TRENDS IN PREMARITAL, POSTNUPTIAL, AND SEPARATION AGREEMENTS

by

Jennifer V. Abrams, Esq.
THE ABRAMS & MAYO LAW FIRM
6252 South Rainbow Blvd., Suite 100
Las Vegas, Nevada 89118
Tel: (702) 222-4021
Fax: (702) 248-9750
website: www.TheAbramsLawFirm.com
email: jabrams@theabramslawfirm.com

and

Marshal S. Willick, Esq.
WILLICK LAW GROUP
3591 East Bonanza Rd., Ste. 200
Las Vegas, NV 89110-2101
Tel: (702) 438-4100
Fax: (702) 438-5311
website: willicklawgroup.com
e-mail: Marshal@willicklawgroup.com

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PRESENTER BIOGRAPHIES

Jennifer V. Abrams

Jennifer V. Abrams is the founder and managing partner of The Abrams & Mayo Law Firm in Las Vegas, Nevada. The firm focuses exclusively on Divorce and related matters within the practice of Family Law.

Ms. Abrams is a State Bar of Nevada Board Certified Family Law Specialist, and a Fellow of the American Academy of Matrimonial Lawyers. Previously she was elected to and served as Treasurer of the Executive Council of The State Bar of Nevada, Family Law Section. She has also served on the State of Nevada Family Law Rules of Civil Procedure Committee, State of Nevada Committee to Re-write NRS Chapters 123 - 126, and State Bar of Nevada EDCR Rule 5 Committee.

Ms. Abrams drafted the State of Nevada Detailed Financial Disclosure Form which is currently used in complex divorce and high-asset cases. Recently, Ms. Abrams re-wrote NRCP 16.2 and 16.205. Ms. Abrams has spoken at and published materials for a variety of CLE presentations for the Annual Nevada Family Law Conference Advanced Family Law Program, the American Bar Association, the Nevada Family Law Judges' Conference, and the Annual Nevada Family Law Conference.

Ms. Abrams is a member in good standing of the State Bar of Nevada, Clark County Bar Association, American Bar Association, American Association for Justice (formerly the Association of Trial Lawyers of America), and the State Bar Associations of California and Louisiana (both inactive).

She received her Juris Doctorate degree, *Magna Cum Laude*, from the Pepperdine University School of Law in California, where she graduated 9th in a class of 255 and was a staff member of the Pepperdine Law Review for two years. Ms. Abrams received her undergraduate degree in Business Administration, Accounting Theory and Practice, from California State University, Northridge, and has passed the California Certified Public Accountants (CPA) examination.

The Abrams and Mayo Law Firm's offices are located at 6252 South Rainbow Boulevard, Suite 100, Las Vegas, NV 89118. The phone number is (702) 222-4021. E-mails may be sent to jabrams@TheAbramsLawFirm.com. Comprehensive information about the firm's specialty practice can be found by visiting www.TheAbramsLawFirm.com.

Marshal S. Willick

Marshal S. 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 Academy of Matrimonial Lawyers (AAML) and the International Academy of Family Lawyers (IAML), former Chair of the Nevada Bar Family Law

Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual. He is frequent teacher of continuing legal education classes and is often sought as a lecturer on family law issues.

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 divorce and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies 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.

Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2101. His phone number is (702) 438-4100, extension 103. Fax is (702) 438-5311. E-mail can be directed to Marshal@willicklawgroup.com, and additional information can be obtained from the firm web sites, www.willicklawgroup.com and http://www.qdromasters.com.

I. MARITAL AGREEMENTS

There are three basic subsets of marital agreements – premarital (also called prenuptial) agreements, postnuptial agreements, and separation agreements. Each has unique characteristics, opportunities, and limitations.

The obvious difference between premarital and postnuptial agreements is whether or not the parties have married. The usual hallmarks of a legitimate premarital or postnuptial 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.[1]

As to at least premarital and postnuptial agreements, the parties share a confidential relationship, and are generally charged with a duty to consider the interests of the other. The Nevada Supreme Court has acknowledged that an engagement to marry creates a confidential relationship between the parties, and both parties are generally charged with a duty to consider the interests of the other.[2]

It could be argued that the parties to a postnuptial 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.[3] To date, however, there is no Nevada authority distinguishing between the fiduciary relationships of fiances and married persons.

By contrast, a separation agreement is necessarily entered into when married 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.[4] Such an agreement connotes actual separation of the parties; authority elsewhere seems mixed concerning the failure of parties to promptly or "immediately" separate after executing such

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[1] *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).

[2] *DeLee v. Roggen*, 111 Nev. 1453, 907 P.2d 168 (1995); Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 1.01 (ABA 2001).

[3] *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," *citing Kudokas v. Balkus*, 26 Cal. App. 3d 744, 103 Cal. Rptr. 318, 321 (Ct. App. 1972)). In any event, there is ***no*** valid authority for the proposition that husband and wife do not have at least ***equal*** fiduciary duties as do fiances, including those of full and fair disclosure of all material facts.

[4] *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).

an agreement, with potential effects up to treating any such agreement a "nullity" if they do not in fact separate.[5]

II. PREMARITAL AGREEMENTS[6]

A. Introduction

The Uniform Premarital Agreements Act (UPAA) was completed by the Uniform Law Commissioners[7] in 1983, and has been adopted, in some form, by about half the States and the District of Columbia.[8] There are several variations.[9]

As a general matter, the use of premarital agreements is increasing. According to a recent survey of the American Academy of Matrimonial Lawyers (AAML), there has been an increase in the number of millennials requesting prenuptial agreements, and most Academy Fellows report seeing an increase in the total number of clients who are seeking prenups during the past three years, with the most common basic purpose being "protection of separate property," "alimony/spousal maintenance," and "division of property."[10]

The model UPAA is concise, with eight sections. Section 1 defines a "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." Section 2 requires that a premarital agreement be in writing and signed by both parties, and is specifically enforceable without consideration.

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[5] 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).

[6] These materials are not intended to be a comprehensive primer on Nevada's law of premarital agreements; for such a primer see, *e.g.*, Robert Dickerson and Joseph Karacsonyi, *Malpractice Traps When Preparing and Reviewing Prenuptial Agreements*, 27 Nev. Fam. L. Rep., Winter, 2014, at 1.

[7] The uniform act was a product of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), also known a the "Uniform Law Commissioners." 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.

[8] *See* http://www.uniformlaws.org/Act.aspx?title=Premarital%20Agreement%20Act.

[9] *See*, *e.g.*, Nancy Levit, The Uniform Premarital Agreement Act and Its Variations throughout the States, 23 J. Am. Acad. Matrim. Law. 355 (2010).

[10] *See* "Prenuptial Agreements on the Rise Finds Survey," AAML press release, Oct. 28, 2016, posted at http://aaml.org/about-the-academy/press/press-releases/prenuptial-agreements-rise-finds-survey.

Section 3 provides an illustrative list of those matters, including spousal support, which may properly be dealt with in a premarital agreement, specifically providing that "The right of a child to support may not be adversely affected by a premarital agreement."

Section 4 provides that a premarital agreement becomes effective upon the marriage of the parties. Thus, the UPAA does not deal with agreements between persons who live together but who do not contemplate marriage or who do not marry, and does not provide for postnuptial or separation agreements or with oral agreements.

Section 5 prescribes the manner in which a premarital agreement may be amended or revoked (again by a signed writing, and again without consideration being required).

Section 6 is the key operative section of the Act and sets forth the conditions under which a premarital agreement is ***not*** enforceable; as Nevada's enactment varies from the model, the sections applicable here are discussed below.

The remaining sections deal with more tangential issues. Section 7 provides for very limited enforcement where a marriage is subsequently determined to be void ("only to the extent necessary to avoid an inequitable result"); and Section 8 tolls any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement during the parties' marriage, while preserving all "equitable defenses limiting the time for enforcement, including laches and estoppel."

B. Nevada's Version of the UPAA

Nevada adopted its version of the Uniform Premarital Agreement Act (UPAA) in 1989, codified as NRS Chapter 123A.[11]

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]."[12]

Somewhat atypically, Nevada's enactment of the "uniform" act contains three variations from the text of the UPAA as promulgated by NCCUSL.

The first variation is not in the actual text, but in the section of the enactment bill. The language in quotes in the first paragraph of the preceding section expanded the original proposed language, which would have simply made the UPAA apply to all premarital agreements, whenever executed.

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[11] 1989 Nev. Stat. ch. 472.

[12] *See Sogg v. Nevada State Bank*, 108 Nev. 308, 312, 832 P.2d 781, 784 (1992).

The effect was to create a two-tier review process for any premarital agreements entered prior to October 1, 1989, since they are valid if they pass muster either under the act or under the pre-act case law.

The second variation is in the permissible content of a premarital agreement. The model act provided that a premarital agreement could include a contract with respect to "the modification or elimination of spousal support."[13] The Nevada enactment states that the parties may contract with respect to "the modification or elimination of alimony or support or maintenance of a spouse."[14]

It is difficult to make out the purpose of the Nevada version's expansion with certainty, except possibly to verify the ability of the parties to contract to modify or eliminate temporary spousal support during divorce proceedings as well as post-divorce alimony. The comments to the UPAA are silent on this point, but there is case law from elsewhere indicating that attempted restrictions on the power of a court to award temporary spousal support or temporary fees and allowances may be overridden if the court determines that such an award is "necessary."[15]

If anything, the additional words of the Nevada enactment indicate a legislative intent to permit such a waiver. However, there is some question as to whether any such "intent" was conscious – the legislative history is devoid of any notice that this provision was altered from the model act. It would appear to be a "stealth" change inserted in the original bill draft, presumably by someone in the Legislative Counsel Bureau who prepared the bill, and the absence of any conscious consideration of expansion of the original model language presumably will be raised if a challenge is ever mounted to an agreement purporting to eliminate temporary spousal support. Additionally, even if found to be intentional, whether a legislative intent to cut off the power of courts to award temporary support and attorney's fees would survive a public policy review remains to be seen.

The third variation of the Nevada enactment from the model act is in the movement of a single word that alters significantly the burden of proof required to challenge enforcement of a premarital agreement. The model act states that a premarital agreement is ***not*** enforceable if the party against whom enforcement is sought proves that:

> (1) That party did not execute the agreement voluntarily; or
> (2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:

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[13] UPAA § 3(a)(4).

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

[15] *Fernandez v. Fernandez*, 710 So. 2d 223 (Fla. Dist. Ct. App. 1998) (pendente lite support and temporary fees constitute "support during the marriage" and may not be waived); *Blanton v. Blanton*, 654 So. 2d 1240 (Fla. Dist Ct. App. 1995) (same); but see *Rubin v. Rubin*, 690 N.Y.S.2d 742 (App. Divorce. 1999) (specific waiver of temporary support enforced); *Musko v. Musko*, 697 A.2d 266 (Pa. 1997) (parties may waive pendente lite support).

> (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
> (ii) 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
> (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.[16]

In other words, a party seeking to challenge an agreement can make either of two arguments – involuntariness, or ***both*** unconscionability and inadequate disclosure.

The Nevada enactment consciously altered the potential grounds for challenge. Under NRS 123A.080(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.[17]

In other words, a party seeking to challenge an agreement drafted in Nevada has ***three*** arguments – involuntariness, ***or*** unconscionability, ***or*** inadequate disclosure. The legislative history makes it clear that this expansion of the grounds for challenge to a premarital agreement was quite conscious.[18]

Commentators have noted that the provisions of the model act requiring both unconscionability and inadequate disclosure have been "strongly criticized."[19] So it is possible that the Nevada modification on this point might be seen as a "progressive" enactment.

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[16] UPAA § 6.

[17] NRS 123A.080.

[18] *See* Remarks of Robert Gaston in Minutes of Assembly Judiciary Committee, March 30, 1989, considering AB 296; remarks of Frank Daykin in Minutes of Senate Judiciary Committee, April 20, 1989, considering AB 296.

[19] *See* Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 8.02 at 371 (ABA 2001); Barbara Ann Atwood, *Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 146 (1993).

1. Possible Nevada Variations as to Enforcement

The legislative history seems to anticipate that the variations from the model act would relate to litigation of all premarital agreements in Nevada divorce cases, but other legal doctrines seem to dictate that the Nevada variations may only apply in those cases where ***both*** the agreement and the divorce occur in Nevada, and possibly in Nevada-executed agreements litigated elsewhere.

Under Nevada law, premarital agreements executed in another State are controlled by the law of that State at the time of the execution of the agreement.[20] So if a premarital agreement was entered into in a State that adopted the model act unchanged, and that agreement happened to be litigated in a Nevada divorce, our case law would indicate that the other State's enactment controls issues relating to the validity and content of the agreement, and it seems at least an open question whether the model act, or the Nevada provisions purporting to govern "enforcement" of premarital agreements would control.[21]

Put more precisely, the issue is whether a Nevada divorce court is obliged to disregard the Nevada law governing enforcement of premarital agreements in favor of the law governing enforcement of such agreements in the state in which the agreement was executed. Under current law the answer would appear to be "yes," but may be even more nuanced.

For example, *Braddock* looks to law as it existed at the time an agreement is ***executed***, but other cases applying *Braddock*-like reasoning have directed trial courts to use the law of the jurisdiction in which property was acquired as of the time that divorce litigation was ***commenced***.[22] So where the law of another jurisdiction has changed over time, a Nevada divorce court might be required to not only discover what the property characterization and division law of that other State, but also decide whether the applicable foreign law is the law as of the execution of the agreement, or as of the commencement of divorce proceedings, or some combination of the two.

Additionally, it is common for premarital agreements litigated in Nevada to contain choice-of-law clauses naming other places, pointing the construction of even more premarital agreements away from the Nevada-specific provisions enacted regarding the enforcement of such agreements, and as noted below in discussion of recent cases, such a provision might well control.

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[20] *Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975).

[21] See generally Leflar et al., American Conflicts of Law (4th ed. 1986); Scoles & Hay, Conflict of Laws (1984).

[22] *See*, *e.g.*, *Berle v. Berle*, 97 Idaho 452, 546 P.2d 407 (1976) (where husband acquired "separate property" while living in new Jersey, both the characterization and property division law of New Jersey was applied in subsequent Idaho divorce, thus preserving wife's interests because States define terms such as "separate property" differently; further, trial court was instructed to "divide the marital property in accordance with the applicable New Jersey law governing distribution of property upon divorce at the time respondent's divorce action was commenced"). 546 P.2d at 411.

Given the difficulty and uncertainty involved in importation of swaths of the characterization and property division law of other States, it is understandable why other community property jurisdictions have chosen to enact "quasi community property" laws providing that property divided at divorce shall include property acquired while domiciled in another State which would have been community property if acquired while domiciled in the community property state.[23] Such statutes essentially translate common-law marital property (and the attendant spousal interests) into community property, presumably allowing forum divorce courts to make equitable property divisions without the heightened risk of error associated in partial importation of other States' marriage and divorce laws. Nevada, however, has not yet elected to adopt any such provision.

2. "Voluntariness" in Nevada

"Voluntariness" is not a concept given much attention in the early case law dealing with marital agreements. Several of the cases have no discussion much beyond the fact that the agreement was signed.[24] This is in keeping with the practice in prior years, where even threats of violence were considered "intrinsic fraud" insufficient to warrant setting aside decrees resulting from such threats[25] and even evidence that a party was beaten into signing a property settlement agreement was not enough, without the allegation of other facts going to substantive unfairness, to cause such an agreement to be set aside.[26]

The scant Nevada case law is not specific as to how much coercion to enter into such agreement is considered invalidating. Even the older cases indicate that under common law, a prenuptial agreement is not enforceable if it is "unconscionable, obtained through fraud, misrepresentation, material nondisclosure or duress."[27] The case so holding, however, involved the unusual situation of the monied spouse trying to invalidate the agreement so as not to pay the agreed term of post-divorce alimony to the non-monied spouse whom he had decided to divorce, and the appellate court finding no indicia in the record of any barrier to enforceability, although the Court also noted that the agreement was executed on the day of the wedding ceremony.

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[23] *See*, *e.g.*, Cal. Civ. Code §§ 4800, 4803 (West 1983); Ariz. Rev. Stat. Ann. § 25-318 (1976).

[24] *See*, *e.g.*, *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972).

[25] *See Manville v. Manville*, 79 Nev. 487, 387 P.2d 661 (1963).

[26] *See Smith v. Smith*, 102 Nev. 110, 716 P.2d 229 (1986).

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

Similarly, the Court had seen no obvious "coercion" problem with the agreement signed the day of the wedding ceremony that it had reviewed in *Sargeant*.[28] But 20 years later, in *Sogg*,[29] the Court recited as a potential ground for invalidity whether "the disadvantaged party was coerced into making rash decisions."[30] The *Sogg* court did not lay down a hard and fast time between presentation of the agreement to the disadvantaged party and the wedding, but cited cases in which the agreement had been presented the day of the wedding, and the day before the wedding.[31]

It has been suggested that, nationally, the case law is mixed, and highly fact specific, as to whether shortness of time between presentation of the agreement and the wedding will bar enforcement.[32] Further, elsewhere, a threat to call off the wedding is apparently often ***not*** seen as sufficiently coercive as to render an agreement subject to attack as "involuntarily" signed.[33]

The holding in *Sogg* hardly constitutes the kind of clear line-drawing that makes the decisions of trial courts easier, but it did mark a substantial break from the prior holdings. The case appears to move Nevada from the camp seeing no problem with an agreement signed on the day of a wedding into that more sensitive to the coercive pressure of signing such a document with no meaningful time for review, and upon threat of wedding cancellation if the demand for immediate signature is not met.

The drafters of the proposed UPMAA, discussed below, noted that States are widely divergent in how they address the concepts of voluntariness, coercion, and duress, especially as to time pressures, and noted that "many courts" use a five-factor test that has evolved elsewhere for making such determinations.[34]

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[28] *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972).

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

[30] *Sogg v. Nevada State Bank*, 108 Nev. 308, 314, 832 P.2d 781, 785 (1992) (where disadvantaged party had never completely reviewed agreement during prior meeting with a lawyer, and was not presented again with the agreement until the morning of the wedding, which would be called off if she did not sign, coercion found to exist).

[31] *Sogg v. Nevada State Bank*, 108 Nev. 308, 314, 832 P.2d 781, 785 (1992), citing *Matter of Marriage of Matson*, 730 P.2d 668, 672 (Wash. 1986); *Bauer v. Bauer*, 464 P.2d 710, 712 (Or. App. 1970).

[32] Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 10.02 (ABA 2001).

[33] Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 10.053 (ABA 2001).

[34] *See*, *e.g.*, *Mamot v. Mamot*, 813 N.W.2d 440, 447 (Neb. 2012) (summarizing five-factor test: (1) "coercion that may arise from the proximity of execution of the agreement to the wedding, or from surprise in the presentation of the agreement"; (2) "the presence or absence of independent counsel or of an opportunity to consult independent counsel"; (3) "inequality of bargaining power — in some cases indicated by the relative age and sophistication of the parties"; (4) "whether there was full disclosure of assets"; and (5) the parties' understanding of the "rights being waived under the agreement or at least their awareness of the intent of the agreement"); *see also In re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000) (superseded by statute as stated in *In re Marriage of Cadwell-Faso and Faso*, 191 Cal. App. 4th 945, 119 Cal. Rptr.3d 818 (Ct. App. 2011)).

3. "Full and Fair Disclosure" in Nevada

The controlling law states the requirement as a negative. Under NRS 123A.080(1)(c), a premarital agreement is not enforceable if the attacking party successfully proves all three of the following: did ***not*** receive a "fair and reasonable" disclosure of the other's property and debts; did ***not*** voluntarily and expressly waive, in writing, any further disclosure than whatever was provided; and did ***not*** have (or reasonably could have had) "an adequate knowledge" of the property and debts of the other.[35] This tri-part test formalizes the pre-UPAA common-law requirement of the duty of prospective spouses to "make full disclosure" of assets and debts prior to executing a premarital agreement.[36]

Presumably, a party defending a premarital agreement need only disprove one of those assertions in order to enforce the agreement – or at least to save it from being unenforceable on that basis alone. There is no post-UPAA Nevada authority fleshing out the meaning of the terms used (such as "fair and reasonable"), and there is apparently a significant range of opinions on the required level of specificity, the burden of proof on the point if contested, and the impact of partial non-disclosure.[37]

As a practical matter, the easiest way of proving that disclosure was made and was adequate is to attach exhibits or an appendix to the agreement itself, detailing the disclosure made. In light of the existing Nevada case law, it might be presumed fatal to a premarital agreement to recite in the text that such a detailed disclosure is attached, and not actually have it attached at the time of execution of the agreement.[38] But anecdotal accounts suggest that even where attachments are indicated but not attached, judges have been satisfied with an adequate showing that actual disclosure was made, especially if disclosure beyond whatever was made was waived.

4. "Adequate Opportunity to Consult Counsel" in Nevada

There is no requirement in the UPAA or Nevada case law that each party to a premarital agreement have independent advice of counsel prior to executing a premarital agreement. In fact, the act is silent on the role of counsel. Rather, this "requirement" is an implication of the defense against enforcement of a premarital agreement by a party who can prove that it was not signed "voluntarily."[39] It is not the presence or absence of counsel that is the focus, but the meaningful opportunity to obtain information and advice, thus negativing allegations of coercion, duress, and lack of knowledge.

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[35] NRS 123A.080(1)(c)(1)-(3).

[36] *Fick v. Fick*, 109 Nev. 458, 464, 851 P.2d 445, 449-450 (1993).

[37] *See* Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 11.01 (ABA 2001).

[38] *See Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993).

[39] NRS 123A.080(1)(a).

The pre-UPAA case law, curiously, did not include access to counsel as a consideration of voluntariness. Rather, it was listed as a factor in determining whether the party claiming disadvantage "was not in fact disadvantaged."[40] The Court started with its prior view of the role of counsel in divorce cases, where a party was held to documents signed only where she had "free access to an attorney of her own choosing."[41]

Without identifying a specific standard of "adequacy," the Court criticized as insufficient the situation presented, where 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), and the wife's attorney refused to certify that he had independently advised her. 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 to do so.[42] The Court held that the agreement was procedurally defective since the wife never reviewed the entire agreement with independent counsel.[43]

The actual terminology used by the Court in *Sogg* was "ample opportunity" to consult with counsel – language repeated the next year in *Fick* as one of the factors which, if proven, could overcome the presumption of invalidity of an agreement that greatly disfavored one party to such an agreement.[44]

As with the rest of the UPAA, there is very little authority from which a bright-line measure of adequacy of the right to consult with counsel can be derived. It is simply impossible to know if the Court would have been satisfied if the attorney consulting with wife had been independently chosen by her, or if their conversation had not been interrupted by the husband, or – if interrupted – they had managed to review the entire agreement, or if the attorney had been willing to certify that he had advised the wife despite all else.

Given the very small number of highly fact-specific premarital agreement cases that are ever appealed, it seems likely that such details will never be spelled out prescriptively, leaving to judges

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[40] *Sogg v. Nevada State Bank*, 108 Nev. 308, 312, 832 P.2d 781, 784 (1992).

[41] *See Muscelli v. Muscelli*, 96 Nev. 41, 604 P.2d 1237 (1980); *Applebaum v. Applebaum*, 93 Nev. 382, 386, 566 P.2d 85, 88 (1977).

[42] *Sogg v. Nevada State Bank*, 108 Nev. 308, 312-13, 832 P.2d 781, 784 (1992).

[43] *Sogg v. Nevada State Bank*, 108 Nev. 308, 313, 832 P.2d 781, 784 (1992).

[44] *Fick v. Fick*, 109 Nev. 458, 463, 851 P.2d 445, 449 (1993).

ample discretion to identify inadequate opportunity to consult counsel "when they see it,"[45] and refuse to enforce the resulting premarital agreements on that ground accordingly.

5. Forum Selection Clauses in Nevada

The UPAA on its face includes "the choice of law governing the construction of the agreement" as one of the matters as to which parties to a premarital agreement may contract.[46] This is reasonable; in light of the reality with the mobility of the modern population, it is quite likely for the parties to be from different States at formation of a premarital agreement, or to relocate from one State to another during the marriage, by the time a premarital agreement comes to be judicially reviewed or tested. The law used in that review could be quite different than that extant or presumed at formation, and the validity and enforceability of the agreement could be judged in accordance with standards and rules that did not exist at the time and place where the agreement was executed.

The Nevada Supreme Court has indicated that it will recognize – and enforce – either permissive or mandatory forum selection clauses, and that the precise language used could be critical in distinguishing between those two possibilities.[47]

Long-standing case authority in Nevada provides that premarital agreements executed in another state are controlled by the law of that state at the time of the execution of the agreement.[48] Given that Nevada's enactment of the UPAA differs in some significant respects from the act elsewhere, practitioners would seem to have a number of additional duties and burdens.

First, when a premarital agreement executed elsewhere is litigated here, Nevada practitioners must look for choice of law clauses. Presuming such clauses were permissible under the law where the agreement was formed, the attorney must obtain sufficient command of the law of the other State (personally or by association) to competently litigate the issues presented, applying the law of that

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[45] *See Jacobellis v. Ohio*, 378 U.S. 184 (1964) (J. Stewart, concurring) ("It is possible to read the Court's opinion in Roth v. United States and Alberts v. California, 354 U.S. 476, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that. [citations omitted]").

[46] NRS 123A.050(1)(g).

[47] *American First Fed. Credit Union v. Soro*, 131 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 73, September 24, 2015).

[48] *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").

other State. As long as *Braddock* remains the controlling law on the subject, that duty of investigating and applying the law of the state of premarital agreement execution probably exists whether or not the agreement at issue contains a choice of law clause.

Second, and more subtly, practitioners drafting or negotiating premarital agreements in Nevada should be versed in the distinction between Nevada's statutory and case law and that present in any other jurisdiction where the parties already have a connection, or where the agreement might end up being litigated.

Since the Nevada enactment has a lessened burden of proof to challenge enforcement of a premarital agreement, a party seeking to make the agreement as "bullet-proof" as possible might wish to at least consider making the applicable law that of some other place. In contrast, a party wishing to preserve as many claims as possible against enforcement of a premarital agreement might well want to make the Nevada statutes the controlling law for review.

And while few people will predict everywhere they might live for the remainder of their marriage, drafting counsel on both sides might have an obligation to at least inquire at the time of drafting of connections by either party with other States, or of any known plans to relocate elsewhere, and suggest in all cases that if the parties do relocate, the client might want to consult with counsel at the new location as to the continuing validity and enforceability of the agreement.

6. Unconscionability in Nevada

Under Nevada common law, a marital 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.[49] As with all contracts, the courts of this state retain power to refuse to enforce any marital agreement if it is unconscionable, or obtained through fraud, misrepresentation, material non-disclosure, coercion, or duress.[50]

A presumption of fraud is found where the agreement entered greatly disfavors one of the parties.[51] Once a court determines that the agreement greatly favors one party, the presumption of fraud is established, and the burden shifts to the party attempting to enforce the agreement to show that the other party was ***not*** disadvantaged.[52] Factors to be considered include:

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

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

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

[52] *Id*.

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.

The term "unconscionable" 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."[53]

Substantive unconscionability focuses on whether the terms of an agreement are "one-sided."[54] Procedural unconscionability focuses on the conduct of the parties and the state that conduct put each of them into at the time of signing the agreement, including the perceived time pressure to which a party is subjected; Nevada is in the group of States that have decided that one party "springing" a purported "agreement" on the other so as to provide no meaningful opportunity to have it independently reviewed with counsel of choice is ***itself*** grounds for finding it unenforceable.[55]

If the case involves substantial ***procedural*** unconscionability, less evidence of ***substantive*** unconscionability is required for a court to reject a purported agreement.[56] There is also the question as to whether any agreement contracted under NRS 123.070 should be closely reviewed under the general "presumption that conveyances between persons occupying fiduciary relations are fraudulent."[57]

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[53] *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).

[54] "Generally, in considering substantive unconscionability, courts look for terms that are 'oppressive.'" *Gonski v. Second Judicial Dist. Ct.*, 126 Nev. 551, 245 P.3d 1164 (2010).

[55] *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992) ("In particular, circumstances which impose time pressures on the disadvantaged party have been held to invalidate the agreement").

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

[57] *Crawford v. Crawford*, 24 Nev. 410, 56 Pac. 94 (1899).

C. The Proposed UPMAA

The Uniform Premarital and Marital Agreements Act (UPMAA) was completed by the Uniform Law Commissioners in 2012, and has been adopted as of 2016 in two States (North Dakota and Colorado).

The model UPAA is considerably more expansive than the UPAA. It was intended to bring into practice the conception that "parties should be free, within broad limits, to choose the financial terms of their marriage" within "limits" of "due process in formation, on the one hand, and certain minimal standards of substantive fairness, on the other."[58] The biggest change was that it explicitly encompassed postnuptial, as well as premarital, agreements.

The Official Comments to the UPMAA note that the act is "not intended to cover cohabitation agreements, separation agreements, or conventional day-to-day commercial transactions between spouses." They specify that the key concept distinguishing postnuptial and marital separation agreements is whether the parties intend the marriage to continue or whether "a court-decreed separation, permanent physical separation or dissolution of the marriage is imminent or planned," in which case the act is inapplicable and separate considerations for a marital separation agreement would apply. The Comments note that at least one jurisdiction, aware of the possibility of "deception of the other party or the court regarding intentions," refuses to enforce a marital agreement if it is quickly followed by an action for legal separation or dissolution of the marriage.[59]

It explicitly contains options for enacting States to consider: "Because a significant minority of states authorizes some form of fairness review based on the parties' circumstances at the time the agreement is to be ***enforced***, a bracketed provision in Section 9(f) offers the option of refusing enforcement based on a finding of substantial hardship at the time of enforcement. And because a few states put the burden of proof on the party seeking enforcement of marital (and, more rarely, premarital) agreements, a Legislative Note after Section 9 suggests alternative language to reflect that burden of proof."[60]

The UPMAA has not yet been taken up by the Nevada Legislature (it was briefly considered, and then withdrawn for "further study," in 2013).

The AAML Legislation Committee analyzed the proposed legislation in 2013, and made a number of findings and recommendations. The Committee noted a study finding high variability among

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[58] *See* Official Comments to UPMAA, posted at http://www.uniformlaws.org/Act.aspx?title=Premarital%20and%20Marital%20Agreements%20Act.

[59] See Minnesota Statutes § 519.11, subd. 1a(d) (marital agreement presumed to be unenforceable if separation or dissolution sought within two years; in such a case, enforcement is allowed only if the spouse seeking enforcement proves that the agreement was fair and equitable).

[60] *Id*.

States between protection of the rights of potentially vulnerable parties, on one hand, and a "highly pro-enforcement" mindset, on the other, with a clear trend toward greater emphasis on enforceability, but with widely disparate rules relating to procedural and substantive fairness standards from place to place.[61]

The AAML Committee described the UPMAA as "building upon the UPAA's enforceability provisions to strengthen requirements related to disclosure, review, advice, and execution of premarital and marital agreements," noting that under Section Nine, an agreement is unenforceable if:

> (1) the party's consent to the agreement was involuntary or the result of duress;
> (2) the party did not have access to independent legal representation under subsection (b);
> (3) unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or
> (4) before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).

The new act would add as triggers for finding an agreement to be unenforceable that the terms "were unconscionable at the time of signing" ***or*** "enforcement ... would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed." This test for enforceability at the time of enforcement (i.e., divorce) would be a substantial departure for Nevada law, but is part of the review process in several States.

In terms of substantive analysis, the AAML Committee noted the tension between "predictability and uniformity," on one hand, and proper "balance of enforcement and challenge grounds" on the other, noting that the new act would swing the pendulum back from emphasizing enforceability to individual determinations of fairness by "favoring" challenges to agreements.

Some of those providing feedback leading to the report were critical of the new act's allowance of challenges based on a "reasonable time" to locate and retain counsel, and the new emphasis on encouraging independent legal representation. The various critics focused on the increased "fairness" provisions as "inviting litigation," which is the natural flip-side to the existing UPAA's emphasis on "enforcement."

Given the overt hostility expressed in some quarters to the fundamental principles of the UPMAA, it seems likely that it would be subject to significant debate if introduced in the Nevada Legislature as a replacement of the existing UPAA.

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[61] Barbara A. Atwood & Brian Bix, *A New Uniform Law for Premarital & Marital Agreements*, 46 FAMILY LAW QUARTERLY 313 (No. 3 Fall 2012).

D. Recent Cases

Gonzales-Alpizar v. Griffith, 130 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 2, Jan. 30, 2014) concerned the recognition to be afforded to a final divorce decree entered in Costa Rica when the court entering that decree proceeded by default and was not informed of the existence of a valid prenuptial agreement.

When the former wife sought to enforce the decree terms in Nevada as to child support and spousal support under the doctrine of comity,[62] the Nevada courts refused on the basis that the wife had not disclosed the premarital agreement to the Costa Rican court, and had therefore committed fraud, making the spousal support term void.

The wife had argued that the premarital agreement was unenforceable because she did not execute the agreement knowingly or voluntarily and because the agreement was unconscionable. The Nevada Supreme Court, reviewing the validity of the premarital agreement de novo,[63] found that the record demonstrated that the wife had signed the premarital agreement "knowingly and voluntarily" and that she failed to demonstrate how the agreement was unconscionable.

The opinion may not be as precedential as it appears, since it concerned the relatively rare scenario of a divorce decree entered by another country. Had the decree been instead issued by another State, issues under the Full Faith and Credit Clause of the Constitution would have been implicated, perhaps leading to a different result.[64]

Jones v. Jones Jr., No. 66632, Order of Affirmance (Nevada Supreme Court, Unpublished Disposition July 14, 2016) found a no-contest clause in a prenuptial agreement to be enforceable. Again reviewing the validity of the prenuptial agreement de novo under NRS 123A.080(3) and *Sogg*.

Reiterating the expansive subject matter permitted of premarital agreements so long as they are voluntarily executed, not in violation of public policy or a statute imposing a criminal penalty, and not unconscionable when executed, the Court approved a "no-contest clause." Under the agreement, the wife received $250,000 per year in ongoing payments. The clause provided that if the wife ever challenged the agreement, all of those sums previously paid were to be forfeited and repaid to the

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[62] The principle of courtesy by which "the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect."

[63] Under *Fick v. Fick*, 109 Nev, 458, 463, 851 P.2d 445, 449 (1993); *Sogg v. Nev. State Bank*, 108 Nev. 308, 312, 832 P.2d 781, 783 (1992); NRS 123A.080(3).

[64] *See*, *e.g.*, *Burdick v. Nicholson*, 100 Nev. 284, 680 P.2d 589 (1984) (a judgment entered in one state must be respected in another state, provided that the first state had jurisdiction over the parties and the subject matter of the suit, even if the cause of action upon which the judgment is based would not be cognizable in the forum state, and even if the underlying action would have been prohibited here as a matter of public policy).

husband, along with everything ever bought with those payments. The clause expressly did not affect prospective child or spousal support.

The wife had filed an action in California attacking the premarital agreement. The Nevada Supreme Court found no public policy concerns regarding spousal support or child-related issues to be implicated, that it was not unconscionable when executed (finding that the wife had independent representation, understood the agreement, and signed it "freely and voluntarily), and had twice been "ratified" in later agreements during marriage. The Court further found that it was not "so one-sided as to oppress her in an unconscionable manner."

Finding further that the clause required the repayment of the previously-paid sums as a "condition precedent" to contesting the agreement, the Court found that the wife had violated it by filing for divorce and challenging the agreement in California without first repaying the money,

Along the way, the Court noted that though "there is a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements," equally strong public policy considerations have been used to render premarital agreements partially or wholly unenforceable."[65] But it found that none of those public policy considerations were implicated here.

E. Trends

If there is a discernable trend in enforcement of premarital agreements in Nevada cases, it is apparent only in broad strokes. Nevada can be seen as firmly in the modern mainstream of enforcement-oriented jurisdictions, but it does have both statutory and case law moderating the harshness of simply enforcing any agreement ever signed irrespective of its unfairness.

First, Nevada's enactment expands the bases for finding agreements unenforceable from two to three. Case law since enactment of the UPAA has increasingly stressed full and fair disclosure, and while the Nevada law of voluntariness is a bit vague, it appears to align with authority that permits findings of impermissible coercion by way of time pressure, unequal bargaining power, and surprise.

For the moment, the Nevada view of premarital agreements appears to be that agreements are to be enforced – so long as they address permissible subject matter, and were voluntary, based on full and fair disclosure, not in violation of public policy and not substantively and procedurally unconscionable.

[65] Citing *Bloomfield v. Bloomfield*, 764 N.E.2d 950, 952 (N.Y. 2001).

III. POSTNUPTIAL AGREEMENTS[66]

A. Introduction

The most singular thing about the legal framework governing postnuptial agreements in Nevada law is that there really isn't one. Unlike ***pre***marital agreements, which are regulated under a modern uniform act,[67] there is no specific statutory scheme regulating the formation, modification, and enforcement of postnuptial agreements. Instead, Nevada has a patchwork quilt of old statutes and a handful of cases, from which some rules can be constructed.

The obvious difference between premarital and postnuptial agreements is whether or not the parties have married. The hallmarks of a legitimate agreement – premarital ***or*** postnuptial – 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.[68]

As to either premarital or postnuptial agreements, the parties share a confidential relationship, and are generally charged with a duty to consider the interests of the other.[69] As detailed above, it could be argued that the parties to a postnuptial 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, and are therefore charged with a duty to consider the interests of the other.[70] Authority from elsewhere indicates that at ***minimum***, postnuptial agreements are subject to at least the same standards and rules of enforceability as prenuptial agreements.[71]

During marriage, in addition to the myriad "agreements" anyone might enter into, Nevada statutory law specifically makes available to spouses a number of potential agreements, including the ability

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[66] These materials are not intended to be a comprehensive primer on Nevada's law of premarital agreements. For some greater detail, *see*, *e.g.*, Marshal Willick, *The Risks & Rewards of Post-Nuptial Agreements* in *Advanced Family Law* (State Bar of Nevada; Las Vegas, Nevada, 2009), posted at http://www.willicklawgroup.com/premaritalpostnuptialseparationmarital-settlement-agreements/.

[67] *See* NRS ch. 123A, the Uniform Premarital Agreement Act ("UPAA"), effective October 1, 1989. The uniform act was promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). An updated, proposed replacement act, the UPMAA, which ***would*** address postnuptial agreements, has been promulgated by NCCUSL but not yet taken up by the Nevada Legislature.

[68] *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).

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

[70] *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).

[71] *Fogg v. Fogg*, 567 N.E.2d 921 (Mass. 1991).

to exempt property acquired during marriage from becoming community property,[72] to allocate the other spouse's earnings as separate property by way of gift,[73] and to allocate income and resources when a spouse has been institutionalized.[74]

A critical inquiry is whether one party is attempting to derive a benefit for an impending divorce – the kind of thing that might be done in a ***separation*** agreement – in the guise of a "postnuptial agreement." As discussed above regarding the proposed UPMAA, they are categorically different kind of agreements, and the attempt to achieve the ends of one while purporting to be the other is a subterfuge for which courts should be wary.

B. Unconscionability, Etc.

All of the considerations going to a review of unconscionability as to premarital agreements apply equally to postnuptial agreements. The drafters of the UPMAA, attentive to the heightened fiduciary duty between married persons, would have postnuptial agreements reviewed more strictly than premarital agreements, but as discussed above, given that Nevada recognizes such a fiduciary duty between fiances, it is uncertain whether the standard of review should be any different here.

The considerations discussed above as to voluntariness, full and fair disclosure, adequate opportunity to consult counsel, and forum selection clauses, also would appear to apply at least equally to postnuptial agreements.

The Nevada Supreme Court has indicated that trial courts should, if anything, give the benefit of the doubt to the party seeking to preserve the marriage even when presented with onerous terms in an agreement prepared by the other. In *Cord*,[75] the Court rejected any application of laches as a bar to the wife's suit, explaining why such a spouse is deserving of equitable considerations:

> A fair reading of the record before us discloses that Virginia Cord executed the postnuptial agreement for the sole purpose of saving her marriage. Thus, the circumstances are not unlike those before the court in Rottman v. Rottman, 55 Cal. App. 624, 204 P. 47 (1921), where the court in holding the wife not barred by laches wrote:
>
> > Not only is she the wife of appellant but according to the amended complaint, the two contracts she seeks to rescind were entered into by her for the purpose of securing to herself a continuance of the relations which she had a right to expect from the very fact of marriage, but which her husband had threatened to deny her. This, we repeat, places her in a position from which she may strongly combat the

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[72] NRS 123.220(1).

[73] NRS 123.190.

[74] NRS 123.220(4).

[75] *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978).

> charge that she unduly delayed the commencement of her action. Having made a very foolish and improvident contract, treating the two as one, for the purpose of securing her rights as a wife, other than the right to support, which she cast away in order to hold to the remainder, she could hardly be expected to be zealously diligent in attempting to cancel the contracts. A move in that direction might imperil the very consummation she had so devoutly wished. She was justified, without incurring the charge of guilt of laches in holding to the last possible moment to the hope that, in the language of the amended complaint, her husband would "live with her and love her as a husband should," and that she might "retain his presence with her."

Public policy in Nevada appears to be that where a party "holds out hope until the last possible moment," the courts should construe all facts and documents in favor of that party.

C. Distinguishing Between Postnuptial Agreements and Separation Agreements

Agreements made between couples ***after*** marriage fall into two categories: (1) postnuptial agreements, and (2) separation agreements.[76] 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 "immediately separate."

The distinction is critical to legal evaluation of what can constitute a valid agreement, 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***.[77]

Specifically, if the parties' agreement ***states*** that the parties are living separately, but they in fact live together thereafter, the courts of some States have held that the agreement is void.[78]

Similarly, if at the time of execution ***one or both*** parties did not have a good-faith intention to continue the marital relationship indefinitely, then an agreement cannot ***be*** a legitimate postnuptial agreement, but if it was to survive at all would have to be reinterpreted as a ***separation*** agreement.

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[76] Separation agreements are also called property settlement agreements, marital settlement agreements, and marital termination agreements.

[77] 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.")

[78] *Auclair v. Auclair*, 165 P.2d 527 (Cal. Ct. App. 1946); *see also Bare v. Bare*, 120 So.2d 186 (Fla. DCA 1960); *Stenson v. Stenson*, 359 N.E.2d 787 (Ill. Ct. App. 1977); *In the Matter of Wilson*, 50 N.Y.2d 59, 427 N.Y.S.2d 977, 405 N.E.2d 220 (1980).

If one party intended to separate, and the other was unsure, vacillating, or desired to continue the marriage, a proposed "postnuptial" agreement would be presumptively unenforceable because the concerns of the Uniform Law Commissioners as to potential "deception of the other party or the court regarding intentions" would be greatly heightened.

D. A Postnuptial Agreement Cannot Address Support, Contemplate Separation or Divorce, or Fail to Include Full and Fair Disclosure of Relevant Facts

NRS 123.030 permits a husband and wife to co-own property in the form of joint tenancy, tenancy 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."[79] The only necessary consideration is "mutual consent."[80]

If parties execute a ***postnuptial*** agreement, then they occupy a "confidential relationship" as in the context of prenuptial agreements throughout the drafting and execution of the document. Additionally, "full and fair disclosure of all relevant information" is required, both parties must have a "meaningful opportunity to consult counsel," and the agreement cannot be unconscionable.[81]

NRS 123.080 permits an agreement as to property at any time, but apparently restricts any agreement as to "support" between persons already married to situations of immediate separation, and therefore to separation agreements, not to postnuptial agreements.[82] Most authorities define an award of preliminary attorney's fees ***as*** a species of temporary spousal support, making that off limits in a postnuptial agreement as well.[83]

It is true that the Nevada case law directly addresses the "easier" facts of a husband and wife purporting to enter into a postnuptial agreement limiting one spouse's duty of support to the other

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[79] NRS 123.070.

[80] NRS 123.080(2).

[81] 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).

[82] *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).

[83] Laura W. Morgan & Brett R. Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 3.05-3.06 at 50-51, § 9.03-9.04 at 379-381 (2d ed. 2012).

where they continue to live together as husband and wife, which is expressly prohibited.[84] But the authority from elsewhere makes clear that continuing cohabitation is no requirement for this bar; an agreement purporting to terminate duties of support – ***or*** liability for attorney's fees – between parties who are still married is void *ab initio*,[85] the little Nevada authority that exists certainly appears to support the same conclusion,[86] and if an agreement purports to be an integrated agreement, that invalidity renders the entire agreement unenforceable.[87]

In short, an agreement purporting to be a postnuptial agreement cannot contain any terms relating to spousal support, because spouses may ***not*** enter into a postnuptial agreement limiting one spouse's duty of support to the other.[88]

Postnuptial agreements are typically framed as contemplating indefinite continuation of a marriage, or of reconciliation if the parties had already separated,[89] rather than confirming that parties had or were about to separate, or explicitly speaking of a divorce filing or that the parties had adverse interests. Such agreements, even if titled uncertainly, would classify as postnuptial agreements.

As noted above, most authorities conclude that a valid postnuptial agreement must have the same disclosures required in a premarital agreement. Failure to provide, at the time of signing, at least the disclosures and waivers that would support a premarital agreement should render a postnuptial agreement unenforceable, for the same reasons.[90]

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[84] *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).

[85] *See*, *e.g.*, *McHugh v. McHugh*, 181 Conn. 482, 436 A.2d 8 (Conn. 1980); *Eule v. Eule*, 320 N.E.2d 506, 24 Ill. App.3d 83 (Ill. App. Ct. 1974); *Holliday v. Holliday*, 358 So.2d 618 (La. 1978); *Estate of Lord*, 602 P.2d 1030, 93 N.M. 543 (N.M. 1979); *Boyer v. Boyer*, 925 P.2d 82 (Okla. Ct. App. 1996); 2 Lindey and Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 110.69[4] (1999) ("the cases are clear that the parties cannot agree to terms relieving one or the other, or both, of legal spousal support obligations during the marriage").

[86] *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996) (prenuptial agreement provisions governing support are "separate entirely from the order for temporary support issued by the court during the divorce proceedings").

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

[88] *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). *Cord* spoke to a couple "continuing to live together as husband and wife" but it is doubtful that either of those specifics (cohabitation or opposite-sex relations) have any importance to the holding today; if either, it is cohabitation, but while the statute makes it clear that for a separation agreement to be valid the couple must actually separate, the logic is less clear as to why parties to a postnuptial agreement must continue to cohabit.

[89] Apparently, the *Jones v. Jones Jr.* case discussed above had exactly those facts – parties that had separated, and then reconciled. The case law contains several such instances. *See*, *e.g.*, *Schwartz v. Schwartz*, 126 Nev. 87, 225 P.3d 1273 (2010).

[90] *See*, *e.g.*, *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992) (marital agreement unenforceable when financial disclosures not attached to document at time of signing).

The duty of "full and fair disclosure" – one of the essential elements of any valid postnuptial agreement[91] – presumably encompasses more than just ***financial*** disclosures, and includes any information that might make the other party more or less amenable to signing the proposed agreement.

Where, for example, a couple had separated based on sexual infidelity, and reconciled based on reassurances of non-repetition, one party's concealment of an ongoing affair might invalidate the agreement, not because of the affair, *per se*, but because the other party might not have been willing to undertake the financial terms of the agreement if that other party had been fully informed. This is because that other party's signature could be found to not have been "voluntary" under the authority equating voluntariness with lack of coercion, and with being fully and fairly informed in advance of signing of all relevant facts.[92]

It is not necessary that a party actually ***lie*** to entice the other to execute such agreement, because actionable misrepresentation may consist of a representation that is misleading because it partially suppresses or conceals information.[93] An "intentional misrepresentation" requires only that the other party made a knowingly false or misleading representation, intended to induce the other to act or refrain, and that the other justifiably relied, and was damaged. The question of whether these elements are satisfied is generally one of fact.[94] The Nevada Supreme Court has made it clear that any required disclosures of relevant information must be made ***prior*** to execution of an agreement if that agreement is to stand.[95]

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[91] *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).

[92] *See Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992); the confidential, fiduciary relationship includes the duty to make full disclosure of assets and debts prior to executing a premarital agreement. *Fick v. Fick*, 109 Nev. 458, 464, 851 P.2d 445, 449-450 (1993).

[93] *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (1992). *See also Jordan v. DMV*, 121 Nev 44, 110 P.3d 30 (2005) (fraudulent misrepresentation occurs when a false representation is made with knowledge or belief that it is false, or with an insufficient basis of information for making the representation, and with intent to induce the plaintiff to act, and the plaintiff relies on the misrepresentation with resulting damages); *Irving v. Irving*, 122 Nev. 494, 134 P.3d 718 (2006) (consent to marriage, if induced by fraudulent misrepresentation, is sufficient grounds for annulment of marriage); *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997) (alleged oral agreement, if proven, would be basis for setting aside alimony and property terms of divorce decree).

[94] *Blanchard*, *supra*.

[95] *Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993).

E. A Postnuptial Agreement Cannot Be a Separation Agreement

As discussed in greater detail below, a ***separation*** agreement does not have the same restrictions as a postnuptial agreement; the parties to a separation agreement might be held to ***not*** occupy a confidential relationship, and some authority permits a finding that the burden is on each party to conduct discovery about the other party in preparation for divorce.[96] And NRS 123.080(1) provides that a ***separation*** agreement can contain provisions for support during the separation without being struck down on that basis.

But one party cannot be planning to immediately divorce, and attempt to get financial advantages ***in*** that divorce in the guise of a "postnuptial agreement" stating on its face that the parties intend to maintain the marital relationship.

As numerous courts and commentators have summarized: no court will enforce a postnuptial agreement machinated by one spouse under the ruse of "saving the marriage" that was ***really*** intended to cheat the other spouse out of assets in an imminent divorce. The Michigan Court in *Wright*[97] probably expressed the thought best:

> a couple that is maintaining a marital relationship may not enter into an enforceable contract that anticipates and encourages a future separation or divorce. . . . It is not the policy of the law to encourage such separations, or to favor them by supporting such arrangements as are calculated to bring them about.[98]

A party cannot convert a postnuptial agreement into a separation agreement by separating after execution of the agreement. As noted in the discussion above of the UPMAA, at least one State (Michigan) considers any separation or divorce filing within two years of the execution of such an agreement to have been presumptively a tactic actually intended by one party to achieve an advantage in divorce, rather than a bona fide postnuptial agreement, and therefore invalid. The precise facts and circumstances of a case should dictate a court's review, but the closer in proximity the execution of a purported "postnuptial agreement" and an advantaged party's filing for divorce, the more suspect and presumptively unenforceable the agreement should be found to be.

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[96] 1 Lindey and Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 13.31; Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 4.03. *See Applebaum v. Applebaum*, 93 Nev. 382, 385, 566 P.2d 85 (1977) ("Once Steven announced his intention to seek a divorce, Geraldine was on notice that their interests were adverse"). There, however, the parties had married in 1968, divorced in 1972, remarried in 1973, and in 1975, the wife moved to invalidate the property settlement in the ***first*** divorce. When the divorce court in the second divorce refused to throw out the property settlement in the first divorce, the case went up on an appeal of the second divorce decree. The case was, therefore, a "double-divorce" case, and its holdings might be considered limited to its facts, although the opinion does not say so on its face.

[97] *Wright v. Wright*, 761 N.W.2d 443 (Mich. App. 2008).

[98] *Wright v. Wright*, 761 N.W.2d 443 (Mich. App. 2008); *see also Blaising v. Mills*, 374 N.E.2d 1166 (Ind. Ct. App. 1978); *Church v. Church*, 630 P.2d 1243 (N.M. App. 1981).

NRS 123.080 provides in part that an agreement between married parties can ***only*** address property, except that the parties "may agree to an immediate separation and may make provision for the support of either of them and of their children during such separation." So if an agreement is offered as a separation agreement but actually speaks to other matters, it is presumptively invalid. Any such agreement should unequivocally reflect that "a suit for divorce is pending or immediately contemplated by one of the spouses against the other."

The Nevada Supreme Court has repeatedly indicated its disapproval of counsel's efforts to disguise intent and misrepresent facts by way of "cleverly drafted" documents intended to assist in the perpetration of a fraud.[99] The kind of potential "deception of the other party or the court regarding intentions" that the drafters of the UPMAA were concerned with is present whenever a party wishes to have a document entitled as one kind of agreement interpreted instead as something else. Any document purporting to be a postnuptial agreement that contemplates imminent separation or divorce, and any separation agreement that contemplates indefinite continuation of a marriage, would both be presumptively invalid and unenforceable.[100]

Any agreement submitted to a court for approval must pass muster as ***some*** kind of agreement in order to bind the parties to the action. If it cannot fulfill the elements required of a valid premarital agreement, or a postnuptial agreement, or a separation agreement, then it cannot stand at all, and should be found invalid and unenforceable.

F. Recent Cases

As noted above, the *Jones v. Jones, Jr.* case involved both premarital and postnuptial agreements.

G. Trends

There has been relatively little appellate activity in the area of postnuptial agreements, and nothing to indicate any recent evolution of judicial thinking on their place in family law. Of course, if some version of the UPMAA is passed, postnuptial agreements will finally have a statutory framework for analysis. In the meantime, such agreements are most closely analogized to premarital agreements, as to all technical and validity requirements, and should be most closely scrutinized when they appear to be mechanisms for financial advantage taken in contemplation of separation or divorce.

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[99] *See*, *e.g.*, *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002) (addressing the affidavit of the residency witness); *Sierra Glass & Mirror v. Viking Industries*, 107 Nev. 119, 808 P.2d 512 (1991) (addressing court filing including only part of a deposition transcript but omitting the pertinent portion).

[100] 1 Lindey and Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 12.20 at 12-4.

IV. SEPARATION AGREEMENTS: WHEN THEY SURVIVE AND WHEN THEY PERISH

A. Introduction

NRS 123.070 provides statutory authority for spouses to enter into any contract, engagement or transaction with the each other respecting ***property***.

NRS 123.080 provides statutory authority regulating valid contracts between spouses. It provides for the creation and subject matter of such contracts, provides that consent is sufficient consideration for such, and instructs how to preserve such a contract in the event of a subsequent divorce. It permits spouses to enter into agreements respecting ***property*** as well as "the ***support*** of either of them and of their children ***during such separation***."

Case law in other states expresses as public policy that the law "encourages the use of separation agreements to settle the financial affairs of spouses who intend to divorce."[101] This policy is based upon the notion that "the parties are in a better position than the court to determine what is fair and reasonable in their circumstances."[102] As with premarital agreements, separation agreements cannot be unconscionable, or obtained through fraud, duress, concealment or overreaching, misrepresentation, or material non-disclosure. Absent any of the foregoing, an agreement between the parties "is presumptively valid and binding no matter how ill-advised a party may have been in executing it."[103]

A settlement agreement dividing ***property*** can be merged into a decree of divorce,[104] directed in a decree of divorce to survive as an independent contract,[105] or can stand as an independent agreement enforceable under the laws applicable to the enforcement of contracts without being referenced at all in a decree.[106] However, when a settlement agreement contains alimony provisions, it will perish if not merged or ordered to survive in the decree.

B. Why *Alimony* Is Treated Differently than *Property* in Settlement Agreements

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[101] *Duffy v. Duffy*, 881 A.2d 630, 633 (D.C. App. 2005) .

[102] *Id*.

[103] *Id.*; *see also Lentz v. Lentz*, 271 Mich. App. 465, 721 N.W.2d 861, 2006 Mich. App. LEXIS 2144 (2006)

[104] NRS 123.080(4).

[105] *Ballin v. Ballin*, 78 Nev. 224, 371 P2d 32 (1962).

[106] *Gilbert v. Warren*, 95 Nev. 296, 594 P.2d 696 (1979).

While married persons may enter into binding contracts with each other "respecting ***property***,"[107] and while a husband and wife may "alter their legal relations [ ] as to ***property***,"[108] Nevada law specifically prohibits such agreements when it comes to post-divorce alimony.[109]

Specifically, NRS 123.080(1) prohibits a husband and a wife, by any contract, to 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 language of the statute makes it clear that the parties are prohibited from entering into any contract that would affect "the support of either of them" past the date of divorce.[110]

The reason for this prohibition is found in our statutory scheme. "Alimony is wholly a creature of statute," entirely unknown to either the common law or ecclesiastical law.[111] The statute, NRS 125.150, authorizes ***the court*** to award alimony to a spouse in granting a divorce.[112] There is no other statutory authority for alimony – alimony can only exist if ordered by a court to a ***spouse***, not to an ex-spouse.[113]

The language throughout NRS 125.150 makes it clear that an award of post-divorce alimony may ***only*** be made by ***a court***, and ***only at the time of the divorce.***[114] Once ordered, only a court can

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[107] NRS 123.070.

[108] NRS 123.080.

[109] *Id.* ("A husband and wife cannot by any contract with each other later 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***." Emphasis added.); *Lewis v. Lewis*, 53 Nev. 398, 2 P.2d 131 (1931) (The trial court is not bound by any agreement made between the parties concerning the amount of alimony to be allowed the ex-wife.); and *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978) (The alimony provision of a postnuptial agreement violates NRS 123.080 and is void. Because the postnuptial agreement is "integrated" and not subject to severability, the entire agreement "must be annulled since a material part of it is illegal.").

[110] *But see Kingsbury v. Kingsbury*, No. 68094, Order of Affirmance (Unpublished Disposition, March 2, 2016) (where decree of separate maintenance, which was prepared by appellant and entered by default, provided that neither party would receive spousal support, Decree of Separate Maintenance permanently waived spousal support).

[111] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000); *Freeman v. Freeman*, 79 Nev. 33, 378 P.2d 264 (1963).

[112] NRS 125.150(1).

[113] *Id*.

[114] The language throughout NRS 125.150 consistently refers to alimony ordered by the court in the decree. NRS 125.150(5) provides: "In the event of the death of either party or the subsequent remarriage of the spouse to whom specified periodic payments were to be made, all the payments ***required by the decree*** must cease, unless it was otherwise ***ordered by the court***." NRS 125.150(6) provides: "If ***the court*** adjudicates the property rights of the parties, or an agreement by the parties settling their property rights has been ***approved by the court***, whether or not the court has retained jurisdiction to modify them, the adjudication of property rights, and the agreements settling property rights, may

modify alimony and only prospectively – there is no jurisdiction to modify alimony payments already ordered and accrued.[115] And if alimony was ***not*** ordered in the original divorce judgment, there is no jurisdiction to award alimony thereafter.[116]

The absolute and exclusive reservation to the court of the right to award alimony is so fundamental that in 1931, the Nevada Supreme Court held in *Lewis v. Lewis*[117] that the court was not bound by any pre-decree agreements between the parties concerning the amount of alimony to be allowed the ex-wife, and in 1978, it declared in *Cord v. Neuhoff*[118] that a pre-separation agreement relating to post-decree alimony was "illegal."

C. History of Merger vs. Survival

The meaning of the words used by courts relating to property settlement agreements in divorce decrees has changed over the years.

In 1931, the distinction between the "approval" of an agreement on the one hand, and its "adoption or incorporation" on the other, was recognized by the Nevada Supreme Court in *Lewis v. Lewis*.[119] That case indicated that the "adoption" of an agreement by the trial court resulted in a merger of the agreement into the decree, so a later motion to modify was directed to the decree and not to the agreement which had been merged into it.

Fifteen years later, in 1948, *Finley v. Finley*[120] the Court again addressed the distinction between "approval" and "adoption" of a property settlement agreement, but came to a different decision.

Finley held that an ***adoption*** of such an agreement gave the wife, "in addition to her contractual rights then existing, the right to invoke contempt proceedings in this state and the rights of a judgment creditor in this or any other state." The language "in addition to" did ***not*** indicate that the

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nevertheless at any time thereafter be modified ***by the court*** upon written stipulation signed and acknowledged by the parties to the action, and in accordance with the terms thereof." NRS 125.150(7) provides: "If ***a decree of divorce***, or an agreement between the parties which was ***ratified, adopted or approved in a decree of divorce***, provides for specified periodic payments of alimony, the decree or agreement is not subject to modification by the court as to accrued payments. . . ."

[115] NRS 125.150(7).

[116] *Cavell v. Cavell*, 90 Nev. 334, 526 P.2d 330 (1974); *Freeman* at 33.

[117] 53 Nev. 398, 2 P.2d 131 (1931).

[118] 94 Nev. 21, 573 P.2d 1170 (1978).

[119] 53 Nev. 398, 2 P.2d 131 (1931).

[120] 65 Nev. 113, 189 P.2d 334 (1948).

agreement became merged in the decree; rather, it appeared to indicate that "adoption" of an agreement made it a part of the decree, but did not destroy its independent existence, with the result that ***both*** contract rights and judgment rights existed. To this extent, *Finley* was inconsistent with *Lewis.*

In 1953, NRS 123.080(4) was enacted to provide a mechanism for the parties to make their agreements effective beyond the date of divorce by introducing their agreement into evidence as an exhibit in any divorce action and requiring the court to, "by decree or judgment ratify or adopt or approve the contract by reference thereto."

In 1962, the Nevada Supreme Court held in *Ballin v. Ballin*[121] that a decree could direct the survival as an independent contract of an agreement containing alimony provisions:

> In our view, the support clause in an agreement should, in accordance with ordinary contract principles, survive a subsequent decree if the parties so intended and if the court directs such survival.
>
> * * *
>
> We therefore conclude that NRS 123.080(4) does not apply to a decree directing survival of an approved agreement.[122]

In the 63 years since NRS 123.080(4) was enacted by the Nevada Legislature, the Nevada Supreme Court has reinforced the principle of merger in numerous opinions.

In *Day v. Day*,[123] the fundamental consideration for the court in determining whether a separation agreement containing an alimony provision survived a validly-entered decree of divorce was whether the ***decree*** specifically directed survival (as opposed to anything stated in the settlement agreement itself)[124]:

> We now take a further step and hold that the survival provision of an agreement is ineffective unless the court decree specifically directs survival. We recognize that our view is an arbitrary one; it has to be. However, we think that questions relating to enforcement rights and choice of forum are of such significance as to require a clear and direct expression from the trial court as to whether the agreement shall survive. Absent such a clear and direct expression in the decree we shall presume that the court rejected the contract provision for survival by using words of merger in its decree ("adopt," "incorporate," etc. and, since the 1953 statute, "approve," "adopt," "ratify."). Accordingly,

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[121] 78 Nev. 224, 371 P.2d 32, at 36 (1962).

[122] 78 Nev. 224, 371 P.2d 32, at 36 (1962).

[123] 395 P.2d 321 (1964).

[124] *Day* at 389; *Rush v. Rush*, 85 Nev. 623, 460 P.2d 844 (1969).

> in the instant matter, we hold that the agreement was merged into the decree of divorce, and that the provisions of such decree for the future support of Mrs. Day are susceptible to a proceeding under NRS 125.180.[125]

The holding in *Day* is consistent with the holdings in *Rush v. Rush*,[126] *Watson v. Watson*,[127] *Wallaker v. Wallaker*,[128] and *Vaile v. Porsboll*,[129] all of which looked to the decree for language regarding merger or survival.

D. Property Terms: When to Merge

In *Gilbert v. Warren*,[130] the parties entered into a Marital Settlement Agreement (MSA) to divide their assets and debts. A default Decree of Divorce not referencing the MSA was entered by the District Court – the decree neither incorporated the MSA by reference nor directed its survival.

Fifteen months later, husband sought set aside the Decree of Divorce on the basis of fraud; re-open the matter to take additional evidence concerning the property agreement; and amend the Complaint for Divorce to seek reformation of the contract. The district court refused to address the agreement, and the Nevada Supreme Court affirmed:[131]

> In the divorce proceedings, the District Court found that there were no property rights or debts to be adjudicated. Between the time of filing the complaint and the entry of the

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[125] *Id*.

[126] 82 Nev. 59, 410 P.2d 757 (1966) (Where the agreement and decree each direct survival, later controversy regarding support must rest upon the agreement, for the rights of the parties flow from the agreement rather than from the decree approving it).

[127] 95 Nev. 495, 596 P.2d 507 (1979) (Where the agreement and decree each direct survival, courts are bound by language in the agreement which is clear and free from ambiguity and cannot, using the guise of interpretation, distort the plain meaning of an agreement).

[128] 98 Nev. 26, 639 P.2d 550 (1982) (Where the decree of divorce confirmed a Property Settlement Agreement and stated that the agreement was "not incorporated into this decree but shall survive the decree herein granted," the action should have been decided on principles of general contract law and although the district court could not modify the divorce decree, respondent has cited no authority that the district court was precluded from granting reformation of the property settlement agreement).

[129] 128 Nev. 27, 268 P.3d 1272 (2012) (Because the parties' agreement was merged into the divorce decree, to the extent that the district court purported to apply contract principles, specifically rescission, reformation, and partial performance based on Vaile's initial payments of $1,300 and Porsboll's acceptance of these payments to support its decision to set the payments at $1,300, any application of contract principles to resolve the issue of Vaile's support payments was improper, citing *Day* at 389-90.

[130] 95 Nev. 296, 300, 59 P.2d 696 (1979).

[131] *Gilbert* at 300.

> divorce decree, the parties entered into a property settlement agreement. However, that agreement was not merged into the Decree of Divorce, and therefore, was not subject to modification by the district court in the absence of a stipulation by the parties.

In other words, the division of property in a settlement agreement not merged into the decree could not be modified by the divorce court, because the agreement was never part of the divorce proceedings.[132]

The cases, collectively, stand for the proposition that as to division of property and debt, merged property settlement agreements may be modified by a divorce court, and non-merged property settlement agreements may not be modified by a divorce court.

E. Alimony Provisions: When to Merge

When considering whether or not to merge a settlement agreement containing an alimony provision into a decree of divorce, at least one commentator has opined that the decision might determine whether the divorce court might elect to modify alimony terms, whether or not the agreement states that they are "non-modifiable":

> In drafting marital settlement agreements where the parties intend alimony to be non-modifiable, it is important that the drafter contemplate the effect of merging the agreement into the decree – including the possibility that merger may nullify the parties' intent. Similarly, for practitioners wishing to modify "non-modifiable" alimony, merger of the agreement may provide the opportunity for making such a claim so long as a change in circumstances warrants such relief.[133]

Care must be taken if there is any intention to have ***any*** support provision in a separation agreement remain valid past the date of the decree of divorce.

The decree could expressly order that alimony is to be paid – in which case the alimony is presumably modifiable.[134] Or, a decree could expressly order the survival of a separation agreement

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[132] *See also Rosenthal v. Rosenthal* _____, (2016) (a court is required to enforce, and may not modify, the terms of an unmerged marital settlement agreement).

[133] See Dixie Grossman, *Alimony: When Nonmodifiable Terms Fail*, 22 Nev. Fam. L. Rep., Summer, 2009, at 4.

[134] Some states have held that a court's ability to modify a temporary or permanent alimony award cannot be waived by agreement or court order. *Sill v. Sill*, 164 P.3d 415 (Utah 2007); *Ellis v. Ellis*, 962 A.2d 328 (Me. 2008); *Braun v. Greenblatt*, 927 A.2d 782 (Vt. 2007); *Norberg v. Norberg*, 609 A.2d 1194 (N.H. 1992); *Eidlin v. Eidlin*, 916 P.2d 338 (Or. App. 1996); *Vorfeld v. Vorfeld*, 804 P.2d 891 (Hawaii App. 1991).

providing for such support – in which case the court would presumably not have jurisdiction to modify that alimony award.[135]

Any support provisions in a separation agreement that are ***not*** merged into a decree and are ***not*** expressly ordered to survive the decree are apparently extinguished as a matter of law upon entry of the decree.[136] And if such a separation agreement lacks a severability clause, the ***entirety*** of the separation agreement becomes void and unenforceable upon entry of the decree – including the property provisions.[137]

F. Child Support

It does not appear that the same application of merger vs. survival applies to child support. In *Fernandez v. Fernandez*,[138] the parents stipulated to "non-modifiable" child support. Later, the father moved to modify his child support obligation to mother, alleging significant changes in both parents' financial conditions which, if true, warranted such relief.

The district court held the parties to their bargain of non-modifiability, but the Supreme Court reversed, holding that "so long as the statutory criteria for modification are met, a 'trial court always has the power to modify an existing child support order, either upward or downward, notwithstanding the parties' agreement to the contrary.'"[139]

The Court reasoned that "[h]ad the Legislature wanted to give parents the option of agreeing to a decree providing for nonmodifiable child support, it could have easily provided an exception to NRS 125B.145." The lack of any such exception in the statute led the Court to conclude that the jurisdiction of the court never ends in a support matter, as long as the child is eligible to receive support.

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[135] Some states allow parties to waive a court's ability to modify a temporary or permanent alimony award. *Burns v. Burns*, 677 A.2d 971 (Conn. App. 1966); *Bair v. Bair*, 750 P.2d 994 (Kan. 1988); *Toni v. Toni*, 636 N.W.2d 396 (N.D. 2001); *Beasley v. Beasley*, 707 So. 2d 1107 (Ala. Civ. App. 1997); *Rockwell v. Rockwell*, 681 A.2d 1017 (Del. Supr. 1996); *Kilpatrick v. McLouth*, 392 So. 2d 985 (Fla. 5th DCA 1981); *Ashworth v. Busby*, 526 S.E.2d 570 (Ga. 2000); *Voigt v. Voigt*, 670 N.E.2d 1271 (Ind. 1996); *Staple v. Staple*, 616 N.W.2d 219 (Mich. App. 2000); *Moseley v. Mosier*, 279 S.C. 348, 306 S.E.2d 624 (S.C. 1983); *Nichols v. Nichols*, 469 N.W.2d 619 (Wis. 1991); *In re Marriage of Ousterman*, 46 Cal. App. 4th 1090, 54 Cal. Rptr.2d 403 (Ct. App. 1996).

[136] *Day* at 389.

[137] *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978) (The alimony provision of a postnuptial agreement violates NRS 123.080 and is void. Because the postnuptial agreement is "integrated" and not subject to severability, the entire agreement "must be annulled since a material part of it is illegal.").

[138] 126 Nev. ___, 222 P.3d 1031 (Adv. Opn. No. 3, Feb. 4, 2010).

[139] *Id*., citing *In re Marriage of Alter*, 171 Cal. App. 4th 718, 89 Cal. Rptr.3d 849, 852 (Ct. App. 2009).

While the agreement for non-modifiable child support in *Fernandez* was in a court order, as opposed to a non-merged contractual agreement, that fact does not appear to have made any difference in the ruling of the *Fernandez* Court.[140] As one commentator noted:

> Fernandez is another step in the long march toward maximizing "predictability, consistency, and adequacy," the intended goals of child support guidelines enacted throughout the country in 1987. At some point, the "angels-dancing-on-the-head-of-a-pin" technicalities of reciting magical non-merger language in a decree should and presumably will be found to be similarly superseded by public policy considerations.
>
> There is an attraction to the concept of holding parties to their agreements, no matter how ill-advised, no matter what changes later, and no matter the effects on third parties. In the context of child support, however – as in child custody – it is more appropriate for the result to be guided by the public policy goals of protecting those who have no part in making such agreements. The result in this case will do lots more good than harm, and was the right call.[141]

Under current law, it appears that, merger or no merger, child support orders will remain modifiable by divorce courts with jurisdiction over the children.

G. Choice of Forum

If a separation agreement is merged into a decree of divorce, post-divorce actions for contempt, enforcement, or modification should be filed in the Family Division. The power of courts to construe their orders and judgments is as old as courts are old.[142] Courts have the inherent authority to construe their prior orders, to administer their own affairs, and to perform their duties.[143]

If, however, the settlement agreement survives as an independent contract, or if there are assets omitted from the settlement agreement, choice of forum should be considered.

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[140] *Cf. Loo v. Deets*, _____ (affirming the district court's dismissal of a contract and tort action based on issue preclusion because the claims asserted implicated the issue of how the Loos' marital assets should be allocated, the identical issue that must have been litigated in the Loos' divorce proceeding as evidenced by the language in their marital settlement agreement, which was merged into the decree and constituted a final judgment on the merits).

[141] Legal Note Vol. 18 — Fernandez & Child Support (June 8, 2010), posted at http://www.willicklawgroup.com/vol-18-fernandez-child-support/.

[142] *Halverson v. Hardcastle*, 123 Nev. 245, 163 P.3d 428 (2007) (a trial court has the inherent authority to construe its orders and judgments, and to ensure they are obeyed); *Reed v. Reed*, 88 Nev. 329, 497 P.2d 896 (1972) (court has inherent power to enforce its orders and judgments); *In re Chartz*, 29 Nev. 110, 85 P. 352 (1907) ("The power of courts to punish for contempt and to maintain decency and dignity in their proceedings is inherent, and is as old as courts are old").

[143] *See Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 14 P.3d 1275 (2000).

"NRS 3.223 details that the family court division has original and exclusive jurisdiction over matters affecting the familial unit including divorce, custody, marriage contracts, community and separate property, child support, parental rights, guardianship, and adoption."[144] It provides:

> **NRS 3.223 Jurisdiction of family courts**
>
> 1. Except if the child involved is subject to the jurisdiction of an Indian tribe pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 et seq., in each judicial district in which it is established, the family court has original, exclusive jurisdiction in any proceeding:
>
> (a) Brought pursuant to title 5 of NRS or chapter 31A, 123, 125, 125A, 125B, 125C, 126, 127, 128, 129, 130, 159, 425 or 432B of NRS, except to the extent that a specific statute authorizes the use of any other judicial or administrative procedure to facilitate the collection of an obligation for support.
> (b) Brought pursuant to NRS 442.255 and 442.2555 to request the court to issue an order authorizing an abortion.
> (c) For judicial approval of the marriage of a minor.
> (d) Otherwise within the jurisdiction of the juvenile court.
> (e) To establish the date of birth, place of birth or parentage of a minor.
> (f) To change the name of a minor.
> (g) For a judicial declaration of the sanity of a minor.
> (h) To approve the withholding or withdrawal of life-sustaining procedures from a person as authorized by law.
> (i) Brought pursuant to NRS 433A.200 to 433A.330, inclusive, for an involuntary court-ordered admission to a mental health facility.
> (j) Brought pursuant to NRS 441A.510 to 441A.720, inclusive, for an involuntary court-ordered isolation or quarantine.
>
> 2. The family court, where established and, except as otherwise provided in paragraph (m) of subsection 1 of NRS 4.370, the justice court have concurrent jurisdiction over actions for the issuance of a temporary or extended order for protection against domestic violence.
>
> 3. The family court, where established, and the district court have concurrent jurisdiction over any action for damages brought pursuant to NRS 41.134 by a person who suffered injury as the proximate result of an act that constitutes domestic violence.

In *Landreth,* the Court held that jurisdiction was proper in the Family Court even though the parties were never married to one another and even though they had no children together. The fact of their meretricious relationship wherein they acted as a familial unit was sufficient to vest jurisdiction in the Family Court.

The *Landreth* Court further held that a district court judge sitting in family court has full power and authority to dispose of cases that fall outside the scope of NRS 3.223. District court judges sitting

[144] *Landreth v. Malik*, 127 Nev. ___, 251 P.3d 163 (2011).

in the family court division were held to have expanded authority to hear family court disputes by virtue of their specialized training: "Certainly, by requiring additional instruction for judges sitting in the family court division, the Legislature intended not to limit the power and authority of the district court judge, but rather to specify the qualification and training necessary for a district court judge to preside in the family court division."[145] It therefore concluded that "by enacting legislation granting concurrent and coextensive jurisdiction to district court judges, the Legislature intended to allow judges to hear cases in other districts, *but not to allow district court judges concurrent and coextensive jurisdiction over cases reserved to the family court.*"[146]

Given the potential issues in a separation agreement entered between spouses pursuant to Chapter 123 of NRS,[147] and the effect, if any, a decree of divorce or others orders from the Family Court may have had on that separation agreement, jurisdiction appears to only be proper in the Family Division.

Furthermore, Nevada adopted a "one family, one judge" rule in NRS 3.025 (3) which provides, in relevant part:

> 3.025. Chief judge in certain judicial districts: Selection; duties; assignment of certain cases to same department of family court.
>
> * * *
>
> 3. If a case involves a matter within the jurisdiction of the family court and:
>
> (a) The parties to the case are also the parties in any other pending case or were the parties in any other previously decided case assigned to a department of the family court in the judicial district; or
>
> (b) A child involved in the case is also involved in any other pending case or was involved in any other previously decided case assigned to a department of the family court in the judicial district, other than a case within the jurisdiction of the juvenile court pursuant to title 5 of NRS, the chief judge shall assign the case to the department of the family court to which the other case is presently assigned or, if the other case has been decided, to the department of the family court that decided the other case, unless a different assignment is required by another provision of NRS, a court rule or the Nevada Code of Judicial Conduct or the chief judge determines that a different assignment is necessary because of considerations related to the management of the caseload of the district judges within the judicial district. If a case described in this subsection is heard initially by a master, the recommendation, report or order of the master must be submitted to the district judge of the department of the family court to which the case has been assigned pursuant to this subsection for consideration and decision by that district judge.

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[145] *Id*.

[146] *Landreth* at 170.

[147] Specifically, NRS 123.080.

It appears that any ability to choose between the general and family division in filing a breach of contract action was eliminated in *Landreth*. Settlement agreements should be drafted with this in mind. For example, if the parties own real estate or a business that they wish to continue operating jointly, it may be advisable to simply refer to a separate and independent operating agreement or other business contract in the separation agreement so that any disputes arising from that separate business agreement would unquestionably be heard by a court of general jurisdiction.

H. Notable Cases

In *Jones v. Jones*, 86 Nev. 879, 478 P.2d 148 (1970), the parties entered into a separation agreement in New York, where they resided.[148]

The agreement provided, among other things, that if the husband failed to perform his obligation, the wife (Edith) could, at her election, sue for breach of the contract, or seek such other remedies in law or equity as might be available to her. The agreement also permitted either party to sue for absolute divorce in any competent jurisdiction, to require the agreement to be offered in evidence, and if accepted by the court incorporated by reference in the decree. It provided that notwithstanding incorporation of the agreement into the decree, it was not to be merged in the decree but was to survive and be enforceable as a contract binding upon the parties for all time. The agreement provided it was to be construed in accordance with the laws of the State of New York.

Shortly after execution of the agreement, the husband moved to Nevada, sought and received a default decree from Edith, and immediately remarried. The separation agreement was not offered in the action nor did the Nevada court acquire personal jurisdiction over Edith. Subsequently, Edith commenced an action in the Nevada court for breach of the New York separation agreement. The lower court reduced the husband's alimony payment.

The question on appeal was whether the lower court exceeded its jurisdiction in modifying the separation agreement. The court found that New York law, under which the agreement had to be construed, did not permit modification of a separation agreement when its enforcement as a private contract was sought and it was not merged in a divorce decree, so long as it was not impeached or cancelled in a manner permitted by law.[149]

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[148] At the time, New York did not recognize no-fault divorce, and such "divorces by contract" were fairly common.

[149] Citations omitted. *See also Portnoy v. Portnoy*, 81 Nev. 235, 401 P.2d 249 (1965) (where the Nevada Supreme Court held that "NRS 125.150(1) only governs the case of a domestic divorce in which the court has jurisdiction to award alimony. Here our sole concern is with the right of a divorced wife to later obtain support when she did not have an opportunity to litigate that right in her foreign divorce action. . . . It is now established beyond question that a valid ex parte divorce entered at the domicile of only one party to the marriage does not automatically end the wife's right to support.").

I. Trends

No clear trend in modern cases relating to separation agreements is apparent, other than perhaps that they are recognized, approved, and part of the modern context of resolution of divorce law. It is important for the practitioner to know when merger will mean "modifiable," and when merger is irrelevant. The law of separation agreements is one more valuable tool in the toolbox of a family law attorney.

V. CONCLUSIONS

Family law has proven to be far more dynamic in recent years than many believed it to be. Part of that evolution has been the law of marital agreements – premarital, postnuptial, and separation, which each have unique characteristics and limitations. The parameters of what is permissible, and what is required, has changed over the years, and could change significantly in the future, as a matter of both case law and proposed statutory amendments. Every family law practitioner should strive to be fully informed of what is available, what is prohibited, what is possible, and why, for the protection of the interests of the clients, and of counsel.

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