Family Law Newsletter
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SCHILLER DUCANTO & FLECK LLP

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Family Law. Unparalleled.

The Past, Present and Future of Pre-nups and Post-nups

In light of the high conflict nature of many divorces, and the cost and time associated with divorce litigation, many couples attempt to pre-plan for the possibility of a later divorce by executing a pre-marital agreement. A pre-marital agreement is a contract entered into between a couple in contemplation of marriage. The contract attempts to resolve divorce-related disputes to minimize conflict, cost and time in the event of divorce. While pre-marital agreements can create stress during the planning and negotiating phase prior to a marriage, they afford both parties future protection, security and predictability in terms of the outcome – provided that they are properly prepared. Indeed, these agreements are encouraged as a matter of public policy since they serve to reduce litigation.

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Pre-marital agreements entered into before 1990 are governed by case law or legal precedent (referred to as "common law"). As explained below, for a pre-marital agreement entered into before 1990 to be valid, there were a number of requirements.

First, the contract was required to be in writing, and oral agreements were not enforceable. Note, there also was no requirement that each party have an attorney. Second, the parties must have had capacity to enter into the contract. That simply means they must have been competent and of legal age. Third, fraud, duress, or coercion could not be part of the process. Duress or coercion basically means taking advantage of another person to the point where they are deprived of their own free will — a difficult burden to sustain.

> **"The contract attempts to resolve divorce-related disputes to minimize conflict, cost and time in the event of divorce."**

Fourth, there must have been a disclosure of assets prior to execution of the agreement, because of the confidential and fiduciary relationship which attaches to the parties once they become engaged. The disclosure did not have to be a detailed analysis of one's holdings, but must have been sufficient to form a reasonable and general knowledge of the value of the other's property. Finally, the agreement was required to be fair and reasonable. This means that it must have provided both parties with an equitable financial settlement in lieu of a waiver of their property or support rights.

Not until 1990 did the Illinois legislature enact a statute outlining standards for enforcement of pre-marital agreements. Accordingly, pre-marital agreements executed after 1990 are now governed by the Illinois Uniform Premarital Agreement Act ("Act"). The Act makes enforcement of pre-marital agreements easier than under the prior law. This easier standard for enforcement reflects the shift towards allowing parties to contract about any divorce-related matters that do not serve to violate public policy. One such area that cannot be contracted are child-related matters, as the courts always retain jurisdiction to assess children's best interests. Overall, the statute serves to place an emphasis on enforcing pre-marital agreements since they promote public policy. Only in extreme, rare and limited circumstances will an agreement entered into after January 1, 1990 be invalidated, as challenges to the validity of pre-marital agreements are generally unsuccessful.

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SDF Congratulates Meighan A. Harmon

Schiller DuCanto & Fleck congratulates Senior Partner Meighan A. Harmon on being listed as a one of the 10 Best Female Attorneys in Illinois by the American Institute of Family Law Attorneys.

Planning for What Comes Next: Estate Planning Instruments and Divorce

A divorce settlement addresses each party's rights and responsibilities related to issues that preceded the divorce (*e.g.*, the accumulation of property and the parties' children), but also each party's rights and responsibilities after the divorce. For example, even a relatively simple Marital Settlement Agreement may generally contain waivers of an ex-spouse's right to make claims to the other party's estate upon death, including rights to property and to act as a trustee or executor of the estate. In their most basic form, these waivers avoid potential conflict and costly litigation between an ex-spouse and representatives of a decedent's estate.

There are situations, however, where divorce does not sever all ties upon death and where estate planning provisions must be made for an ex-spouse or the child of divorcing spouses as part of a divorce settlement.

Special Needs Trusts:

For example, where parties to a divorce have a child with a disability or illness requiring long-term expenses and care (often beyond the age of majority), it is common to establish a special needs trust funded by the parties and used to pay a child's expenses specified in the trust instrument (*e.g.*, medical and educational expenses). If there are insufficient assets in the parties' marital estate at the time of divorce to fully fund the trust, then the parties may agree to contribute to the trust after the divorce to cover the child's expenses. Ordinarily, parents cannot be ordered to provide financial support to a child beyond college. However, where a child is found to be disabled, a court can order parties to contribute indefinitely. In the case of a special needs trust, the trust will state both permissible uses of the income and corpus of the trust, as well as name the trustee(s) of the trust. The interests of divorcing spouses are sometimes not aligned concerning their children, so it is not uncommon for only one spouse (or a third-party trustee) to be named as trustee of a special needs trust.

The Marital Settlement Agreement must reference and incorporate the terms of the trust. A special needs trust should be drafted by an attorney who specializes in estate planning, and divorce counsel for both parties should be part of the process. Terms concerning the marital estate's contribution to the trust, each party's respective contributions to the trust after the divorce, and the parties' ongoing financial obligations to the child should be part of the divorce settlement.

Other Estate Planning Instruments:

Ex-spouses occasionally name one another as trustees or beneficiaries of a trust (or a will) after a divorce. This is often done to allow a party use of his or her assets during his or her lifetime, but to ensure that the remainder of (or a portion of) his or her estate passes to the ex-spouse for the benefit of the children. In this instance, it is imperative that the Marital Settlement Agreement addresses the ex-spouse's entitlement under the estate planning instrument after the divorce, and that the terms of the instrument (and any modification or amendment) supersede any waivers contained in the Marital Settlement Agreement. It is also imperative that the divorcing spouses and their divorce counsel work with separate estate counsel for each party to craft language to avoid ambiguity and possible future litigation.

In addition, a Marital Settlement Agreement should also address any estate planning instruments which existed during the marriage, including those that may hold limited partnerships or other entities to be allocated in a divorce proceeding. For example, if a business or partnership is held in a trust of which both spouses are beneficiaries, the value and disposition of both the asset and the trust must be addressed in the Marital Settlement Agreement; in many cases, the trust instrument must be modified to reflect the ultimate disposition of the asset. Further complexity arises when both parties are beneficiaries to an irrevocable instrument which holds a business or partnership.

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By definition, an irrevocable instrument cannot be modified or amended without the agreement of the beneficiaries, so the modification of the instrument may become part of the divorce negotiation. In this instance, it is imperative that both parties and their separate divorce counsel also work with estate counsel for each party in reviewing and redrafting documents as required.

In sum, estate planning is often part of a divorce settlement, and negotiation of these terms can be as integral to the divorce settlement as allocation of parental responsibilities, support issues, or division of a marital estate. It is important for each party and his or her divorce counsel to work closely with estate planning counsel to effectuate a settlement which avoids ambiguity and litigation, even after death.

The Past, Present and Future of Pre-nups and Post-nups *(Continued from cover)*

The Act has some similar, but also some different, requirements for the enforceability of pre-marital agreements from earlier common law. First, oral agreements are still not allowed; thus, the contract must still be in writing. Further, a party can only invalidate a pre-marital agreement if they prove: (i) he or she did not execute the contract voluntarily; or (ii) the agreement was unconscionable when signed and there was no financial disclosure or the party did not waive his right to that disclosure. The former standard as to voluntary execution remains the same, but the latter standard is different.

No longer is the fairness and reasonableness of an agreement a requirement as it was under the common law. Now, an agreement will only be invalidated based upon its terms if it is found to be "unconscionable." That means it represents a bargain no reasonable person, in his or her right mind, would ever accept. The unconscionability standard examines the circumstances surrounding the execution of the agreement and the economic outcome of the agreement for each party. The standard for proving unconscionability is very difficult. However, even if an agreement is found unconscionable, a court can still enforce the contract if there were adequate financial disclosures or waivers of those disclosures.

Pre-marital agreements in many respects are like insurance policies for marriage. They represent an investment designed to save money in the future upon the occurrence of the life-altering event of divorce. They require proper planning, expertise in terms of drafting and an understanding of your goals and the law. When done properly, they represent a useful divorce- planning tool that should be thoughtfully considered before getting married.

The Do's and Don'ts of Premarital Agreements

For many newlyweds, the idea of a premarital agreement is foreign, particularly when the parties are young, neither has previously been married, neither is coming into the marriage with any significant income or assets, and the family of neither party is particularly wealthy. For some couples, however, a premarital agreement is a prerequisite to getting married, particularly in situations where this is not the first marriage, the parties are older and have had an opportunity to earn significant income and/or acquire substantial assets, or one of the parties comes from a wealthy family. Inevitably, the topic of a premarital agreement arises when most newly-engaged couples would rather be enjoying this special time in their lives than addressing these serious and often complex financial decisions.

In summary, most premarital agreements create new definitions and create new standards to apply to issues arising upon dissolution, as opposed to those set forth in the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"), the controlling statute. For example, many premarital agreements redefine the concepts of "marital" and "non-marital" property. They also can create new standards or limitations for spousal support and can require provisions different from those set forth in the Illinois Probate Act regarding potential inheritances in the event the parties are still married when one dies.

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Since the enactment of the Uniform Premarital Agreement Act ("the Act") in 1990, relatively few appellate cases have construed these agreements. In those cases that have applied and analyzed the Act, however, premarital agreements have been found to be unenforceable where: (i) they were not executed voluntarily; (ii) they were unconscionable when executed; and (iii) the elimination or modification of spousal support results in undue hardship in light of circumstances not reasonably foreseeable at the time of the execution of the agreement. Therefore, if a premarital agreement is a prerequisite to getting married, doing all you can to ensure that your agreement will be upheld against a future challenge should be your guiding priority.

Accordingly, the following are some helpful tips to consider with respect to a premarital agreement:

DO's

DO seek the advice of an attorney so you can understand the nuances of a premarital agreement before you talk to your future spouse about it.

DO think carefully about your goals and the objectives that you hope to accomplish with the premarital agreement.

DO discuss the agreement with your future spouse well in advance of the wedding, and do so by months and not weeks.

DO make sure you understand what, in the event of a divorce, your future spouse will be entitled to receive without a premarital agreement.

DO take into consideration how your future spouse may react to any proposed variations from what he or she would otherwise be entitled to under the statute.

DO understand the importance of preparing and providing your future spouse with a full and complete disclosure of all of your income and assets.

DO know that a premarital agreement cannot address financial or custody issues regarding future children.

DO consider how you would like you and your spouse to pay for your reasonable living expenses during the marriage.

DO address how you and your future spouse will title and pay for assets that you acquire after the marriage.

DO consider whether or not you and your future spouse will have a joint account and if so, how that will be funded.

DO make sure you understand what, in the event of death, your future spouse would be entitled to under the Probate Act.

DO think about what, in the event of death, you want to leave for your future spouse versus your children from a prior marriage and/or your family members.

DO consider whether, in the event of death, what you would like your future spouse to receive from your estate assuming you are still married and have children together.

DO encourage your future spouse to be represented by counsel.

DO seek the advice of an attorney as soon as possible if you are on the receiving end of a proposed premarital agreement.

DON'Ts

DON'T represent yourself in premarital agreement negotiations.

DON'T propose an agreement that is unconscionable.

DON'T feel forced to enter into an agreement that you think is unconscionable.

DON'T misrepresent or fail to disclose any of your income or assets.

DON'T try to address any issues concerning custody or child support in the agreement.

DON'T wait until right before the wedding to discuss a premarital agreement with your soon-to-be spouse.

DON'T threaten your soon-to-be spouse that you are not going through with the wedding unless he or she signs the premarital agreement.

DON'T discourage your future spouse from obtaining his or her own legal counsel.

When thoughtfully negotiated and wisely drafted, a premarital agreement should ultimately satisfy both parties. However, if this is not possible to achieve, other alternatives may be available to provide adequate protection of your premarital assets. While these protections likely do not assure the same security and predictability that can be accomplished through a premarital agreement, these options should nevertheless be explored with your attorney prior to cancelling the wedding.

IN THE NEWS

Michele M. Jochner was selected to serve on the Chicago Bar Association Board of Managers for a 2-year term. Michele also presented "Special Considerations for Interlocutory Review" at Illinois Appellate Practice: What Every Lawyer Should Know hosted by the ISBA on April 29, 2016.

Joshua M. Jackson was elected to the Board of Directors of the Lake Forest Symphony.

Karen Pinkert-Lieb spoke at the Annual Estate Planning Course by Illinois Institute of Continuing Legal Education. The topic was Family Law Issues for Estate Planners.

Jason N. Sposeep will be speaking at "Basic Interdisciplinary Collaborative Practice Training" hosted by the Collaborative Law Institute of Illinois on September 17, 2016. Jason also presented "The Interface Between the 2016 Changes to the Illinois Marriage and Dissolution of Marriage Act and Collaborative" at the Chicago Bar Association on May 20, 2016.

Michele M. Jochner and Jason N. Sposeep spoke at "Elder Law Issues and Divorce" at the Illinois State Bar Association Elder Law Bootcamp on April 22, 2016.

Carlton R. Marcyan will begin a two-year term at the Lake Forest-Lake Bluff Rotary Club as the Club's President-Elect from June 2016-June 2017 then fulfill a yearlong term as President from June 2017-June 2018.

Jennifer Dillon Kotz is now on the Advisory Board for devonstowe, a recruitment and leadership development company.

Attorneys Arnold Stein, Anita Ventrelli, Thomas Villanti, Ben Mackoff, Carl Marcyan, Tim Daw, Andrea Muchin and Claire McKenzie are pictured with the the Honorary Joseph DuCanto Way sign that is now at the northeast corner of Michigan Blvd. and Chicago Ave. in honor of Schiller DuCanto & Fleck's late Founding Partner Joseph N. DuCanto.

Michele M. Jochner, Editor / Burton S. Hochberg, Co-Editor / Brittany Heitz Goodlett, Co-Editor / Justine E. Long, Layout/Design

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