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Marriage, Trust and Postnuptial Agreements

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Postnuptial agreements, marital agreements authorized by Domestic Relations Law (DRL) §236(B)(3), can provide solutions to complicated issues that may arise during the marriage. Consequently, there has been a reported increase in the number of postnuptial agreements being drafted by practitioners. While some spouses feel awkward about asking their spouse to sign a postnuptial agreement, these agreements do not necessarily predict a future divorce. In fact, a postnuptial agreement can save a marriage.

Despite their popularity, there is a surprising lack of legal precedent regarding the permissible content and the appropriate level of disclosure required for a postnuptial agreement to be enforceable. Of even more concern is the inconsistent precedent between the First and Second Departments with regard to the time frame to challenge a postnuptial agreement. Accordingly, practitioners must understand the guidelines, restrictions and limitations of these agreements before recommending them to their clients and must be cognizant of the fiduciary relationship between spouses, which causes stricter judicial review to be imposed on postnuptial agreements than other marital agreements.

A postnuptial agreement is entered into by a married couple who has no plans to separate or divorce. Because these agreements are entered into during marriage, unlike prenuptial agreements which are entered into by couples prior to marriage, they allow couples to confront, address and resolve issues that they are currently facing, not issues they anticipate may happen. The overall goal of a postnuptial agreement is to stop potential conflicts and promote stronger relationships. In some instances, they are triggered when conflicts arise in the marriage and couples, rather than seeking marital counseling or divorce, are able to reach a postnuptial agreement.

Commonly, not unlike prenuptial agreements, postnuptial agreements are used to alter

property rights that arise by way of marriage, thereby superseding rights acquired pursuant to the DRL or the Estates Powers & Trusts Law (EPTL). However, a postnuptial agreement can also be used to rectify an omission contained in a prenuptial agreement or modify a prenuptial agreement by addressing unanticipated issues. Postnuptial agreements are private documents, and there is no statutory requirement to file or register them with the court.

The following are examples where a postnuptial agreement could be a viable solution to a potential marital dispute or unanticipated issue: (1) Jill, and her husband, Bill, both practicing physicians, have agreed that Jill is going to care, full-time, for their son. Jill wants to ensure that the decision for her to give up her career is equally shared by the parties in the event of a divorce; (2) Charlotte's children from a prior marriage are concerned about their rights to inherit in light of her recent marriage to Scott; (3) Danielle, a stay-at-home mother, and her siblings inherited an equal interest in a closely-held company which her siblings operate. Danielle's siblings are insistent that she preserve her interest in the company so that in the event she and her husband ever divorce the company will not be adversely affected; (4) Charles, four years after he and his wife got married, became an equity partner in a law firm. While Charles loves his wife, he would like to protect his partnership interest and his partners from unnecessary exposure in the event of a divorce.

General Requirements

For a postnuptial agreement to be valid and enforceable it must provide adequate consideration, be properly executed and follow the ordinary principles of contracts. In the drafting of documents, close attention must be paid to the fiduciary relationship existing between the parties. Notwithstanding the cost, each party should be represented by independent counsel during the negotiation of, and execution of, the postnuptial agreement. Even if each spouse will ultimately be represented by individual counsel, practitioners should never give advice to spouses simultaneously. The mere fact that each party was represented by independent counsel can make a postnuptial agreement impervious to challenge.¹ However, the failure to be represented by counsel does not automatically establish overreaching, and is only one factor a court will consider when determining the validity of a postnuptial agreement.²

Consideration Is Required. Because there is a fiduciary relationship between husband and wife, postnuptial agreements require consideration to be binding. Consideration can be given in a myriad of ways. Courts generally look at the totality of the circumstances when determining whether sufficient consideration was given. The act of trading various assets and liabilities for one another can be sufficient consideration. A promise to do something in exchange for an asset can be sufficient consideration. However, a promise to remain married - if, for example, there is conflict that could disrupt the marriage - can be, but is not always, sufficient consideration. See *Whitmore v. Whitmore*, 8 AD3d 371, 372, 778 NYS2d 73, 75 (2d Dept. 2004).

In *Whitmore*, where husband did not relinquish any rights to wife's property, but wife relinquished all of her rights to husband's property, wife's agreement to continue to remain married to husband did not provide adequate consideration. Yet, in *Zagari v. Zagari*, 191 Misc.2d 733, 746 NYS2d 235 (Sup. Ct. Monroe Co. 2002), where the postnuptial agreement provided that wife waive and release all of her "marital rights" without a similar waiver by husband, the fact that the agreement specifically recited that husband's consideration and wife's consideration given for the postnuptial agreement was the "continuation of marriage" the agreement was, as a matter of law, enforceable.

Execution Requirements. A postnuptial agreement must be executed in accordance with DRL §236(B)(3). Pursuant to this provision, "an agreement by the parties, made . . . during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties and acknowledged." A bright-line rule requires postnuptial agreements to be "acknowledged or proven in the manner required [for] a deed to be recorded." *Matisoff v. Dobi*, 90 NY2d 127, 128, 681 N.E.2d 376, 377, 659 NYS2d 209, 210 (1997). Moreover, postnuptial agreements must be subscribed and acknowledged by the parties simultaneously for it to be valid.³

The Appellate Division, First Department, has specifically held that an acknowledgment signed after the commencement of a divorce action will not validate a defective agreement. *Anonymous v. Anonymous*, 253 AD2d 696, 677 NYS2d 573 (1st Dept. 1998). However, if a defect is cured prior to the commencement of a divorce agreement, the postnuptial agreement will be valid and enforceable. For example in *Arizin v. Covello*, 175 Misc.2d 453, 669 NYS2d 189 (Sup. Ct. N.Y. Co. 1998), the parties entered into a prenuptial agreement prior to their marriage which was not properly acknowledged. During the parties' marriage, they reaffirmed the terms of the agreement in a postnuptial agreement. This agreement was subscribed and acknowledged by the parties simultaneously and was therefore, unlike its predecessor agreement, valid and enforceable. The acknowledgment requirement cannot be cured through testimony.⁴

Disclosure Requirements. Practitioners should be guided by both policy and the spirit of DRL §236 when seeking to provide disclosure in connection with the negotiation of a postnuptial agreement. DRL §236(B)(3) specifically requires full and complete disclosure. Because there is no statutory definition as to what constitutes adequate disclosure, the issue of disclosure is very subjective and raises the question, "how much is enough?"

The fiduciary relationship that exists between spouses places couples in a confidential relationship which underscores the need for a husband and wife to make adequate disclosure in order for a postnuptial agreement to be enforceable.⁵ In order to protect both the client and yourself against potential malpractice claims, each party should disclose their individually and jointly held assets and liabilities in the form of a sworn statement and exchange at least three years of tax returns. If the terms of a postnuptial agreement are premised upon specific pieces of property and the postnuptial agreement indicates that the property is identified on a schedule attached to the agreement, the schedule must actually be attached for the agreement to be enforceable.⁶ You should also

be as specific as possible when identifying the property in the body of the postnuptial agreement.

Challenge to Agreement

Arguments made to challenge the validity of a postnuptial agreement are not frequently won since courts presume that postnuptial agreements reflect the intention of the parties and the arguments made by the motioning party typically lack any relevance. Accordingly, it is extremely important that the contents of the postnuptial agreement are satisfactory to the client at the time it is executed. It is important to note that despite the high burden placed on postnuptial agreements, "[j]udicial review [will be] exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences" *Christian v. Christian*, 42 NY2d 63, 71, 365 N.E.2d 849, 855, 396 NYS2d 817, 823.⁷

It is presumed that due to the nature of the relationship existing between husband and wife, the agreement reached is fair and reasonable. To set aside agreements on the grounds of coercion, duress, undue influence or overreaching, a party must demonstrate that he or she is unable to exercise his or her own free will or is unable to act in such a manner as to further his or her own interests. A threat to end a marriage by one spouse if the other spouse does not enter a postnuptial agreement does not meet the burden for duress or coercion.⁸ However, evidence of duress exerted by one spouse over another spouse throughout the entirety of the marriage, as well as at the time the postnuptial agreement was executed, can lead to a rescission of the postnuptial agreement.⁹

With the exception of spousal support provisions made in a postnuptial agreement, the terms of the postnuptial agreement must be fair and equitable at the time they are made. Spousal support provisions must be fair and reasonable upon execution and not unconscionable at the time of enforcement. See DRL §236(B)(3). See also, *Valente v. Valente*, 269 AD2d 389, 703 NYS2d 206 (2d Dept. 2000).¹⁰

Time Frame to Challenge a Postnuptial Agreement. DRL §250 amended the law relating to the statute of limitations for marital agreements, including postnuptial agreements. DRL §250 provides that the statute of limitations for an action or proceeding arising from a postnuptial agreement is three years. The statute further provides that the statute of limitations is tolled until a matrimonial action is commenced or one of the parties to the agreement dies. DRL §250 is only applicable to postnuptial agreements executed on or after July 3, 2007.¹¹

If a challenge is made to a postnuptial agreement that was executed prior to July 3, 2007, the applicable statute of limitations is six years. However, the tolling of the statute of limitations is treated differently by the First and Second Departments. See CPLR §213. The First Department tolls the statute of limitations, until an action for divorce is commenced or one of the parties dies.¹² In the Second Department, a proceeding arising from a postnuptial agreement will be time barred if it is not brought within six years of the

date of execution. By not tolling the statute, spouses may be compelled to litigate in order to escape the running of the statute of limitations.

DRL §250 is also applicable to invalidate or enforce a postnuptial agreement in estate or non-marital litigation. If a claim is made to challenge that part of the postnuptial agreement that addresses waiver of estate rights, and a matrimonial action was never brought during the lifetime of the deceased spouse, the statute of limitations is tolled until the decedent's death.

Estate Planning

Postnuptial agreements can be an effective estate planning tool. Matrimonial practitioners should consult with competent trusts and estates counsel before including estate planning provisions in postnuptial agreements. For example, an aging couple may use a postnuptial agreement in order to divide property in various proportions to take advantage of marital deductions. Parties can, by way of a postnuptial agreement, waive the elective share,¹³ the intestate share¹⁴ or their rights to a specific piece of property. A waiver of the elective share may not waive the exemption for the benefit of family under New York law. See EPTL §5-3.1. A waiver of the exemption for benefit of family must also be specifically itemized in the postnuptial agreement for it to be enforceable and binding.¹⁵

Drafting Recommendations

A postnuptial agreement should include the following recitals and provisions.

- That the parties are married and intend to stay married.
- That the postnuptial agreement is not being entered into under threat of divorce.
- That both parties have been represented by independent counsel.
- Despite the fact that the parties intend to stay married, the filing of an action to dissolve the marriage by either party will not be deemed an abandonment of the postnuptial agreement.
- The purposes of the agreement, including but not limited to, declaring property separate or marital, including income; and fixing respective rights and interests with regard to separate and marital property.
- Provisions identifying the allocation of family debt and support.
- A waiver of interest in specific property.
- A waiver of the elective share or intestate share.

When conducting the initial consultation with a client, practitioners should address whether he and his spouse intend to continue to reside in New York state subsequent to the execution of the agreement or whether they intend to move to another state. If there is a chance the parties may relocate, it is important to consult with an attorney practicing in the state in which the parties may relocate regarding the enforceability of the postnuptial agreement.

Another drafting consideration is to explain, in the body of the postnuptial agreement, the reasons why certain rights are being relinquished or altered. The postnuptial agreement itself will provide the court, in the event a challenge is made, with an explanation as to the nature and purpose of the agreement. Alternatively, such an explanation can be provided in the form of a side letter.

Conclusion

Postnuptial agreements are flexible documents that provide couples with an alternative to marital counseling or even divorce. As demonstrated herein, it is extremely important that these documents are carefully drafted and that close attention is paid to the fiduciary relationship existing between the parties.

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Endnotes:

1. *Beutel v. Beutel*, 55 NY2d 957, 434 N.E.2d 249, 449 NYS2d 180 (1982); *Cron v. Cron*, 8 AD2d 3d 186, 780 NYS2d 121 (1st Dept. 2004).
2. *Rodriguez v. Rodriguez*, 11 AD3d 768, 783 NYS2d 102 (3d Dept. 2004); *Forsberg v. Forsberg*, 219 AD2d 615, 631 NYS2d 709 (2d Dept. 1995); *Brassey v. Brassey*, 154 AD2d 293, 546 NYS2d 370 (1st Dept. 1989).
3. *Leighton v. Leighton*, 46 AD3d 264, 847 NYS2d 64 (1st Dept. 2007); *Kerner-Puritz v. Puritz*, NYLJ, Sept. 25, 2006, p. 22, col. 1 (Sup. Ct. N.Y. Co.); *D'Elia v. D'Elia*, 14 AD3d 477, 788 NYS2d 156 (2d Dept. 2005).
4. See *Kerner-Puritz v. Puritz*, supra; *Matter of McGlone*, 284 NY 527, 32 N.E.2d 539 (1940) (the Court of Appeals validated wife's right of election on the ground that the writing was not acknowledged).
5. See *Dayton v. Dayton*, 175 AD2d 427, 572 NYS2d 487 (3d Dept. 1991); *Urfirer v. Cornfeld*, 17 AD3d 129, 793 NYS2d 25 (1st Dept. 2005); *Chalos v. Chalos*, 128 AD2d 498, 499, 512 NYS2d 426 (2d Dept. 1987) (failure by husband to apprise wife of the value of his holdings, of which the wife was familiar, did not constitute fraud sufficient to invalidate the agreement).

6. *Darius v. Darius*, 245 AD2d 663, 665 NYS2d 447 (3d Dept. 1997).
7. *Christian v. Christian*, 42 NY2d 63, 365 N.E.2d 849, 396 NYS2d 817 (1977); *O'Malley v. O'Malley*, 41 AD3d 449, 836 NYS2d 706 (2d Dept. 2007); *Barchella v. Barchella*, NYLJ, Oct. 15, 2007, p. 34, col. 5 (2d Dept.).
8. *VR v. MR*, 10 Misc. 3d 1077(A), 814 NYS2d 893, 2006 WL 228633 (Sup. Ct. Suffolk Co.).
9. *Hosseiniyar v. Alimehri*, NYLJ, May 25, 2008, p. 36, col. 2 (2d Dept.).
10. Interestingly, in New Jersey four standards must be met for a postnuptial agreement to be enforceable. They include: (i) full disclosure; (ii) independent representation by each party; (iii) absence of coercion or duress; and (iv) the terms must be fair and equitable. Postnuptial agreements must be fair and equitable when being enforced as well as when they are negotiated and executed. Because a change in circumstances, subsequent to the execution of the postnuptial agreement, can render the postnuptial agreement unconscionable in the future, it makes it difficult for attorneys to recommend postnuptial agreements to their clients. *Pacelli v. Pacelli*, 319 N.J.Super. 185, 725 A.2d 56 (App. Div. 1999).
11. *Brody v. Brody*, NYLJ, May 13, 1998, p. 28, col. 3 (Sup. Ct. Nassau Co.).
12. *Bloomfield v. Bloomfield*, 97 NY2d 188, 764 N.E.2d 950, 738 NYS2d 650 (2001).
13. EPTL §5-1.1(A).
14. EPTL §4-1.1.
15. *Matter of Dito*, 218 AD2d 737, 630 NYS2d 575 (2d Dept. 1995).