IN BRIEF

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PRE- AND POSTNUPTIAL AGREEMENT TIPS AND TRAPS

Many couples wish to define their marital rights and responsibilities by entering into prenuptial or postnuptial agreements. The impetus for such an agreement is frequently a reaction to a bad dissolution of a prior marriage or a result of parental pressure. Some people simply wish to carefully define their financial relationship. Whatever the couple's motivation, approach these agreements with caution.

In Oregon, prenuptial agreements are authorized by ORS 108.700 to 108.740. Postnuptial agreements are not authorized by statute, and their status is considerably less certain than that of prenuptial agreements. Because of the high incidence of divorce, it is quite possible that a prenuptial agreement you draft will be "put to the test."

PRENUPTIAL AGREEMENTS

Understand the Law. Prenuptial agreements can be very comprehensive in scope. Typically, they address both what happens in the event of a divorce and what happens in the event of death. They can also examine any day-to-day financial arrangements the parties may wish to include. The competent drafter must have a good grasp of both estate planning and domestic relations law. If you are inexperienced in one of these areas, consult with another lawyer who can provide the needed expertise.

Represent Only One Party. Represent only one party to a prenuptial agreement, and insist that the other party have independent counsel. Even if the parties say that they agree about every term of the agreement, their interests are adverse, and it is not permissible for one attorney to represent both parties. Independent representation for each party will increase the likelihood that the agreement will be upheld and will provide an often-helpful second set of eyes during the drafting process. It is good practice, although not required, to have both attorneys sign a certificate stating that they have fully explained the agreement to their clients and that they believe that the clients understand the terms and how their rights are being altered. There is no required format for such a certificate. You can find an example in the OSB CLE *Family Law*, Volume II (Dissolution Practice), Chapter 14: Formal Agreements.

Time Carefully. Although a prenuptial agreement in Oregon could be signed just before theorgan starts to play the wedding march, this timing makes the parties vulnerable to the contention that the agreement was signed under duress. It is better to have both parties execute the agreement a reasonable period of time before the ceremony. Although Oregon law does not define a "reasonable period of time," California law requires that prenuptials be signed at least a week before the wedding ceremony.

Draft Carefully. During the drafting process, advise clients that they are opting out of the complex bundle of marital rights that has developed over centuries and are trying to create a customized bundle that applies only to their situa-

tion. Take the time to describe exactly what will happen to complex assets, such as retirement plans, stock options, intellectual property, and business assets.

Consider Reasonableness of the Agreement. Although a reasonable agreement that provides for the needs of both spouses may produce a more satisfying marital relationship than a one-sided agreement, Oregon does not require that prenuptials be reasonable. A prenuptial agreement is very difficult to set aside and is likely to be upheld under the Oregon statute.

ORS 108.725 sets forth the two grounds under which a premarital agreement is not enforceable. The first ground is that the party did not execute the agreement voluntarily. The second ground is that the agreement was unconscionable when it was executed **and**, before execution, one party (1) was not provided fair and reasonable disclosure of the other party's property or financial obligations, (2) did not waive the right to disclosure, and (3) did not have or reasonably could not have had adequate knowledge of the other party's property or financial obligations. Clients challenging a prenuptial agreement will find this an extraordinarily difficult standard to meet. Absent unusual circumstances, courts are quite likely to enforce prenuptial agreements. This message is particularly important for the "have not" spouse who is frequently less sophisticated than the "have" spouse, uncomfortable with the prenuptial negotiation, and anxious to get married and put it all behind.

Although full disclosure of each party's property and financial obligation is not required by the statute, it eliminates any attack based on unconscionability, leaving only lack of voluntary execution as a ground for setting aside the agreement. If the parties choose the full disclosure approach, lawyers customarily attach exhibits to the prenuptial agreement, showing each client's separate property and any property they hold jointly or intend to make joint following the marriage.

Keep File Notes and Letters to Clients. Take reasonably detailed notes about your conversations with clients and keep those notes in your files. This is particularly wise when a client insists on doing something that you think may not work out well or that the client may later regret. Advise clients in writing when they are acting contrary to your advice. If the situation is crucial, consider having the client sign off on the letter acknowledging your advice.

Retitle the Property. A prenuptial agreement may be used to define the legal status of untitled property. For instance, a prenuptial (or postnuptial) agreement could state that all the parties' household furniture and furnishings are joint property, regardless of who brought such property to the marriage or paid for it. This statement would effectively make such property joint. A prenuptial agreement, however, cannot actually change the title to property. Although it is possible to state in a prenuptial agreement that the parties' principal residence is joint property, this may create an ambiguous situation unless the title to the residence is also transferred at the same time. Creating joint assets can be tricky, particularly when one person is buying an interest in an asset, such as a residence already owned by one of the clients. Use available resources, such as the OSB CLE on Family Law, as a starting point.

Advise Clients to Keep Records. A well-drafted prenuptial agreement is only half the battle. The other half consists of the client's keeping careful records, reviewing the agreement from time to time, and doing his or her best to live within its terms. Even the best-drafted prenuptial agreement will not be helpful if the parties have kept poor records or acted inconsistently with the document, such as placing assets in joint names without intending to make the assets joint for purposes of the agreement.

Modify in Writing. Prenuptial agreements can be modified or terminated, but only in writing. Tearing them up, throwing them in the fireplace, or otherwise destroying them will not alter the agreement.

POSTNUPTIAL AGREEMENTS

Although many of the comments above about prenuptial agreements also apply to postnuptial agreements, the following additional considerations come into play.

Include Consideration. A prenuptial agreement requires no consideration to be enforceable, including any modification or revocation of the agreement. Postnuptial agreements are governed by contract law, which requires consideration to enter into and modify an agreement. The mutual alteration of marital rights may provide adequate consideration, but it is safer to require additional monetary consideration, no matter how minimal.

Clarify Application. Postnuptial agreements do not enjoy the statutory authority of prenuptial

agreements. Although carefully drafted and reasonable postnuptial agreements may be enforceable, they are considerably less certain than prenuptial agreements. The recent case of *In re Marriage of Grossman*, 338 Or 99, 106 P3d 618 (2005), had a chilling effect on postnuptial agreements, although the facts of that case are unusual and may not have broad application. In *Grossman*, the parties executed a postnuptial agreement while contemplating a divorce. After executing the agreement, the parties reconciled and continued to live together for some years. They later divorced, and the validity of the agreement came into question. The Oregon Supreme Court ruled that the agreement was no longer effective, possibly because it would have resulted in an extremely uneven division of property and it was not clear whether the parties intended the agreement to apply to anything other than the divorce impending at the time they executed the agreement.

To avoid the result in *Grossman*, practitioners should distinguish marital settlement agreements from postnuptial agreements. The former are generally executed in contemplation of a divorce; the latter are not. A postnuptial agreement should clearly provide that it applies to any future divorce, if that is what the parties intend. If it is not their intention, the parties should enter into a marital settlement agreement, which should provide that it applies only to their impending divorce.

Advise Clients About Lack of Certainty. If the parties want to be certain of enforceability, they may need to get divorced, sign a prenuptial agreement, and then remarry. Obviously, this extreme solution will not appeal to most clients. However, to protect yourself, advise clients in writing that a postnuptial agreement may not hold up.

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