - (9) a provision for retirement benefits remaining separate;
 - (10) the treatment of future acquisitions of property;
 - (11) a designation of what shall be deemed or treated as community property after marriage;
 - (12) obtain mutual releases of claims to the separate property of the other;
 - (13) a provision for the right to dispose of separate property by each;
 - (14) a provision requiring that any modifications or transmutation of property requires a written agreement executed with same formality as the original agreement;
 - (15) a provision as to the most advantageous manner for the filing of tax returns;
 - (16) a provision for the execution of required or necessary documents;
 - (17) a provision for execution of wills;
 - (18) the binding effect of the agreement on heirs, administrators, personal representatives and assigns;
 - (19) the governing law being the laws of the State of Nevada and selection of venue;
 - (20) the enforcement of the agreement and provision for attorney's fees and costs;
 - (21) verification that both parties have received advice of independent counsel in the execution of the agreement;
 - (22) the acknowledgment that neither party is deemed the drafter of the agreement;
 - (23) the provision for payment of costs in drafting of the agreement;
 - (24) the signatures of each party with an acknowledgment before a notary; and,
 - (25) as with the property settlement agreement, the agreement should contain a certificate of legal advice given by each attorney.

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

- (1) Executed the agreement voluntarily;
- (2) the agreement, by its terms, is not unconscionable;
- (3) that each party was provided a fair and reasonable disclosure of the property and financial obligations of the other party and waives the right to disclosure beyond that disclosure provided;
- (4) each party has, or reasonably could have had, an adequate knowledge of the property and/or financial obligations of the other party; and
- (5) that each party has had the benefit of advice from independent legal counsel of each in the preparation and execution of the agreement.

JUDICIAL REVIEW, DISCLOSURE AND FAIRNESS

Premarital agreements prior to the adoption of the Act (October 1, 1989) are controlled by the common law as interpreted by the Nevada courts. The Supreme Court can review the validity of a premarital agreement de novo. *See Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993). Also, the issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law. NRS 123A.080(3).

In *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992), the court concluded that if the disadvantaged party would have received more under community property laws, the agreement is *presumed* to be fraudulent. That presumption can be overcome by giving the disadvantaged party ample opportunity to obtain the advice of independent counsel. See *Muscelli v. Muscelli*, 96 Nev. 41, 604 P.2d 1237 (1980). Other factors to overcome the presumption include making certain the disadvantaged party was not coerced into making rash decisions, proof the party had substantial business experience and acumen, and that the party was aware of the financial resources and understood the rights that were being forfeited. The *Sogg* court relied on the following factors in determining the premarital agreement was invalid:

- (1) The husband's attorney drafted the agreement and selected the wife's attorney for review of the agreement;
- (2) the disadvantaged party was never advised that she should select her own attorney;
- (3) the agreement did not have an asset list attached;
- (4) the selected attorney for the disadvantaged party had a brief conference with the wife and refused to sign the "advice" certificate on the agreement;
- (5) the disadvantaged party was not given a copy of the agreement to take to another attorney prior to signing; and,
- (6) 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.

Nevada is not the only state to see combination of facts. See *In the matter of the marriage of Mattson*, 730 P.2d 668, at 672 (Wash. 1986).⁶

As with all contracts, the court retains the power to refuse to enforce a particular premarital agreement if it is unconscionable, obtained through fraud, misrepresentation, material nondisclosure or duress. See *Lewis v. Lewis*, 53 Nev. 398, 2 P.2d 131 (1931); *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990). The premarital agreement may provide for the return of separate property contributions if such contributions are used to acquire or improve property held jointly or in common. In the absence of evidence of modification by the parties, the agreement must be enforced as written. See *Matley v. Matley*, 101 Nev. 281, 701 P.2d 749 (1985). However, the court is under no obligation to independently determine the validity and substantive fairness of the premarital agreement. *Kantor v. Kantor*, 116 Nev. ___, 8 P.3d 825 (2000) (Where the wife's amended petition admitted the validity of the agreement, the court was under no obligation to independently determine the validity and substantive fairness of the agreement.)

The parties are required to deal in good faith and disclose assets. NRS 123A.080(1)(c). For example, the parties share a confidential, fiduciary relationship and each has a responsibility to act with good faith and fairness to the other. Such responsibility contemplates that each party will make

⁶ The agreement was invalidated because the first meeting to review a sample agreement occurred only three days prior to the day the agreement was signed, which was the night before the wedding. The disadvantaged party was pressured into signing the agreement. For example, the wedding would be called off if the disadvantaged party either refused or failed to sign the agreement.

a full and fair disclosure prior to the execution of a premarital agreement. *Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993), see *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990).

PUBLIC POLICY RESTRICTIONS

NRS 123A.050(1)(h) requires that a premarital agreement not violate public policy or a criminal statute imposing a penalty, but it does not provide further guidance in its one sentence. Nor is there expansive case law detailing the public policy considerations at play when reviewing agreements.

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 not procured through fraud, misrepresentation or nondisclosure. See *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973). In its pre-Act discussion, the *Buettner* court covered national law on void contracts for public policy reasons, including contracts promoting divorce and contracts severely limiting alimony beyond what a court would normally award. The court did approve contracts that promote marital tranquility, for example premarital agreements that resolve property issues. *Id.* at page 44. The court then remanded the matter on other contract grounds.

We can draw some conclusions based upon the discussion in *Buettner* and the construction of the Act, as adopted by Nevada:

- (1) There can be no agreements to promote divorce. The agreements must promote marital tranquility. *Buettner* at page 44.
- (2) No consideration for creation and/or revocation of agreements is required so as not to promote contracts for sex. See NRS 123A.040 and 123A.070.
- (3) Children of the marriage cannot be disadvantaged by giving less than the court would normally award for child support. See NRS 123A.050(2).
- (4) All persons entering marriage are entitled to the same rights. A minor capable of contracting marriage may make a valid marriage contract or settlement. See NRS 123.310.
- (5) A party cannot be placed on public assistance by way of an agreement that severely limits spousal support. NRS 123A.080(2), see *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973).
- (6) Providing fairness exists, public policy is not violated. See *Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993).
- (7) The agreement cannot violate a criminal law imposing a penalty. NRS 123A.050(1)(h).

POSTNUPTIAL AGREEMENTS - MARRIAGE CONTRACTS

GENERALLY

Similar to the Act, the Nevada Revised Statutes allow for marriage contracts under Chapter 123, a subset of the chapter dealing with “Rights of Husband and Wife.” This chapter also addresses general provisions, separate property, and community property. Further, Nevada will honor either postnuptial or antenuptial agreements executed in another state. The agreements are controlled by the law of that state at the time of the execution of the agreement. *Barbash v. Barbash*, 91 Nev. 32, 535 P.2d 781(1975), *Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975), and *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1980).

FORM AND CONSENT

The parties are free to engage in marriage contracts. Either husband or wife may enter into a contract with the other, or with any other person affecting property, which either might enter into if unmarried. They are bound by the general rules which control the actions of persons “occupying relations of confidence and trust toward each other.” NRS 123.070. NRS 123.080 provides that parties cannot alter their legal relations, except as to property, and except that they can agree to an immediate separation and provide for support during separation. Mutual consent is sufficient consideration. NRS 123.080(2). A common use is the property settlement agreement at divorce. *See* NRS 123.080(4).

All marriage contracts or settlements must be in writing, executed and acknowledged or proved in like manner as a conveyance of land is required to be executed, acknowledged or proved. NRS 123.270. In other words, the agreement must be ready for recording, and recorded, with the County Recorder wherever the real property of the marriage is located. NRS 123.280. The agreement is not valid for real property if no attempt is made to record the document, except as the agreement relates between the parties. NRS 123.300. Essentially, the recorded agreement acts as notice to all persons that an encumbrance is placed in the chain of title. NRS 123.290.

Separate or community property can be transmuted by the agreement of the parties. The agreement may be oral. *See Mulikin v. Jones*, 71 Nev. 14, 278 P.2d 876 (1955). 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. Executrix of the Estate of Hiegel*, 96 Nev. 456, 611 P.2d 207 (1980). Parties are estopped to assert the requirement that an agreement be in writing where an oral agreement at time of separation dividing assets has been fully performed. *See Schreiber v. Schreiber*, 99 Nev. 453, 663 P.2d 1189 (1983). However, an agreement conveying a real property interest must be in writing. *See Occhiuto v. Occhiuto*, 97 Nev. 143, 625 P.2d 568, NRS 111.220.

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. *See Day v. Day*, 80 Nev. 386, 395 P.2d 321 (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. *Balin v. Balin*, 78 Nev. 224, 371 P.2d 32 (1962). Further, the parties may make provision that the agreement survives the decree.

We note that divorce or annulment 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 proceedings and not merged in the decree. *See* NRS 133.155. Revocation of a will by divorce revokes as to property, but does not revoke as to naming former spouse as executrix. *See Todaro v. Todaro*, 92 Nev. 566, 554 P.2d 738 (1976).

REPRESENTATION

The same set of rules of professional responsibility as in premarital agreements, mentioned and cited above, should be reviewed at the engagement phase. Similar questions will be posed and you will be faced with trying to decide which person is your client. Again, we encourage representing only one party and encouraging the other to seek counsel.

In drafting a separation and property settlement agreement, care should be given to the determination as to whether or not the agreement is going to be merged into the decree of divorce and whether it shall be nonmodifiable as an integrated agreement which settles all disputes relating to support, as well as division of the assets. A negotiated integrated agreement not merged in the decree and providing for a fixed period of support gives the client the agreed upon support, unmodified by the court. If terminable only by death or remarriage, the integrated agreement is preferable and should not be merged. In light of the court's conclusion in both *Schryver v. Schryver*, 108 Nev. 190, 826 P.2d 569 (1992) and *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992), both discussed below, alimony may be extended up until the last day of the month of final payment, so an attorney must look to the wisdom of having the property settlement merged into the decree.

In preparing a separation and property settlement agreement, the attorney should consider the following non exhaustive list of items:

- (1) Determine if the provisions for support are reciprocal consideration for property division, and therefore an integrated agreement which may not be modified;
- (2) determine if the agreement is to be merged into and made a part of the decree;
- (3) provide that the parties are separated, or are to immediately separate, and if reconciled it shall not affect the agreement as a full and final resolution of all claims each may have against the other;
- (4) settle questions of custody, visitation, child support and medical insurance (provided that such provisions are not binding on the court and remains subject to jurisdiction of the court during the children's minority);
- (5) provide for the sum, duration and security for payment of alimony, or fully waive alimony;
- (6) include a provision for the distribution of community and joint tenancy assets;
- (7) provide for the assumption of debts;
- (8) provide for separate character of all property subsequently acquired;
- (9) provide for right to dispose of property by will, trust or estate plan and the waiver of inheritance rights;

- (10) provide for the mutual release of obligations in the future;
- (11) provide for the execution of documents to effectuate the transfer of assets and require compliance with the provisions of the agreement;
- (12) provide for the acknowledgment of full disclosure, and full knowledge of assets and financial status, by each party;
- (13) provide for payment of taxes, delinquency and penalties;
- (14) consider including a waiver and release of all other claims for personal if any, property damage known or unknown prior to date of agreement;
- (15) provide that the agreement represents the entire agreement and may not be modified except by written agreement executed with the same formality;
- (16) include a provision for enforcement and payment of costs and attorney's fees incurred;
- (17) include a provision that neither party is deemed the drafter;
- (18) provide that the laws of the State of Nevada shall govern validity, construction, performance and effect of the agreement, and select the venue;
- (19) insure that the agreement is duly acknowledged before a notary public by each party;
- (20) provide for the acknowledgment that each party had representation of independent counsel; and,
- (21) the agreement may include a certification by independent legal counsel of having advised the client, and the client acknowledged receiving such advice, and understanding the contents of the agreement and its legal consequences, and the client freely and voluntarily executed the agreement in the presence of such legal counsel.

JUDICIAL REVIEW, DISCLOSURE AND FAIRNESS

Under NRCP 60, the court will review all orders, including adopted property settlement agreements, merged or not, for clerical mistakes, inadvertence, excusable neglect, fraud, etc. The time limitation is six months from entry of the order.⁷ Parties in Nevada may also bring an independent action for relief under contract theory at any time in the Civil Division. Merger of the two actions is possible. *See Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997). This independent action is the only course available to an aggrieved party once the six-month time period has passed under NRCP 60. Ease of seeking relief can be compared to pouring cement. At first, it is easy to move around and adjust. But as time passes, it becomes harder and harder to move, until so much time has passed that it is as hard as stone.

We note before discussing circumstance giving rise to altering agreements, that an integrated agreement is invalid relating to the support provisions where there was no immediate separation but continued cohabitation which rendered the entire agreement unenforceable. *See Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978). Also, if issues of fraud, misrepresentation and mistake as to value are raised at trial, an independent action to reform the agreement is subject to motion to dismiss being granted as barred by res judicata. *Spilsbury v. Spilsbury*, 92 Nev. 464, 553 P.2d 421 (1976).

⁷ Please note that notice of entry of the order is not considered in the rule for time limitation purposes. Nor are the number of days mentioned. It is simply counted by six calendar months from entry of the order.

The court will reform agreements upon proof of fraud and/or mutual mistake. *Wallaker v. Wallaker*, 98 Nev. 26, 639 P.2d 550 (1982), involved an independent action to reform a property settlement agreement as to alimony payments based on fraud and mutual mistake. The lower court ruled it lacked jurisdiction to modify the property settlement as the decree provided the agreement was not incorporated in the decree, but shall survive the decree granted. The Supreme Court ruled that although the court could not modify the divorce decree, it had jurisdiction to reform the property settlement agreement as to alimony on principles of general contract law. *Renshaw v. Renshaw*, 96 Nev. 541, 611 P.2d 1070 (1980).

Failure to disclose assets will give rise to partition actions. In *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990), the court held that recovery of damages, including wages that were earned during marriage, was community property despite not being disposed of by the decree and not included as community property in the written property settlement agreement. The court held that the fact that the property is not mentioned in either the findings, decree, or in the property settlement agreement, a party is not prejudiced by an independent action to partition previously undivided property. Instead, the parties to a divorce become tenants in common as the omitted property.

The parties have a fiduciary duty to each other. In *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992), the husband attorney prepared the property settlement agreement and the wife, without benefit of independent counsel, signed the agreement and filed an answer in proper person, which said agreement was merged into the decree of divorce. The agreement did not provide that the law practice was community property divisible upon divorce, nor was she so advised. The Supreme Court reversed the lower court concluding that the lower court had failed to recognize the parties' "agreement as the product of an attorney/client relationship giving rise to a fiduciary relationship between the attorney and client and all transactions growing out of that relationship are subject to the closest scrutiny. When an attorney deals with a client for the former's benefit the attorney must demonstrate by a higher standard of clear and satisfactory evidence that the transaction was fundamentally fair and free of professional overreaching." The court held that the unadjudicated property was subject to partition in an independent action in equity as the property not disposed of in a divorce action is held by the parties as tenants in common.

If there is misrepresentation, mutual mistake, fraudulent nondisclosure, an NRCP Rule 60(b) motion may be brought. In *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992), there was representation of the actual value of pension rights which were relied upon as an essentially equal distribution of assets contained in the property settlement incorporated in the decree. Thereafter, it was learned the actual value of the pension gave substantially greater assets to the former husband. Pursuant to NRCP 60(b), a motion was filed for relief from the judgment and granted. The court concluded that the parties were either mistaken about the pension value or the parties entered into the property settlement based upon a mutual mistake that they had essentially split their property equally and if the husband and his counsel knew the value of the pension, they fraudulently represented the value and such fraud is grounds for relief from the judgment pursuant to NRCP 60(b)(2).

The court may use its equitable powers to alter an agreement if there has been a misrepresentation by one party. In *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (1992), the marital settlement agreement was incorporated by reference into the divorce decree. The valuations as to the assets were fixed by the husband and relied on by the wife. It subsequently was determined that certain assets did not have the represented value. Wife filed a complaint to rescind the agreement because of intentional misrepresentations. Husband filed a motion to dismiss pursuant to NRCP 12(b)(5), which the lower court granted. Judgment was reversed. Even though the agreement contained a provision that the parties had not relied upon the values provided in the financial statement, the integration clauses do not bar claims for misrepresentation. Waiver clauses cannot bar a misrepresentation claim. Since the wife had accepted a parcel of property forfeited for nonpayment, as a part of the settlement, she clearly relied on the husband's representation as to which he had superior knowledge that it was a part of the marital estate and she was damaged because the property was of no value.

A bankruptcy filing by one party after the agreement for division of property and debts is made gives rise to “changed circumstances” for modification of alimony. In *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992), the parties had entered into a property settlement agreement which provided that the husband would make alimony payments and he would purchase wife’s interest in his medical practice. After the property settlement obligations were discharged in bankruptcy, husband continued to pay the monthly alimony installments. He prepaid before the termination date of the alimony payments pursuant to the agreement. The wife, prior to the termination date, filed a motion to modify the alimony award which was granted. In that the agreement had provided for the payment to the wife of over \$1.25 million over a period of 15 years for her community interest in the professional practice and the discharge in bankruptcy profoundly affected wife's financial position, the court continued the alimony at \$7,500 per month until the wife's remarriage or death.

The Nevada Supreme Court, relying on *Schryver v. Schryver*, 108 Nev. 190, 826 P.2d 569 (1992), found that although the final alimony payment was made prior to the termination date and the motion for modification, the term for support and the court's jurisdiction did not terminate until the last day of the month. Where the period of alimony has not elapsed, the district court has jurisdiction to modify the alimony portion of the divorce decree regardless of whether the supporting spouse made all the required alimony payments. Further, the court approved as proper a district court considering a discharge of property equalization debts in bankruptcy as a “changed circumstance which would merit the modification of an alimony award.” The court in relying upon a case of the Washington Court of Appeals determined that, although it could not recharge the husband with debts he discharged in bankruptcy, federal law did not preempt state procedures for modifying alimony to compensate the wife for the discharged obligations.

PUBLIC POLICY RESTRICTIONS

As with premarital agreements, Nevada does not have extensive case law describing public

policy reasons for voiding or altering marriage agreements. We can draw some conclusions from the statutes and case law. *See Rush v. Rush*, 85 Nev. 623, 460 P.2d 844 (1969).

- (1) In order to avoid fraud and protect spouses, the agreements must be in writing. NRS 123.270.
- (2) Recording agreements that affect real property promotes the transfer of land. *See* NRS 123.280 through 123.300.
- (3) All persons entering marriage are entitled to the same rights. A minor capable of contracting marriage may make a valid marriage contract or settlement. *See* NRS 123.310.
- (4) Children cannot be disadvantaged by the dealings of their parents when making the agreement. Agreements providing for educational expense for children may be enforced as third party beneficiary contracts. *See Gibbs v. Giles*, 96 Nev. 243, 607 P.2d 118 (1980); *Morelli v. Morelli*, 102 Nev. 326, 720 P.2d 704 (1986).
- (5) Mutual consent is enough consideration for a marriage agreement so as not to promote contracts for sex. *See* NRS 123.080(2).
- (6) A party cannot be placed on public assistance by way of an agreement that severely limits spousal support.
- (7) Parties must deal fairly and disclose all assets as there is abundant case law on partition, reformation, rescission and money damages/restitution in cases of fraud, nondisclosure, later bankruptcy filings, etc.
- (8) As with all contracts, the agreement cannot violate a criminal law imposing a penalty.
- (9) The parties must use the court to alter their legal relation. *See* NRS 123.080(1).

NEVADA REVISED STATUTES

CHAPTER 123

GENERAL PROVISIONS

§ 123.070. Husband and wife may make contracts.

Either husband or wife may enter into any contract, engagement or transaction with the other, or with any other person respecting property, which either might enter into if unmarried, subject in any contract, engagement or transaction between themselves, to the general rules which control the actions of persons occupying relations of confidence and trust toward each other.

§ 123.080. Contract altering legal relations: Separation agreement; consideration; introduction in evidence in divorce action.

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.

MARRIAGE CONTRACTS OR SETTLEMENTS

§ 123.270. Contracts or settlements to be written and acknowledged.

All marriage contracts or settlements 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.

§ 123.280. Recording in counties where real property situated.

When such marriage contract or settlement is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real property may be situated which is conveyed or affected by such contract.

§ 123.290. Record of contract to impart notice.

When such marriage contract or settlement is deposited in the recorder's office for record, it shall, as to all property affected thereby in the county where the same is deposited, impart full notice to all persons of the contents thereof.

§ 123.300. Effect of not recording contract or settlement.

No such marriage contract or settlement shall be valid as to any real property, or affect the same, except as between the parties thereto, until it shall be deposited for record with the recorder of the county in which such real property is situate.

§ 123.310. Minors may make marriage contracts or settlements.

A minor capable of contracting marriage may make a valid marriage contract or settlement.

CHAPTER 123A

PREMARITAL AGREEMENTS (UNIFORM ACT)

Acts 1989, ch. 472, § 22(2), provides: "The provisions of this act apply to any premarital agreement executed on or after October 1, 1989, but any premarital agreement made before that date is enforceable if it conforms to the common law, as interpreted by the courts of this state before that date, or the requirements of sections 2 to 11 [NRS 123A.010 to 123A.100], inclusive, of this act."

§ 123A.010. Short title.

This chapter may be cited as the Uniform Premarital Agreement Act.

§ 123A.020. Application and construction.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting.

§ 123A.030. Definitions.

1. “Premarital agreement” means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

2. “Property” means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

§ 123A.040. Formalities.

A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.

§ 123A.050. Content.

1. Parties to a premarital agreement may contract with respect to:

(a) 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;

(b) 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;

(c) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(d) The modification or elimination of alimony or support or maintenance of a spouse;

(e) The making of a will, trust or other arrangement to carry out the provisions of the agreement;

(f) The ownership rights in and disposition of the death benefit from a life insurance policy;

(g) The choice of law governing the construction of the agreement; and

(h) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

2. The right of a child to support may not be adversely affected by a premarital agreement.

§ 123A.060. Effect of marriage.

A premarital agreement becomes effective upon marriage.

§ 123A.070. Amendment and revocation.

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

§ 123A.080. Enforcement: Generally.

1. 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.

2. If a provision of a premarital agreement modifies or eliminates alimony or support or maintenance of a spouse, and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

3. An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

§ 123A.090. Enforcement: Void marriage.

If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

§ 123A.100. Limitation of actions.

Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.