Chicago Daily Law Bulletin®

Volume 162, No. 229 Serving Chicago's legal community for 161 years

Consider pre-nup in engagement season

Brace yourselves: Engagement season is coming. Recent data shows that the winter holiday season is the most popular time of year for wedding engagements.

Given the readily available statistics showing that more than 50 percent of marriages end in divorce, some newly engaged spouses this holiday season would do well to add a line item to the wedding planning punch list: venue, florist, band, pre-nup, photographer, officiant and transportation.

According to the websites WeddingWire and WedInsights, approximately 40 percent of all wedding engagements take place between late November and mid-February. More specifically, more than 20 percent of all engagements occur on the same 10 days in a calendar year, eight of which are between Dec. 13 and Jan. 1.

For many of the couples emerging from the holiday season as spouses-to-be, the last thing on their minds is a premarital agreement. For some, however, it should be one of the first.

Divorce litigation has the potential to be high-conflict, drawn out and expensive, particularly in cases involving significant compensation, vast family wealth or substantial and complex financial estates.

To alleviate the emotional and financial stress of divorce, many spouses-to-be enter into premarital agreements, which, put most simply, are contracts designed to eliminate, reduce or resolve in advance disputes commonly arising during a traditional divorce.

Parties to a premarital agreement can contract to virtually anything except matters relating to children (born and unborn), allocating parenting time and parental responsibilities and child support.

Premarital agreements entered into after 1990 are governed by the Illinois Uniform Premarital Agreement Act, which provides a series of requirements for the validity and enforceability of a premarital agreement.

A premarital agreement will not be enforced where it can be proved by the challenging party that the agreement was not executed voluntarily (meaning, in many cases the challenging party can prove the existence of duress or coercion); or that the agreement was unconscionable at the time it was executed, and (a) the party challenging the agreement was not provided a fair and reasonable disclosure of the other's financial estate, or (b) did not knowingly waive his or her right to a fair and reasonable disclosure of the other party's estate, or (c) did not otherwise have adequate knowledge of the other party's financial estate. It's also unenforceable if the elimination of spousal support results in undue hardship in light of circumstances not reasonably foreseeable at the time of the agreement's execution.

The enforceability of a premarital agreement is paramount and requires diligence and attention to detail in the preparation, negotiation and execution stages. As has been said many times and is worth repeating, an unenforceable agreement is not worth the paper it is written on. With this in mind, the following are ways to better ensure the enforceability of a premarital agreement:

MODERN FAMILY

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- Each party to the contract should retain independent counsel experienced in family law and litigation to analyze, negotiate and prepare the terms of the agreement. Not only does having experienced legal counsel aid in the avoidance of enforceability pitfalls in the future, but it better enables each spouse to have a clear understanding of the rights and obligations attendant to the agreement.
- Start the discussion early and execute the agreement as far in advance of the wedding date as possible. Sufficient lead time between execution and the wedding date helps insulate an agreement from attack on the basis that it was not entered into voluntarily. WeddingWire data shows that, on average, almost 50 percent of engaged couples are engaged for between 12 and 13 months before being married; there is no excuse for spouses engaged on Dec. 24, 2016, waiting until Halloween 2017 to start the pre-nup discussion, which is arguably the least romantic element of wedding planning.
- The significance of a fair disclosure of each party's financial landscape cannot be overstated. Under Illinois law, unconscionability of a premarital agreement is analyzed at execution, not at the time of enforcement. An unconscionable agreement, generally speaking, is one to which no reasonable person would bind him or herself.

The absence of a full financial disclosure, or a knowing waiver of the same, puts the agreement at risk of exposure to attack on grounds of unconscionability, depending of course on the circumstances relative to the omissions at issue.

- Record the contract's execution, either by virtue of a video recording or a court reporter. The parties should each state on the "record," among other things, that they made a fair and reasonable financial disclosure or whether the same has been knowingly waived, that they understand the terms of the agreement and that they are not under the influence of any mind-altering substances or operating under duress or coercion.

An additional concept that should be considered during the preparation stage is how the agreement could be interpreted in the future.

When it comes to a concrete premarital agreement, in some cases, less is more; say what you mean. When terms of a contract are ambiguous, courts are tasked with determining the intent of the parties, which leads to additional litigation (read: cost and frustration) during divorce.

Not only can convoluted agreements lead to issues of disputed interpretation, but it becomes less likely that the parties fully understand the document, which could defeat the intended purpose of the agreement.

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