THE RISKS AND REWARDS OF POST-NUPTIAL AGREEMENTS

by

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BIOGRAPHY

Mr. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and past President of the Nevada chapter of the AAML. He has authored several books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other States, and in the drafting of various State and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, and has repeatedly represented the entire ABA in Congressional hearings on military pension matters. He has served on many committees, boards, and commissions of the ABA, AAML, and Nevada Bar, has served as an alternate judge in various courts, and is called upon to testify from time to time as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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I. GENERAL BACKGROUND AS TO MARITAL AGREEMENTS

The most singular thing about the legal framework governing post-nuptial agreements in Nevada law is that there really isn't one. Unlike premarital agreements, which are regulated under a modern uniform act,[1] there is no specific statutory scheme regulating the formation, modification, and enforcement of post-nuptial agreements. Instead, Nevada has a patchwork quilt of old statutes and a handful of cases, from which some rules can be constructed, some lessons can be learned, and some cautions can be derived.

As a general rule, spouses have the same rights as anyone else to make agreements with one another concerning their present or future assets and liabilities. If prior to marriage, such agreements are often (interchangeably) called premarital agreements or prenuptial agreements. After marriage, such agreements are termed post-nuptial agreements.

Perhaps most easily conceptualized as a marital subset of the Statute of Frauds,[2] some spousal agreements are required to be in writing.[3] In fact, one of the enumerated statutory classes of agreements required to be in writing since the original enactments of Nevada law is "Every promise or undertaking made upon consideration of marriage, except mutual promises to marry."[4]

By negative inference, any agreements or contracts not specifically required to be in writing presumably fall instead under the general rule of contracts, meaning there must be an offer and

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[1] *See* NRS ch. 123A, the Uniform Premarital Agreements Act ("UPAA"), effective October 1, 1989. The uniform act was promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Now 116 years old, NCCUSL provides States with non-partisan draft legislation intended to bring "clarity and stability" – and most especially, consistency – to various areas of the law. Explicitly supportive of the federal system, members of NCCUSL must be lawyers, and include lawyer-legislators, attorneys in private practice, State and federal judges, law professors, and legislative staff attorneys, who have been appointed by State governments as well as districts and territories to research, draft and promote enactment of uniform State laws in areas where uniformity is desirable and practical.

[2] *Cf.* NRS 111.220, "Agreements not in writing: When void."

[3] For example, premarital agreements under NRS 123A.040, agreements exempting property acquired during marriage from community property under NRS 123.220(1), agreements to treat the other spouse's earnings as separate property by way of gift under NRS 123.190, agreements granting to one spouse complete management and control of community property under NRS 123.230, or agreements to allocate income and resources when a spouse has been institutionalized under NRS 123.220(4).

[4] NRS 111.220(3).

acceptance, meeting of the minds, and consideration.[5] But they could be either written or oral.[6] And the Nevada Supreme Court has made quite clear, in the area of marital and other relationships, that enforceable contracts may be express or implied.[7]

Generally, the three common types of spousal agreements addressed in family law are premarital agreements, post-nuptial agreements, and separation agreements. Collectively, they are contracts that alter the relations that would otherwise be attendant automatically under the laws of marriage and divorce, or that resolve some or all of the issues that a court would consider in a divorce action.[8]

The obvious difference between premarital and post-nuptial agreements is whether or not the parties have married. The usual hallmarks of a legitimate premarital or post-nuptial agreement are that full and fair disclosure must be made, the parties must have an adequate opportunity to consult counsel, and the agreement cannot be unconscionable.[9]

As to either premarital or post-nuptial agreements, the parties share a confidential relationship, and are generally charged with a duty to consider the interests of the other.[10] It could even be argued that the parties to a post-nuptial 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.[11] To date, however, there is no Nevada authority distinguishing between the fiduciary relationships of fiances and married persons.

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[5] *See*, *e.g.*, *May v. Anderson*, 121 Nev. 668, 119 P.3d 1254 (2005); *but see* RESTATEMENT SECOND, CONTRACTS § 48, Comment a, referencing as an "obsolete view" that a contract requires a "meeting of minds," as out of harmony with what it termed the "modern doctrine" that a manifestation of assent is effective without regard to actual mental assent.

[6] *Jensen v. Jensen*, 104 Nev. 95, 753 P.2d 342 (1988) (parties to written contract may orally modify its terms); *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997) (on conflicting evidence, trial court concluded there had been no oral side agreement modifying the parties' property settlement agreement, and denied reformation of the written contract).

[7] *See*, *e.g.*, *Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 229 (1990) (parties may, by express or implied agreement, modify child support terms, and an implied agreement to waive a right will be found from conduct which is inconsistent with any other intention); *Western States Construction v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992) (conduct demonstrating an implied contract for partnership or joint venture, if proven, is to be given effect).

[8] *See* Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 1.01 (ABA 2001).

[9] *See* 2 Lindey and Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 120.50 (1998); Laura W. Morgan & Brett R. Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 16.01 at 455 fn. 2 (2001).

[10] Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 1.01 (ABA 2001).

[11] *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).

By contrast, a separation agreement is necessarily entered into when parties have separated, or are contemplating doing so, and so have acknowledged at least the potential of adverse interests. 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.[12] Such an agreement connotes actual separation of the parties.[13]

II. MANAGEMENT AND CONTROL OF COMMUNITY PROPERTY

Either spouse may convey, charge, encumber, or dispose of his or her separate property without the consent of the other spouse.[14]

Before proceeding to determine how post-nuptial agreements might alter the rules of property management and control within a marriage, it is prudent to review the default rules that such an agreement could seek to alter.

As of 1975, both spouses were granted management of their community property.[15] Oddly, the statute begins with an escape clause by which one spouse can leave all management and control to the other, and then sets out those few things that explicitly can ***not*** be given to the other spouse.

For example, a spouse may not gift any community property, or bequeath more than half of it, without consent of the other spouse,[16] may not purchase, sell, convey, or encumber community real property without the other spouse's acknowledged joinder,[17] generally may not create a security interest in, or sell, community "household goods, furnishings or appliances" unless the other spouse joins in doing so,[18] and may not acquire, purchase, sell, convey or encumber the assets, including real

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[12] *See Applebaum v. Applebaum*, 93 Nev. 382, 385, 566 P.2d 85 (1977); 1 Lindey and Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 13.31 (1998); Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS §§ 1.01, 4.03 (ABA 2001).

[13] Authority elsewhere seems mixed concerning the failure of parties to promptly or "immediately" separate after executing such an agreement, with potential effects up to treating any such 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; Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 1.02 (ABA 2001).

[14] NRS 123.170.

[15] NRS 123.230.

[16] NRS 123.230(1), (2).

[17] NRS 123.230(3), (4).

[18] NRS 123.230(5).

property and goodwill, of a business without the consent of the other, at least where both spouses participate in management of the business.[19]

The language of the statute was tweaked slightly in 1977, and again in 1997 and 1999, but essentially the 1975 changes produced the community property management and control scheme still used in Nevada.

Each spouse, acting alone, has power to manage and control the entire community property estate, within the few limits set out in NRS 123.230. The spouse actively managing the community assets is deemed to be in a position of a trustee for the other spouse's share of the community property in a manner that is analogous to the trustee relationship of a partner to his partnership or an agent to his principal.[20] The managing spouse has the burden of keeping community and separate property segregated, because if they are intermingled, if the managing spouse cannot prove the separate nature of the property claimed to be separate, the entire property will be deemed community.[21]

Most of the law in the field of management and control predates the 1975 amendments, and thus is essentially the concept of "what used to apply to just the husband now applies to both." This sometimes, but not always, provides rational guidelines.

For example, the prior case law that the spouse actively managing the community assets is deemed a trustee for the other spouse's share of the community property is easily carried into the neutral, so that it can logically be applied to any financial transaction undertaken by either spouse. In practice, this has evolved into an inquiry upon divorce as to expenditures made or investment losses suffered during marriage into a "waste" inquiry in which reimbursement liability may be found for foolish or malicious expenditures of community property.

In two cases that issued following the change of Nevada community property law from "fair and equitable" to "presumptively equal" in 1993, the Nevada Supreme Court addressed the kind of circumstances that would permit a trial court to find a "compelling reason" to divide property other than equally.

In *Lofgren v. Lofgren*,[22] the Court identified one "compelling reason" which would justify an unequal division of community property as the financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order.

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[19] NRS 123.230(6).

[20] *Fox v. Fox*, 81 Nev. 186, 195, 401 P.2d 53 (1965).

[21] *Fox v. Fox*, 81 Nev. 186, 195, 401 P.2d 53 (1965).

[22] *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

The next year, in *Putterman v. Putterman*,[23] the Court held that both the husband's financial misconduct in the form of refusing to account to the trial court concerning earnings and other financial matters, and his lying to the court about his income, provided compelling reasons for an unequal disposition of community property. The Court also noted, in dicta, that other possible "compelling reasons" for an unequal division of community property could include negligent loss or destruction of community property, unauthorized gifts of community property, and even, possibly, "compensation for losses occasioned by marriage and its breakup."

Neither case expressly stated a standard of review beyond the conclusory finding of the absence of an "abuse of discretion." The cases indicate that there is a fairly wide scope of judicial discretion, which in turn signals that the essential inquiry is now "reasonableness."

It is difficult to be precise with the degree to which long-standing legal standards shifted once the review was made applicable to both spouses. For example, under the prior statutes, the case law declared that a husband could make voluntary dispositions of "some" of the community property without the consent of the wife, except that he could not "make excessive gifts with the intent to injure or defraud" the wife, who would have a right to sue both him and the recipient of the property if he did so.[24]

These are subjective calls – "some," "intent to injure," and "excessive" are all inherently subjective terms that virtually beg the questions involved in their usage, giving the trial courts considerable discretion to make findings sufficient to satisfy their individual views of equity. The current statute appears to be harsher, stating that "neither spouse may make a gift of community property without the express or implied consent of the other,"[25] which would appear to apply to ***any*** sum of community property, no matter how small.

In practice, the pre-1975 level of discretion appears undisturbed. While *Lofgren* and *Putterman* speak to "unauthorized gifts," as a practical matter trial courts are extremely reluctant to find gifts of community property to third parties "unauthorized" in any circumstances short of outright theft or fraud, finding implied spousal consent from acquiescence or silence following virtually any degree of notice to or knowledge of the spouse that the transfers occurred. This is probably wise, since any harsher requirement of proving "consent" could create an impossible burden of proof of agreement to long-past gifts.

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[23] *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).

[24] *See Nixon v. Brown*, 46 Nev. 439, 214 P. 524 (1923).

[25] NRS 123.230(2).

III. STATUTORY REGULATION OF POST-NUPTIAL AGREEMENTS

NRS 123.030 permits a husband and wife to own property in the form of joint tenancy, tenants in common, or community property. A husband and wife may enter into any "contract, engagement or transaction" with the other respecting property following their marriage, subject to the rules governing "the actions of persons occupying relations of confidence and trust toward each other.[26] The only necessary consideration is "mutual consent."[27]

NRS 123.080(1) provides the "other shoe," stating that:

> 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.

The controlling Nevada statute, therefore, applies to both post-nuptial agreements (the parties intend to remain together) and separation agreements (the parties intend to immediately separate).

NRS 123.080 permits an agreement as to property at any time, but apparently restricts any agreement as to "support" only on immediate separation.[28] Some 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 its interpretations of the statute, and has expressly addressed such agreements in several cases, without indicating a concern as to the validity of such agreements.

Other provisions, in fact, indicate the multiple other matters that might be legitimately addressed in an agreement made between persons who are already married. In addition to the myriad "agreements" anyone might enter into,[29] Nevada statutory law specifically makes available to spouses a number of potential agreements, including the ability to exempt property acquired during marriage from becoming community property,[30] to allocate the other spouse's earnings as separate

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[26] NRS 123.070.

[27] NRS 123.080(2).

[28] *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).

[29] Powers of attorney, wills and trusts, durable powers of attorney (generally or for health care decisions), deeds of transfer, etc.

[30] NRS 123.220(1).

property by way of gift,[31] and to allocate income and resources when a spouse has been institutionalized.[32] Any of these agreements are specifically required to be in writing.

However, it seems to be easier for property to go in the opposite direction – the Nevada Supreme Court has stated that separate property can be transmuted into community property by agreement of the parties, and the agreement to do so may be oral.[33] Presumably, these holdings supersede the statutory law – in place since 1873 – holding that "all marriage contracts or settlements" must be written and acknowledged.[34]

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.[35] 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.[36] 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.[37]

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[31] NRS 123.190.

[32] NRS 123.220(4).

[33] *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).

[34] NRS 123.270.

[35] *Sly v. Sly*, 100 Nev. 236, 679 P.2d 1260 (1984); *Verheyden v. Verheyden*, 104 Nev. 342, 757 P.2d 1328 (1988).

[36] *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990); *Robison v. Robison*, 100 Nev. 668, 691 P.2d 451 (1984) (community interest measured by the proportion that the purchase price is paid with community funds).

[37] *Verheyden*, *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).

IV. LIMITATIONS, CAVEATS, AND PROHIBITED TERMS OF POST-NUPTIAL AGREEMENTS

A. Spousal Support/Alimony

Under Nevada's enactment of the UPAA, parties are explicitly granted authority to modify or eliminate rights and obligations regarding "alimony or support or maintenance of a spouse."[38] When parties are separating, an agreement for support may be consideration for an integrated agreement relating to property division and will therefore not be subject to modification.[39]

However, a husband and wife may ***not*** enter into a post-nuptial agreement limiting one spouse's duty of support to the other where they continue to live together as husband and wife.[40] If the agreement purports to be an integrated agreement, that invalidity renders the entire agreement unenforceable.[41]

In other words, it would appear that if there is a desire to contractually avoid the possibility of an alimony award, the agreement to do so must be concluded before the marriage. This is, perhaps, the largest malpractice danger in the field of post-nuptial agreements.

B. Survivorship Benefits in ERISA-Qualified Retirement Plans

In a somewhat ironic contrast to the treatment of alimony, case law exists stating that because of the structure of ERISA, which speaks of what "spouses" might do, a spousal waiver of ERISA-governed retirement and survivorship benefits cannot be accomplished by way of a premarital agreement, since definitionally the parties to such an agreement are not married.[42] Thus, it seems that there are some things that can be accomplished by a post-nuptial agreement that cannot be achieved in a premarital agreement.

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[38] NRS 123A.050(1)(d).

[39] *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).

[40] *See Cord v. Neuhoff*, 94 Nev. 21, 24 n.3, 573 P.2d 1170, 1172 n.3 (1978); *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996).

[41] *Cord v. Neuhoff*, 94 Nev. at 24, 573 P.2d at 1172.

[42] *See*, *e.g.*, *Nat'l Automobile Dealers and Assocs. Retirement. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996).

There is contrary authority.[43] But a cautious practitioner should ensure that spousal survivorship waivers are accomplished after the fact of marriage, even if called for in a premarital agreement.

C. Limitations on Time, Place, and Content

Post-nuptial and premarital agreements executed in another state are controlled by the law of that State at the time of the execution of the agreement.[44] As with premarital agreements, post-nuptial and separation agreements cannot be unconscionable, or obtained through fraud, misrepresentation, material non-disclosure, or duress.[45]

By extension of certain other cases, it would also appear to be very unwise for an attorney to draft a post-nuptial agreement for his or her unrepresented spouse to sign. 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.[46] It would seem reasonable to expect the same level of scrutiny, and result, in a case involving a post-nuptial agreement.

V. FORMALITIES AND VALIDITY

All marriage contracts or settlements must be in writing and executed and acknowledged or proved in the same manner as conveyances of land.[47] That provision has been labeled the "Statute of Frauds regarding marriage contracts."[48] The agreement should be recorded in each county where any

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[43] *See*, *e.g.*, Linda Ravdin, MARITAL AGREEMENTS 354 (Tax Management Inc., 2002) (discussing *Critchell v. Critchell*, 746 A.2d 282 (D.C. Cir. 2000), and *Marriage of Rahn*, 914 P.2d 463 (Colo. App. 1995), while criticizing other decisions for "misreading the statute" relating to waivers by prospective spouses in prenuptial agreements).

[44] *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).

[45] *See Braddock*, *supra*, 91 Nev. at 739-40, 542 P.2d at 1062.

[46] *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).

[47] NRS 123.270.

[48] *Occhiuto v. Occhiuto*, 97 Nev. 143, 145 n.1, 625 P.2d 568, 569 n.1 (1981).

conveyed or affected real property is located.[49] Such recordation is deemed to impart notice to all persons.[50]

However, while an agreement conveying a real property interest must be in writing,[51] an oral agreement supported by documents of note and deed of trust can satisfy the statute of frauds and NRS 111.210(1).[52] There are normally specificity requirements, etc., necessary for transfers of real estate, but the Nevada Supreme Court has also held that intent is to be enforced regardless of technicalities, which sometime include formal title.[53] It thus seems plausible that an oral post-nuptial agreement might be similarly proven, although it would not seem wise to rely on such a result.

The case law prior to enactment of the UPAA spent no significant time addressing the formalities of the premarital, post-nuptial, or separation agreements at issue, instead focusing on their substance.[54] And there ***is*** no statutory list of requirements for ***post***-nuptial agreements, per se, only for ***premarital*** agreements. The question presented is whether the few formality requirements for premarital agreements would be found to govern post-nuptial agreements as well.

The bare provisions of the UPAA itself require that a premarital agreement must simply be in writing and signed by both parties.[55] There is a question as to whether this more recent enactment supersedes the provision, dating to 1873, under which "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."[56] Since land conveyances require not just being in writing,[57] but also "acknowledgment,"[58] it would appear that the necessary level of proof has been ***lessened***,

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[49] NRS 123.280.

[50] NRS 123.290.

[51] *See* NRS 111.210

[52] *See Daniel v. Hiegel*, 96 Nev. 456, 457, 611 P.2d 207, 208 (1980).

[53] *See Schmanski v. Schmanski*, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999); *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994); *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995).

[54] *See*, *e.g.*, *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978) (discussing merits and legal effect of agreement without discussion of document formalities).

[55] NRS 123A.040.

[56] NRS 123.270.

[57] NRS 111.210.

[58] NRS 111.115, NRS 111.155.

and the statutory conflict is likely to resolved in favor of the later enactment.[59] No case has yet construed NRS 123A.040.

While typically in marital settlement agreements, etc., there is a separate "acknowledgment" by parties to an agreement indicating that they understand the text and intend it, the term might not require that additional step, since the notary statutes speak of a notarized document having been "acknowledged" by the notary as having been signed freely and voluntarily for the purposes set out in the document.[60]

And case law has fleshed out the requirements for premarital agreements to include an adequate disclosure, supplied in advance, of the assets of each spouse.[61]

While there is no case law on the point, there would not seem to be any obvious public policy purpose for the Nevada Supreme Court to make the formality requirements of a post-nuptial agreement any more onerous than that for premarital agreements, so it is likely that "in writing, and signed" is adequate, and "notarized" is all the acknowledgment required, even if the older statutes could be argued to still apply and require more.

The cautious practitioner, however, will have any post-nuptial agreement in writing, and "acknowledged," and include the same disclosures, and waivers of further disclosures, as would be required for enforcement of a premarital agreement entered into under NRS chapter 123A.

VI. ENFORCEABILITY UPON DIVORCE

Almost certainly, the rules permitting parties to challenge prenuptial agreements upon divorce, irrespective of time since execution (essentially tolling any statute of limitations argument)[62] apply

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[59] *See*, *e.g.*, *Lemberes v. State*, 97 Nev. 492, 634 P.2d 1219 (1981) reiterating rules of statutory construction that "the special statute, to the extent of any necessary repugnancy, will prevail over the general one," and "[w]here express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy between the statutes as to preclude the presumption, or the later statute revises the whole subject-matter of the former," *citing Ronnow v. City of Las Vegas*, 57 Nev. 332, 365, 65 P.2d 133, 146 (1937); *see also Southern Nev. Tel. Co. v. Christofferson*, 77 Nev. 322, 363 P.2d 96 (1961) ("a statute establishing a comprehensive plan for regulating a particular subject matter, repeals, by necessary implication, an earlier law dealing with but a small part of the same subject," *citing City of Carson v. County Commissioners*, 47 Nev. 415, 224 P. 615 (1924); *State v. Economy*, 61 Nev. 394, 130 P.2d 264 (1942).

[60] See NRS 240.002, defining "acknowledgment" by a notary.

[61] *See Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993); *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992).

[62] *See* NRS 123A.100.

to post-nuptial agreements as well. The same statute preserves any equitable defenses relating to enforcement, including laches and estoppel.

Under Nevada common law, a premarital agreement (and, therefore, presumably a post-nuptial 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.[63] As with all contracts, the courts of this state retain power to refuse to enforce a particular agreement if it is unconscionable, obtained through fraud, misrepresentation, material non-disclosure, or duress.[64]

In the premarital agreement cases, a presumption of fraud has been found where the agreement entered greatly disfavors one of the parties.[65] Once a court determines that the agreement greatly favors one party and the presumption of fraud is established, the burden shifts to the party attempting to enforce the agreement that to show the other party was not disadvantaged.[66] Factors to be considered include:

1. Ample Opportunity to obtain the advice of independent counsel;
2. Whether the disadvantaged party was coerced into making a rash decision by the circumstances under which the agreement was signed;
3. Whether the disadvantaged party had substantial business experience and business acumen; and
4. Whether the disadvantaged party was aware of the financial resources of the other party and understood the rights that were being forfeited.

For review of premarital agreements, under NRS 123A.080(1)(b), courts look for unconscionability at the time of execution of the agreement, not at the time of divorce. The term is not easily or precisely defined, and the Nevada Supreme Court has indicated that it requires a finding of both procedural and substantive unconscionability "in order for a court to exercise its discretion to refuse to enforce a clause as unconscionable."[67] If the case involves predominant procedural unconscionability, however, less evidence of substantive unconscionability is required.[68]

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[63] *See Buettner v. Buettner*, 89 Nev. 39, 45, 505 P.2d 600, 604 (1973).

[64] *Id*. (premarital agreements); *Braddock v. Braddock*, 91 Nev 735, 739-40, 542 P.2d 1060, 1062 (1975) (same for post-nuptial and separation agreements).

[65] *Sogg v. Nevada State Bank*, 108 Nev. 308, 312, 832 P.2d 781 (1992).

[66] *Id*.

[67] *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 96 P.3d 1159 (2004); *see also Burch v. Second Judicial Dist. Ct.*, 118 Nev. 438, 443, 650, 49 P.3d 647 (2002).

[68] *D.R. Horton*, *supra*.

In the context of marital agreements, "unconscionability" has been said to exist when enforcement of the agreement results in one spouse having insufficient property to provide for his or her reasonable needs – a specific ground for ignoring a "no alimony" clause in a premarital agreement.[69] Multiple factors may be considered when reviewing an agreement for "fairness," including:

1. Duration of the marriage;[70]
2. Assets owned by each party;
3. Income and earning capacity of each property;
4. Property each party brought to the marriage;
5. Children of this or any prior marriage;
6. Future support needs of each party;
7. Age and health of each party;[71]
8. Standard of living during the marriage;[72]
9. What each party would have received in the absence of a prenuptial agreement;[73] and
10. Each party's contribution to the marriage, including homemaker and child care contributions.[74]

It would seem reasonable to expect the same analysis for a post-nuptial agreement, but existing case law has not yet engrafted upon the review of post-nuptial agreements the full law under the UPAA applicable to premarital agreements.

VII. CONCLUSIONS

Post-nuptial agreements can be useful tools for re-aligning the interests of spouses to ongoing marriages where circumstances have changed in such a way that the terms applicable to ownership or management of the parties' property should also change. All the usual fairness and disclosure rules applicable to agreements between fiduciaries should be observed in drafting such an agreement.

The statutes in place since the founding of the State provide a substantial number of enumerated subjects that such a post-nuptial agreement may – and may not – address. And case law has fleshed out others, most notably the prohibition of modifying the duty of support in an ongoing marriage.

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[69] NRS 123A.080(2).

[70] *Burtoff v. Burtoff*, 418 A.2d 1085 (D.C. 1980).

[71] *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985).

[72] *Kolflat v. Kolflat*, 636 So.2d 87 (Fla. Dist. Ct. App. 1994).

[73] *Casto v. Casto*, 508 So.2d 330 (Fla. 1987); *In re Marriage of Richardson*, 606 N.E.2d 56 (Ill. Ct. App. 1992).

[74] *See DelVecchio v. DelVecchio*, 143 So.2d 17 (Fla. 1962); *In re Estate of Hildegass*, 244 A.2d 672 (Pa. 1968); *Button v. Button*, 388 N.W.2d 546 (Wis. 1986); *Austin v. Austin*, 819 NE 2d 623 (Mass. App. Ct. 2004).

Because there is no comprehensive legal structure governing the specifics of post-nuptial agreements as a class, practitioners should probably attend to such agreements with at least the formalities required for premarital agreements, and should probably expect that they will be subject to the same reviews for fairness, unconscionability, disclosure, and enforcement.

Knowing what can and can't be accomplished through such agreements, and how, is one more piece of the education required of a well-trained family law attorney.

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