

PRE-NUPS & POST-NUPS

With Carol Ann Wilson, CFP

I. Classifications of “Marital Agreements”

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

- A. Pre-nups
- B. Post-nups
- C. Marital Settlement Agreements

The usual hallmarks of a legitimate premarital or post-nuptial agreement are that full and fair disclosure must be made, the parties must have an adequate opportunity to consult counsel, and the agreement cannot be unconscionable.

As to either premarital or post-nuptial agreements, the parties share a confidential relationship, and are generally charged with a duty to consider the interests of the other.

It could even be argued that the parties to a post-nuptial agreement have a *greater* fiduciary obligation to one another than do fiances, since they are already in a statutorily-defined “confidential relationship” by virtue of the marriage alone.

By contrast, a separation agreement is necessarily entered into when parties have separated, or are contemplating doing so, and so have acknowledged at least the potential of adverse interests. The parties may be held to *not* occupy a confidential relationship, and some cases permit a finding that the burden is on each party to discover the other party’s income and assets in preparation for divorce.

- D. Why Would Someone do a pre-nup or post-nup
 - 1. Alter the default rules for acquisition, and division set out by statute.
 - 2. Protecting the stronger spouse (typical)
 - 3. Protecting the weaker spouse (seldom)
 - 4. Protecting existing kids or an estate plan

II. What MUST be in Premarital Agreements

- A. Most places require writing & signature; few other formalities under the UPAA

1. But common sense: notarized signatures, attorney certifications
- B. Duty to make full disclosure of assets and debts prior to executing a premarital agreement (or adequate waiver or proof of adequate knowledge).
 1. Any mildly paranoid divorce lawyer will urge full disclosure.
- C. Generally, agreements will address pre-marital property, post-marital property, during marriage and upon divorce.
- D. Agreements will also address support obligations between the parties upon divorce
 1. Mixed opinions as to whether can alter support obligations/attorney's fees during marriage.
- E. Indicia of "voluntariness."
- F. "Adequate" opportunity to consult counsel
 1. CA requires a week.
 2. Cases – all over the place.

III. What CAN'T be in Premarital Agreements

- A. Child Custody
- B. Child Support (below, but maybe not above, what statutes require)
- C. Elimination of alimony (if recipient would become a public charge)
- D. Waiver of ERISA-based retirement survivorship benefits
- E. Essentially, those things on the flip side of what you MUST do make it invalid –
 - (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:
 - (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. [UPAA § 6.]

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

F. Voluntariness/coercion/duress

1. Timing
2. Threats to cancel the wedding

IV. What MAY be in Premarital Agreements

A. Choice of Law

B. States vary –

1. TX vs. NV community property
2. NV vs. CA on quasi-COMMUNITY PROPERTY

V. What MUST and CAN'T be in Post-nup Agreements

A. Trickier – no statutory law at all in most places

B. Best practice– if it was required for a pre-nup, include it in a post-nup

1. Formalities
2. Full disclosure
3. Indicia of “voluntariness.”
4. “Adequate” opportunity to consult counsel

C. But some twists:

1. Some places, may **not** address alimony/support obligations

D. Short version: As with premarital agreements, post-nuptial and separation agreements cannot be unconscionable, or obtained through fraud, misrepresentation, material non-disclosure, or duress.

VI. ATTACKING AGREEMENTS

A. In the premarital agreement cases, a presumption of fraud has been found where the agreement entered greatly disfavors one of the parties. Once a court determines that the agreement greatly favors one party and the presumption of fraud is established,

the burden shifts to the party attempting to enforce the agreement that to show the other party was not disadvantaged. Factors to be considered include:

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

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