WHEN ESTATE PLANNING AND MARITAL AGREEMENTS COLLIDE (PART 1)

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There is much to be gained from cross-discipline collaboration between matrimonial and estate planning attorneys when planning for our clients. Divorce is an aspect of planning for the modern family that cannot be ignored or downplayed. Part 1 of this article examines how a client's premarital agreement may be drafted to account for a possible future divorce. Part 2 of this article, which will appear in the December issue of The Practical Lawyer, will examine pre-divorce estate planning instruments, including trusts, as well as ways to plan for the possibility of a beneficiary's divorce in a senior generation's estate plan.

Divorce and trust laws are state-specific. Thus, while these materials discuss some general concepts relevant in most jurisdictions and reference particular state laws for illustration, any advice to a particular

client should be provided with the assistance of legal counsel who practices in and is familiar with the applicable state law.

TAX CONSEQUENCES OF DIVORCE

The following is a summary of only a few of the federal tax rules that need to be considered in the dissolution context.[1] Without grounds for special treatment, assets provided to a divorced spouse or for children of a terminating marriage would, like any other irrevocable transfer of assets, potentially be subject to federal gift tax. (Divorcing individuals may not view such transfers as gratuitous, but the intent behind a transfer is irrelevant for gift tax purposes.) There are three overlapping legal grounds supporting the exclusion of transfers pursuant to divorce agreements from an individual's taxable gifts: (i) Internal Revenue Code (Code) section 2516; (ii) a broader statutory argument that arises from Code section 2512(b); and (iii) case law.

Transfers under Code section 2516

The primary statutory approach is based on Code section 2516, which provides as follows:

> Where spouses enter into a written agreement relative to their marital and property rights and divorce occurs within the 3-year period beginning on the date 1 year before such agreement is entered into (whether or not such agreement is approved by the divorce decree), any transfers of property or interests in property made pursuant to such agreement—
>
> (1) to either spouse in settlement of his or her marital or property rights, or
>
> (2) to provide a reasonable allowance for the support of issue of the marriage during minority,
>
> shall be deemed to be transfers made for a full and adequate consideration in money or money's worth.[2]

The agreement must be legally effective for transfers (either outright or in trust) to so qualify, but it need not be approved by (or even presented to) the divorce court, although death of a party prior to entry of the decree would invalidate the agreement (although the marital deduction would generally apply instead). The statue could also apply to transfers pursuant to a prenuptial agreement so long as divorce followed the agreement within two years. It does not apply to cover amounts for the support of minor children in excess of a reasonable allowance.

In addition to the required timeframe, there are further limitations to this statutory protection. First, transfers to or for the benefit of the other spouse must be "in settlement of his or her marital or property rights."[3] This has been interpreted to imply that transfers must be determinable: If a trustee or other party has discretion over the spouse's enjoyment, that discretion will be presumed to be exercised to the minimal extent possible, and amounts over this will be considered taxable gifts.

Transfers within the statutory timeframe under the following provision of a property settlement agreement (PSA) would avoid gift tax under section 2516:

> Each party accepts the provisions herein made for him or her in lieu of and in full and final settlement and satisfaction of any and all claims or rights that either party may now or hereafter have against the other party for support or maintenance or for the distribution of property. However, each party has relied upon the representations of the other party concerning a complete and full disclosure of all marital assets in accepting the property settlement, and it is understood and agreed that this provision shall not constitute a waiver of any marital interest either party may have in any property owned but not fully disclosed by the other party as to existence or fair market value at the time this agreement is executed. Moreover, the failure of either party to disclose property shall constitute a material breach of this agreement, which shall give rise to all remedies at law or in equity available to the other party.

Transfers to or for the benefit of the marital children, by contrast, only qualify for the gift tax exemption

under section 2516 if they "provide a reasonable allowance for the support of issue of the marriage during minority."[4] Transfers above the level of legally required support, or when the children are above age 18, will thus be considered taxable gifts. In practice, there appears to be no guidance from the Internal Revenue Service (IRS) on the scope of the former limit, though it presumably is intended to track state law on parental support obligations. The latter restriction, however, means that any value provided to marital children, which may be enjoyed after the age of majority, is not exempted by the statute, and may be a taxable gift (unless it meets one of the other exceptions described below). This would apply, for example, to the present value of an interest in trust that continues beyond the age of minority.

Divorce-related transfers based on the settlement agreement are involuntary and generally not treated as a completed gift.

Testamentary transfers pursuant to a property settlement agreement (PSA)

A related issue in the dissolution context is the deductibility of transfers upon death required pursuant to a PSA when payable to persons other than the ex-spouse. *Leopold v. United States* addressed the deductibility of a testamentary gift and allowed a deduction for a testamentary gift required by a PSA.[5] The decedent in *Leopold* had three daughters, two from his first marriage and one from his second (which was also dissolved). Although the decedent made a bequest to the third daughter, the amount was uncertain, so the second ex-wife filed a creditor's claim based on the settlement agreement. Reasoning that "[u]nder exceptional circumstances, it may be that a claim by someone who might otherwise inherit from the decedent should be deductible under section 2053," the court allowed the deduction for the ex-wife's claim.[6] The third daughter was left nothing more than was required by the PSA and the second ex-wife appeared to take a smaller settlement in consideration for her ex-husband's promise to leave their daughter a gift in his will. Because the ex-wife bargained for the gift to her daughter, it was held to be for full and adequate consideration and therefore a deductible estate expense.

Code section 2043(b)(2) now provides, effective in the case of estates of decedents dying after July 18, 1984, that for purposes of section 2053(a)(3), a transfer of property that satisfies the requirements of section 2516(1) shall be considered made for an adequate consideration in money or money's worth.[7] Therefore, the relinquishment (or promised relinquishment) of marital rights in a decedent's property in favor of a third party does not result in a taxable distribution at the decedent's death with respect to that property. Rather, it is deductible as a payment on an executory contract in the decedent's estate.

Transfers under Code section 2512(b)

Transfers that do not qualify for the section 2516 exemption may still avoid gift tax if such a transfer is made in full consideration for surrendered rights. Donative intent is not required.[8] The release of future support rights can constitute "adequate consideration," and can therefore eliminate taxable gift treatment under section 2512(b) (which provides generally that a gift occurs only if property is transferred for less than adequate consideration).

To constitute adequate consideration, however, the support rights being released must be assigned an economic value. A taxable gift arises to the extent of the excess of the value of transferred property over that of the support obligation.[9] The benefit to this approach is that property can be transferred, which would otherwise be outside the scope of section 2516 (such as to marital children after the age of majority), as long as it is equal in value to the other rights being released.

For example, in a 1979 Revenue Ruling where the divorce agreement provided for an annuity to the wife with remainder to adult children, the IRS concluded that if the husband had established that the wife actively bargained for and relinquished support rights in exchange for the full present value of the annuity, then there would be no gift by the husband.[10]

Since child support rights generally cannot be fully released, and because there is no generally accepted valuation methodology for legal support rights, this is not a widely favored strategy for transferring value to minor children.[11] But it can be a useful planning technique to shift wealth to adult children in the context of divorce.

Case law treatment of transfers pursuant to PSAs

Finally, under a line of cases that predates Code section 2516, transfers to or for the benefit of a divorcing spouse or marital children—if made pursuant to a divorce decree entered by a court—may not be sufficiently voluntary to be properly subject to gift tax.[12] The language and reasoning in these cases is broader than section 2516, since the principle applies even when the technical limitations of that provision would not be satisfied. This rule is referred to as the *Harris* rule, referencing *Harris v. Commissioner*, the first of these cases, which was decided in 1950.[13]

Subsequent cases have held that a settlement agreement between the parties can become part of the court decree for purposes of the *Harris* rule simply by reference and incorporation into the decree, as long as the court had the power to review and approve the agreement.[14] Commentators have thus argued that *Harris* effectively exempts transfers from gift tax (including transfers to children above the age of majority) as long as the obligations are determinable and enforceable under the terms of the divorce decree.[15] This appears to be the common understanding and practice of lawyers in some states, Florida and Illinois among them.

Note, however, that in *Spruance v. Commissioner*, the Tax Court warned that "*Harris* did not incorporate a broad rule that all transfers based on a court decree need not be supported by adequate consideration, and that all involuntary transfers are free from gift tax."[16] *Spruance* held that remainder interests given to the marital children in a settlement trust—and receivable by them as adults—were taxable gifts by the grantor. This reasoning, though, has not since been cited by a court or by the IRS, so it is unclear whether the case remains good law.

With these federal tax rules in mind, as well as additional rules discussed below, the next sections will discuss planning in contemplation of divorce, during the dissolution process, and after the divorce is finalized.

KEEPING SEPARATE PROPERTY SEPARATE: MARITAL PROPERTY AGREEMENTS

Premarital agreements

Marriages end in two ways—death or divorce. A good premarital agreement will address both. The potential for both death and divorce need to be considered, openly discussed, and drafted for in the agreement. A premarital agreement provides the least amount that the parties owe each other. A well-drafted agreement should, if nothing else, define the minimum provisions that must be made for the surviving spouse and specify the parties' intentions to provide for each other upon divorce. The contracting spouses are always free to be more generous than the agreement requires. The collaboration between an estate planner and a matrimonial lawyer produces the strongest agreements.

Most clients who want premarital agreements may be categorized as follows:

- Wealthy parents of adult children getting married who stand to inherit wealth or have inherited wealth;
- Adult children of a wealthy parent entering into a second marriage; and
- Wealthy people marrying either other wealthy people or people with substantially less wealth.

Premarital agreements are not usually suitable for people without significant wealth.

It has been said that everyone who marries enters into a premarital agreement that is set forth in the family and probate laws of the state in which they live. The ideal agreement creates a default separate

property regime. Joint property should only be created by an agreement of the parties and not by operation of law. Further, a premarital agreement should waive all intestate rights on death, and the waiver of other "marital rights" that include: (i) the right to take as a pretermitted heir; (ii) a family allowance; (iii) a probate homestead; (iv) property that would pass from the decedent by testamentary disposition in a will executed before the waiver; (v) the right to elect to take community property or quasi-community property against the decedent's will; (vi) the right to take the statutory share of an omitted spouse; (vii) the right to be appointed as the personal representative of the decedent's estate; and (viii) other rights that might accrue on death.

Any rights created on death should be clear and specific. The agreement should address the issues of who pays the estate taxes, any change in the size of the estate, a change in the type of assets, and changes in the law. An agreement providing for a percentage of the estate is disfavored when the assets consist of real estate and real property. The valuation of these assets could hold up distributions for years, and create unnecessary litigation. The use of life insurance can be an efficient way of providing for the surviving spouse.

Most clients entering into premarital agreements will want a limitation on alimony, spousal maintenance, or spousal support, which in many states will be reviewed by the court as to whether it was unconscionable at the time the agreement was entered into, at the time of enforcement, or both.

Agreements designating certain assets as separate property and the rest as marital or community property create the risk of commingling assets during the marriage. This leads to litigation, which is what agreements are written to avoid.

Your engagement letter should clarify that you are drafting the agreement for the state in which the parties are planning to live. If they plan to move to another state or country soon, you may want to refer an agreement out to counsel in the other jurisdiction. Even if you have a choice of law and a choice of forum provision, if there is no nexus with the state, a court may not enforce that choice of law clause. Further, another court may find that the provision in the agreement relates to a public policy issue, and not enforce that provision. This could occur if the agreement attempts to limit spousal support, or if it has restrictions on personal behavior. Never count on a choice of law clause to protect you in the event the agreement is litigated.

If the parties have homes in several states and countries, it may be difficult to know in what state or residence a divorce might be filed. It is wise to get the input from attorneys in the other jurisdictions. You will have to decide whether the parties need a separate agreement for the other jurisdiction, or if you want to incorporate their recommendations in your agreement. Unfortunately, family law differs so much from state to state that trying to put it all in one agreement may lead to confusion.

Most countries allow people to elect a marital regime, such as separate property, community property, or a combination thereof. If the parties have a residence in a country that has marital regimes, they should seek the counsel of a foreign lawyer. In some cases, a foreign premarital agreement could invalidate the native regime.

In the absence of a premarital agreement, assets acquired as compensation are community or marital property. Assets brought into a marriage or acquired by gift or inheritance during marriage are considered separate property. However, to the extent separate and community or marital property are commingled, the property is presumed to be community or marital in nature.

A typical agreement may waive rights to income or assets of the other spouse. It may also waive the right to maintenance and support, pension and retirement benefits, and the right to serve as personal representative. But an agreement may go much further so long as it is legal and does not violate public policy.

The agreement can determine the treatment of contributions of funds and/or services by one spouse or

by the marital community to another spouse's property as a gift or a loan, or whether such contribution creates an equitable interest. The agreement can determine the treatment of life insurance and retirement plans existing prior to marriage and future plans or policies obtained by the parties.

Importantly for this discussion, an agreement can also provide that upon the dissolution of marriage, the parties agree to resign from fiduciary positions held under irrevocable trusts created by the other party.

Postmarital agreements

Without a premarital agreement, the parties may later consider entering into a postmarital agreement. Realistically, parties to a premarital agreement are more likely to enter into the agreement because they want to get married, but parties that are already married do not have that incentive. It may be more difficult to construct adequate consideration for one spouse to give up rights he or she has already acquired by law as a result of the marriage than to enter into a premarital agreement before any rights have vested. Furthermore, not all jurisdictions uphold postmarital agreements.[17] The Uniform Premarital and Marital Agreement Act (UPMAA) has been adopted by North Dakota and Colorado. The act makes it easier to set aside premarital agreements on the basis of unconscionability or lack of disclosure.

Enforceability of marital property agreements

When there is a marital agreement already in place, it is common to challenge its enforceability but generally difficult to set it aside. Each jurisdiction has its own standards for finding a marital agreement enforceable.

Marital property agreements usually contain choice of law provisions. Parties can choose which state's law governs their agreement, though under the UPMAA, the chosen state must have a significant relationship either to the agreement or to either party.[18] The Uniform Premarital Agreement Act (UPAA) simply allows for choice of law.[19] Under general contract law, parties to a contract may choose which state's law is to be applied unless the state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the choice, or application of the law of the chosen state would be contrary to the public policy of the forum state.[20]

Standards generally turn on a combination of fairness and adequate disclosure of assets. For example, in Washington, the supreme court developed a two-pronged analysis of substantive and procedural fairness to determine the validity of premarital agreements.[21] First, a court looks at whether the agreement makes a fair and reasonable provision for the party not seeking to enforce it. If the agreement is fair and reasonable and the challenging party has not shown fraud or overreaching, there is no need to advance to the second prong. Only in the second prong does a court examine whether full disclosure has been made of the property involved, and whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by both parties of their rights.[22]

A detailed analysis of the enforceability of premarital and postmarital agreements is beyond the scope of this outline.[23] Because of the nuanced complexity of what constitutes adequate disclosure, this topic warrants closer examination.

BEST PRACTICES FOR FINANCIAL DISCLOSURE FOR MARITAL PROPERTY AGREEMENTS

The most common challenge to the validity of premarital agreements is that there was not adequate disclosure. In the majority of states, financial disclosure is not required for a premarital or postmarital agreement to be found valid. Rather, parties can waive all disclosures. Nevertheless, as discussed below, inadequate disclosure may still successfully be used to void an agreement in many circumstances. Furthermore, different standards will apply if the agreement is to be governed by the UPAA or the UPMAA.[24] Exhibit A provides a selection of cases regarding financial disclosure for premarital and postmarital agreements.

Agreements under the UPAA and UPMAA

Twenty-six states and the District of Columbia have adopted the UPAA. The Act provides: "The agreement is enforceable without consideration."[25] Further, disclosure can be waived.[26]

For agreements under the UPMAA, which has been adopted by Colorado and North Dakota, the waiver must simply be in a separate record signed by both parties.[27]

Under the UPAA, the parties owe a fiduciary duty to deal openly and fairly with each other in the formulation of marital agreements. Accordingly, a premarital agreement[28] must comply with certain formalities. A premarital agreement must be in writing and signed by both parties.[29] The parties must have general contractual capacity and enter the agreement free from fraud, duress, and undue influence.[30] The UPAA recognizes marriage itself as adequate consideration for a premarital agreement.[31]

The UPAA requires that all premarital agreements meet a procedural fairness test.[32] The party seeking to enforce the agreement has the burden of proof. The agreement will be void if: (i) it was not entered into voluntarily; or (ii) it was unconscionable before and at the time of execution of the agreement *and* (a) there was a lack of fair and reasonable disclosure of the property or financial obligations, (b) there was no voluntary waiver of any right to disclosure, and (c) the party challenging the validity of the agreement did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.[33]

Under the UPAA, it is possible for the parties to voluntarily and knowingly waive the disclosure requirement.[34] The waiver must be in a separate signed writing and it must be signed *before* the agreement itself is signed.[35] Although the UPAA does not specifically require the presence of independent legal counsel as a condition to enforceability of a premarital agreement, the absence of independent counsel may be a factor in determining whether the fairness tests have been met. Furthermore, the UPAA does not specify how long before the agreement itself is signed the waiver must be signed; presumably immediately before signing the agreement is sufficient.

Best practices regardless of controlling law

It is always in the best interests of the wealthier party to make an adequate financial disclosure (and not rely on a waiver). Some states' laws are more demanding as to financial disclosures. In our mobile society, it is important to contemplate that a couple may move during their marriage, possibly to a jurisdiction with more stringent laws applicable to divorcing couples.

State law may require legal advice for an effective waiver of financial disclosure. State law may not permit waiver at all. A combination of no financial disclosure, lack of counsel, and a short time between presentation and wedding makes validity vulnerable even when waiver is generally permissible. In some jurisdictions, the lack of independent counsel or even inadequate counsel has been held to be a sufficient circumstance to cause an agreement to be invalid.[36] Independent legal counsel is highly indicative of voluntariness. In California, there are specific rules that must be followed if one or both parties are not represented by counsel.[37]

States allowing waiver of disclosure may require that it was made knowingly and voluntarily. Even when waiver is permissible, it is best to comply with the most demanding validity standards.

For an agreement under which parties will retain exclusive rights to nonmarital assets but share the fruits of their labor, it is best for the parties to identify all premarital assets so as to be able to reclaim them.

Fair and adequate financial disclosure greatly enhances validity, and is often the key to a finding of validity even when other aspects of the process or the substance are somewhat deficient. Courts routinely reject claims of duress and coercion, even when the agreement is presented close to the wedding, if the proponent provided a fair and adequate financial disclosure. Courts also examine other critical factors, including the bargaining positions and sophistication of the parties, the parties'

understanding of the legal consequences of the agreement, and the parties' knowledge of their rights.

When representing the economically disadvantaged party, the lawyer should insist upon financial disclosure before giving advice to the client about the adequacy of the terms, and before formulating proposed terms to enhance the financial security of the client. The lawyer should also inquire into the client's expectations as to future inheritance or other resources, especially when the client is young and has living parents or grandparents.

MECHANICS OF FINANCIAL DISCLOSURE

Best practices

The gold standard is a written statement appended to the agreement listing amounts and sources of income, and the identity and value of all significant assets and liabilities.[38] For some parties, a statement of net worth without detail may be adequate (e.g., if both parties are wealthy, if the parties have a general understanding of the assets of the other, or if they work and own a business together). Tax returns, financial records, and other raw data (and with respect to a closely held business, more (see below)) may be required.

Courts have upheld oral disclosure, if adequately proven, but this is risky for the proponent.[39] A party's pre-existing knowledge of the other party's financial affairs has been held to be adequate, as has a recital in the agreement that the parties made an informal financial disclosure or that they were each familiar with the other's financial affairs, and a list of major assets without values, but these are risky for the proponent.

Disclosure of the value of assets whose value is not readily apparent

No requirement for formal appraisal exists; rather, a good-faith statement of value is generally sufficient. Any statement of value of such assets should be appropriately qualified. For example:

> It is understood that the estimates of fair market value are not based upon appraisal and therefore may be erroneous; however, the estimates furnished are the best opinion of the person making the estimate. The estimate is based upon [describe]. [Other party] has had the time and opportunity to request documents, inquire, and appraise the property but has chosen not to do so. It is also understood that the listing of liabilities may be inaccurate to some extent because each of the parties has accounts in progress for which billings or monthly statements have not been received, or because the precise amount of the indebtedness is unknown; however, the estimate is the best opinion of the person making the estimate.

Disclosure of the value of a closely held business

Disclosure of an interest in a closely held business presents a special challenge. The value of the business may not be readily ascertainable, and there is no requirement for a formal appraisal. However, an owner who fails to provide meaningful disclosure of known data does so at his own peril. He could provide the gross revenues of the business, the number of employees, his percentage interest, salary, or other compensation received from the business, and the like. It is a mistake for the owner to assume that the other party's knowledge of the existence of the business is tantamount to an understanding of its value. The owner's statement as to value should be appropriately qualified. When the value is stated at book value, it is especially important that the disclosure include an acknowledgment that actual value may be higher. The lawyer for the owner should inquire:

- Whether there have been any recent appraisals of the business (e.g., in connection with another owner's divorce) or of a major asset (e.g., a commercial building);
- Has the owner received any offers to buy the business or a major asset? Are there plans for an initial public offering?

- Has the owner made any statements of value, such as in a loan application, application for key-person insurance, or in connection with a divorce?

The owner's financial advisor or certified public accountant (CPA) will often be helpful in formulating a disclosure statement that will balance the need for disclosure to ensure validity and the interest of the business owner in the confidentiality of the business' records and business information. Options for disclosure include:

- The owner's good-faith statement of value, coupled with explanation of the basis for the statement (e.g., "$_____, which is five times book value"), coupled with qualifying statements (e.g., "fair market value may be much higher");
- The owner's accurate statement as to key data from which the other party's lawyer can judge whether the information is sufficient to make a decision about signing or asking for more information (including, e.g., type of entity, years in business, type of goods or services sold, percentage ownership, number of owners, gross and net revenues, and owner's compensation for last three years);
- Provision of documents (e.g., business tax returns, profit and loss statements, for last three years);
- A combination of the above and a statement such as the following:

> It is agreed that this agreement is not based upon the estimations being wholly accurate; rather, the parties are attempting to provide a good-faith disclosure of their respective estimated financial positions. It is further agreed that each party knows that this agreement need not be executed by that party should there be any question about the accuracy or sufficiency of the disclosure. Any inaccuracy in estimation, or omission, shall not be a ground to revoke this agreement and each of the parties waives any such inaccuracy on estimation, or any omission.

The most likely challenge will be that the owner has undervalued the company. This claim may be made because an asset is difficult to value or has a wildly fluctuating value. However, in some jurisdictions, full disclosure does not require that the other party must know the exact financial status of the owner's resources, but rather that the party provide enough information so that the less wealthy party will not be prejudiced by the lack of information, and can intelligently determine whether she desires to enter the prenuptial contract.[40] The following type of statement could be used to document this understanding:

> Wife acknowledges and agrees that value of the Company set forth on Schedule A is based primarily on the fact that the value of Husband's business is related to his ability to provide personal services. An estimated fair market value of the business has been suggested on Schedule A; however, no formal appraisal of the Company has been prepared in connection with this Agreement. Wife acknowledges that she has been offered and/or has received all information that she has sought with respect to the Company, and agrees to the terms of this Agreement without regard to the value of the Company, including the possibility that the fair market value of Husband's interest therein is (or may become) significantly higher than as represented on Schedule A.

Disclosure of irrevocable trust interests

In some states, beneficial interests in certain irrevocable trusts are property for divorce purposes. Moreover, the definition of "property" for the purpose of divorce is broader than for nearly any other purpose, and is subject to expansion through the common law. Since the attorney drafting a premarital agreement does not know where a divorce will take place, it is best to assume that beneficial interests in irrevocable trusts are property and, therefore, to disclose those interests to the extent possible.

In general, a party will need to disclose vested rights, such as an interest as a beneficiary in an irrevocable trust or a revocable trust of which the party is the

settlor. The kinds of information the party as beneficiary or settlor should disclose (and the other party should request) include:

- The name of the trust;
- Whether the trust is revocable or irrevocable;
- The identity of the trustee and settlor;
- The nature and value of trust assets;
- The number and identity of trust beneficiaries (e.g., is the party to the premarital agreement the sole beneficiary or only one of many?);
- The current rights of the party, if any, to income and principal;
- Whether the trustee can distribute income or principal to the party, the standard for the exercise of this power, and whether the trustee has discretion to withhold distributions from the party;
- The history of income and principal distributions, if any, to the party;
- What future rights the party has and when these rights come into being, such as upon a parent's death or upon reaching a certain age;
- Whether the party has a power of appointment and whether it permits the party to exercise it in favor of a spouse; and
- Whether trust assets will be includible in the gross estate of the party (or anyone else) for federal estate tax purposes.

Client retention of documents and other materials

In states where there is no bar to discovery related to premarital agreements, the less-wealthy spouse will often challenge the accuracy of disclosures for leverage. If a marriage had a duration of any meaningful length, it can be extremely difficult for the party defending the accuracy of disclosures to find documents supporting the information on disclosures because third parties do not keep them and memories are not very reliable.

The drafting attorney should provide the client with an entire file of the disclosures and copies of supporting documents. This can be done via a DropBox or Sharefile file, a thumb drive, or hard copies.

The drafting attorney should also include a letter clearly stating that it is the client's responsibility to retain the materials.

Disclosure of expectancies or other possible changes

There is no general requirement to disclose the value of a parent's estate. Consider whether you can and should do so to support the overall enforceability of the marital agreement.

The beneficiary of a trust may or may not have access to the level of detailed information about assets held in trust necessary to provide full disclosure in the context of negotiating a premarital agreement. The trustees and other family members may have strong objections to disclosing the trust assets. The beneficiary may not even know of the existence of the trust or of its assets in jurisdictions that allow silent trusts.

When there is a big disparity between what your client has now and what they expect to inherit outside of trust, a general statement in the agreement acknowledging an understanding that the future spouse may inherit substantial assets may be sufficient (or may be all you can deliver). Include a statement such as: "The parties have known one another for some time and are generally familiar with the assets and liabilities of each."

Although the beneficiary may have certain rights as a beneficiary to an accounting of trust assets, that is far different than having the right to current and immediate disclosure of trust assets.

It is difficult to predict how a court will view non-disclosure due to lack of availability. It is prudent to err on the side of providing whatever is available and noting that is the case.

Disclosure of hard-to-value tangible assets

Disclosure of assets that are hard to value (such as art, antiques, collectibles, jewelry) should include the value for homeowner's insurance, the amount paid, and the date of acquisition. For works of art, is the artist's work held by any museums? Are the antiques or collectibles important; is there a market for them? Was any of the jewelry ever worn by a member of a royal family or anyone important that would affect the value? How much effort should the client put into tracking down current values, assuming such data are available? Are these items in the aggregate worth a substantial amount? Are they worth a substantial amount relative to the value of the real estate, cash, securities, retirement accounts, and business interests? An appraiser may be necessary to answer these questions.

ADDRESSING PRIVACY CONCERNS

Many parties prefer that their financial data be kept confidential. There may be particular matters, such as business information, that are especially sensitive. A party may have concerns about the disclosure of financial information to a new spouse's adult children or other family members, or in a court proceeding between a new spouse and his former spouse. The premarital agreement can include a confidentiality provision that prohibits each party from disclosing the other's financial information to a third party, with an exception for her lawyer or other professional advisors, or in response to a court order. It can also provide for the right to seek a court order, in the event of future litigation, to protect this information.

A pre-execution confidentiality agreement protects the client in the event the marriage plans fall through. Consider whether it is in the client's interest to have the premarital agreement *require* that it be submitted to the court at divorce; another option would be for the parties to enter into a settlement that affirms the premarital agreement and to have only the marital settlement agreement go into the court record. The agreement could describe accurately what disclosure was provided and identify the specific documents provided for review, but not attach them to the agreement itself.

Combine a list of personal assets and liabilities with another form of disclosure for a closely held business. Include a confidentiality clause in the agreement[41] as well as a dispute resolution clause that provides for arbitration of divorce (if permitted by law) or a private reference judge in certain states.[42]

If a spouse has beneficial interests in third-party settled trusts, consider having the non-moneyed spouse enter into an agreement directly with the senior generation that created the trust interest or the trustee of the trust. The agreement could include both a confidentiality agreement regarding the trust interests and assets, and an agreement to not pursue any additional disclosure regarding the trust, including assets, values, and other beneficiaries. Consider having the trustee provide small consideration for this agreement. Rather than borrowing boilerplate language that, on its surface, looks serviceable, consider the following drafting tips for confidentiality clauses in the marital agreement context:

- Clearly identify what information is protected. Avoid a laundry list of concepts. Courts may view overly broad definitions as unreasonable, jeopardizing enforcement of the agreement. A realistic assessment of what is intended to be protected is necessary. If it is broad, you should be able to justify its breadth.
- Clarify circumstances for disclosure. The point of a non-disclosure agreement is to avoid *inappropriate* disclosure of confidential information, not *all* disclosure. Again, describe the circumstances under which disclosure is or is not appropriate, including how, when, and to whom disclosure may be made and avoid the laundry list. The agreement should also specify exceptions where disclosure may be legally required.
- Specify the ongoing nature of the obligation. If disclosure after a term of years or the death of a party is to be permitted, this should be specifically stated. To ensure that the confidentiality obligation endures beyond the end of marriage, you should explicitly state that the spouse's

non-disclosure obligation survives the end of the marriage.

- Provide adequate consideration. For a non-disclosure agreement to be enforceable, it has to be supported by adequate consideration. In the marital agreement context, the agreement to marry is sufficient context. If, however, the non-disclosure agreement is being entered into after the marital relationship has begun, depending on the state, additional consideration may be needed to support the agreement.
- Comply with applicable state and federal laws. The enforceability of confidentiality agreements may be limited by state and federal laws.

The following is a broad form of a confidentiality and non-disparagement clause that could be adapted to a marital agreement to allay concerns regarding disclosed assets:

> Confidentiality. Each party must preserve the confidentiality of this Agreement. It shall not be disclosed except as required by law or if necessary to enforce its terms. If filed with the Court for enforcement purposes, the parties shall use best efforts to file it under seal. Each party must refrain from publicly disclosing this Agreement or the contents thereof. Neither party shall give a copy of this Agreement to any person other than legal, accounting, financial, or professional advisors of a party and only to the extent necessary to implement or enforce its terms. Whenever possible, only an excerpt of this Agreement should be provided to the professional. The professional must be advised that the document or excerpt is confidential and that it must be used only in connection with providing professional services and not publicly disclosed. Before disclosing the terms of this Agreement or any written portion of this Agreement to any such professional, the party must take reasonable precautions, as determined in their sole discretion, to require the professional to maintain the confidentiality of this Agreement.
>
> Unless with the prior written consent of the other party, the parties agree that at no point before, during, or after their marriage (including in the event their marriage is dissolved) shall either party share or otherwise disseminate in any form, including without limitation any type of social media (such as Facebook, LinkedIn, YouTube, Flickr, Twitter, Snapchat, blogs, etc.) the following information: (i) any information, including without limitation photography or videos, featuring or including the other party that may have an adverse material impact on that party's career, character, or reputation; (ii) any information, including general summaries, related to the existence of, terms of, or financial information contained in, this Agreement; or (iii) any information related to the financial arrangements between the parties or the financial situation or net worth of the other party.
>
> Notwithstanding the foregoing, each Party may discuss the terms of the Agreement with (but not provide a copy of the Agreement to) close family members or friends with whom he or she feels significant trust and is reasonably satisfied will not further disclose the information.
>
> The parties understand and agree this paragraph is a material provision and that any breach of this paragraph shall be a material breach of this Agreement, and that each party would be irreparably harmed by violation of this provision.

FRAUD IN THE INDUCEMENT

Fraudulent disclosure alone is not always sufficient to negate a marital agreement. To succeed on such a claim, it is necessary to show that a party was fraudulently induced to enter into the agreement that the other party is seeking to enforce, based on a knowing misrepresentation of material facts or failure to disclose material facts by the enforcing party.

To succeed on a claim of fraudulent inducement with respect to a marital agreement, the party challenging the agreement must allege and establish the basic elements of a fraud claim. To support a claim for fraud, a plaintiff must show proof of all nine essential elements of the claim: (i) a representation

of existing fact; (ii) its materiality; (iii) its falsity; (iv) the speaker's knowledge of its falsity; (v) the speaker's intent that it be acted upon by the person to whom it is made; (vi) ignorance of the falsity on the part of the person to whom the representation is addressed; (vii) the latter's reliance on the truth of the representation; (viii) the right to rely upon it; and (ix) resulting damage.[43] Each element must be proven by clear, cogent, and convincing evidence.

A claim of fraud fails in the absence of any one of the nine elements.[44] Moreover, reliance on a fraudulent misrepresentation must be reasonable under the circumstances, which is a question of fact.[45] "When the agreement is executed as a result of marital discord, incident to reconciliation, or to resolve a financial disagreement, a court will generally find that each party acted independently, or was obligated to protect his or her own interests, or was not entitled to rely on a special confidence placed in the other."[46]

In *Northington v. Northington*,[47] the Alabama Court of Appeals upheld the trial court's decision to enforce a postnuptial agreement that had been entered into following the husband's discovery of his wife's infidelity and in consideration of the husband's agreement not to file for divorce. The wife contended that she had been fraudulently induced to sign the postnuptial agreement due in part to the fact that the husband had not disclosed the value of the real estate listed in the agreement but had merely identified the real estate, cost basis, and debt. The court rejected that contention in part because the wife had been married to her husband for over 20 years at the time of the postnuptial agreement and had the time, resources, and advice of counsel needed to obtain the information necessary to make an educated decision to enter into the agreement.

The fact of a lie cannot be used to establish materiality when the underlying misrepresentation is itself not material; to reach that conclusion, the fact of the lie bootstraps materiality and subverts the intent of the required elements. Hence, the fact of a party's misrepresentation itself is irrelevant to the validity of the agreement.

Notes

1 For a comprehensive examination of taxation as it relates to dissolution, see Carlyn S. McCaffrey and John C. McCaffrey, Tax and Estate Planning for Divorce: Selected Issues (Oct. 2015), available at https://www.bocaratonepc.org/assets/Councils/BocaRaton-FL/library/McCaffrey%20Carlyn%20-%20Tax%20and%20Estate%20Planning%20for%20Divorce%20Oct%202015.pdf.

2 I.R.C. § 2516. See also I.R.C. § 2043(a) (providing that transfers at death in fulfillment of such obligations are also deemed for full and adequate consideration).

3 I.R.C. §2516.

4 Id.

5 510 F.2d 617 (9th Cir. 1975).

6 Id. at 623-34 (internal quotation marks and citation omitted).

7 I.R.C. § 2053(c)(1)(A).

8 Treas. Reg. § 25.2511-1(g)(1).

9 See Rev. Rul. 77-314; see also Sherman v. United States, 492 F.2d 1045 (5th Cir. 1974).

10 Rev. Rul. 79-363. Note, however, that had the wife done so, presumably she would have been deemed to have made a taxable gift to the adult child in the amount of her relinquished support received by that child.

11 Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates, and Gifts ¶¶ 123.6.2, 121.4.3 (1989).

12 See Harris v. Comm'r, 340 U.S. 106 (1950); Cooley v. Brennan, 228 P.2d 104 (Cal. App. Dep't Super. Ct. 1951); Comm'r v. Copley's Estate, 194 F.2d 364 (7th Cir. 1952).

13 Harris, 340 U.S. at 107.

14 See McMurtry v. Comm'r, 203 F.2d 659, 665 (1st Cir. 1953) (finding no taxable gift where transfers made pursuant to the parties' property settlement agreement were held attributable to the divorce decree that approved the settlement agreement).

15 See Bittker & Lokken, supra note 11, at ¶ 123.6.2.

16 Spruance v. Comm'r, 60 T.C. 141, 154 (1973), aff'd 505 F.2d 731 (3d Cir. 1974) (quoting Surrey & Warren, Federal Estate and Gift Taxation, 222-23 (1961)).

17 See Linda J. Ravdin, Postmarital Agreements: Validity and Enforceability, ABA Family Law Quarterly (Summer 2018).

18 UPMAA § 4(1).

19 UPAA § 3(a)(7).

20 Restatement (Second) of Conflict of Laws § 187 (Am. L. Inst. 1971).

21 Marriage of Matson, 730 P.2d 668, 670 (Wash. 1986).

22 Id. Failure under the first prong leads to a more extensive examination under the second. To be found enforceable

under the second prong, the court will look at the circumstance surrounding the execution of the agreement (bargaining positions, sophistication of the parties, presence of independent advice, understanding of legal rights and consequences, timing vis-a-vis wedding date, etc.).

23 For a more detailed discussion, see P. Andre Katz & Amanda Clayman, When Your Elderly Clients Marry: Prenuptial Agreements and Other Considerations, 16 J. Am. Acad. Matrim. L. 445 (2000). See also Premarital and Marital Contracts: A Lawyer's Guide to Drafting and Negotiating Enforceable Marital and Cohabitation Agreements 196 (Edward L. Winer & Lewis Becker eds., 1993).

24 The UPAA was promulgated by the Uniform Law Commission, National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1983. In 2012, the Uniform Law Commission promulgated the Uniform Premarital and Marital Agreements Act (UPMAA), essentially a revised UPAA, which established procedural and substantive safeguards for marital agreements in an effort to bring them into accord with safeguards for premarital agreements. Uniform Law Commission, National Conference of Commissioners on Uniform State Laws (2012). To date only Colorado and North Dakota have adopted the UPMAA, both in 2013.

25 UPAA § 2 (1983).

26 Id. § 6(a)(2).

27 UPMAA § 9(d)(2).

28 The UPAA uses the term "premarital agreement" instead of "prenuptial agreement" and defines such contract as an "agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." Id. § 1.

29 See id. § 2.

30 Id. §§ 2, 6.

31 Id. § 2.

32 Id.

33 Id. § 6.

34 Id. § 6(a)(2)(ii); Fick v. Fick, 851 P.2d 445 (Nev. 1993).

35 An agreement need only have been executed voluntarily and with fair financial disclosure (actual or constructive) or an express waiver. UPAA § 6(a)(2).

36 In Allen v. Allen, the court invalidated a prenuptial agreement based on inadequate counsel. No. 15-P-722, 2016 WL 4238770 (Mass. App. Ct. Aug. 11, 2016). Wife was from Brazil and spoke limited English. Husband's attorney drafted the agreement. Wife visited a Portuguese-speaking attorney who translated the agreement and read it to her out loud; however, that attorney gave wife no legal advice. The appeals court agreed with the trial judge and thus found that the wife did not have adequate opportunity to consult with counsel.

37 Cal. Fam. Code § 1615.

38 Cannon v. Cannon, 865 A.2d 563, 584 (Md. Ct. App. 2005).

39 DewBerry v. George, 62 P.3d 525, 531 (Wash. Ct. App. 2003). In DewBerry, the court upheld an oral agreement because it was procedurally and substantively fair, and it had been followed by both parties throughout their marriage.

40 See Matson, 730 P.2d at 671.

41 See In re Marriage of Burkle 37 Cal. Rptr. 3d 805 (Cal. Dist. Ct. App. 2006). Parties were persons of "high public inteest." Husband filed motion to seal or redact certain pleadings and parties' postmarital agreement. The trial court ordered certain information redacted, but refused to redact information on account balances and postnuptial agreement. The press intervened, arguing the public had presumptive right of access to dissolution proceedings and pleadings and the statute was unconstitutional on its face. Trial court agreed and Court of Appeal affirmed.

42 DeLorean v. DeLorean, 511 A.2d 1257 (N.J. Super. Ct. 1986).

43 Elcon Constr., Inc. v. E. Wash. Univ., 273 P.3d 965, 970 (Wash. 2012).

44 Frontier Bank v. Bingo Invs., LLC, 361 P.3d 230, 238 (Wash. Ct. App. 2015).

45 Williams v. Joslin, 399 P.2d 308, 309 (Wash. 1965).

46 Linda J. Ravdin, Postmarital Agreements: Validity and Enforceability, 52 Fam. L. Q. 245 (Summer 2018).

47 257 So. 3d 326 (Ala. Civ. App. 2017).

EXHIBIT A

A SELECTION OF CASES REGARDING FINANCIAL DISCLOSURE FOR PREMARITAL AND POSTMARITAL AGREEMENTS

Premarital Agreement Cases

Premarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
Branch v. Branch, 508 S.W.3d 911 (Ark. Ct. App. 2016)	PMA upheld where H made accurate statement of net worth without detail; obligation to provide fair and reasonable disclosure does not require full and complete detail.	At dissolution	
Knapp v. Ginsberg, 282 Cal. Rptr. 3d 403 (Cal. Ct. App. 2021)	Malpractice case arising from a PMA entered into by Knapp with Grant Tinker (produced the *Mary Tyler Moore Show*); apparently Tinker made no formal financial disclosure; Knapp understood Tinker was very wealthy, but all she wanted was the marital home (valued at $10M as of Tinker's death) and a paid-off mortgage (balance of $4M at his death); Tinker's estate was insufficient to pay off the mortgage.	After death	Example of a case where weaker party needed financial disclosure to assess whether H could fulfill the promises he made in the agreement; apparently, he was not as rich as he seemed.
King v. King, No. 2020-CA-1624-MR, 2021 WL 5856347 (Ky. Ct. App. Dec. 10, 2021)	Premarital agreement invalid where recited financial disclosures were attached, but they were not W's preexisting knowledge, and recital of same, not good enough to save agreement.	After death	Messy process in other respects.
Waton v. Waton, 887 So. 2d 419 (Fla. Dist. Ct. App. 2004)	H's disclosure regarding value of business (he said "value unknown") was adequate for PMA where he stated ownership percentage and gross revenues.	At dissolution	

Premarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
Gordon v. Gordon, 25 So. 3d 615 (Fla. Dist. Ct. App. 2009)	H's disclosure of existence of pension without specifying value of it adequate for PMA "[w]hen considering the value of husband's employer pension in light of the other substantial assets that husband fully disclosed."	At dissolution	
Kwon v. Kwon, 775 S.E.2d 611 (Ga. Ct. App. 2015)	Recitation that parties made full and fair disclosure coupled with waiver language did not save PMA where evidence showed H omitted two LLCs; party cannot use waiver to avoid duty to disclose; other party has no duty to inquire; rather, burden on each to disclose.	After death	
In re Marriage of Wanger, No. 14-3357, 2016 WL 900432 (Ill. App. Ct. Mar. 8, 2016)	Waiver did not save agreement where H made written disclosure of substantial assets but withheld information about trusts and other assets. Rejected H's argument no obligation to disclose irrevocable trusts because settlor (his father) still alive.	At dissolution	Applying CA law; Burden on attacking party.
In re Marriage of Solano, 124 N.E.3d 1097 (Ill. App. Ct. 2019)	Challenging party not entitled to discovery as to assets that may not have been disclosed when PMA included a waiver of any disclosure beyond that already provided.	At dissolution	

Premarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
Blige v. Blige, 656 S.E.2d 822 (Ga. 2008)	PMA failed for lack of disclosure where H was truck driver and failed to disclose (actually he hid) substantial cash.	At dissolution	One day before wedding, H took W to lawyer he hired for her, lawyer handed agreement to her, read it with her, and asked her to sign it. Burden of proof on party seeking enforcement.
Levy v. Sherman, 43 A.2d 25 (Md. Ct. App. 1945)	Premarital agreement recited that disclosure was made but there was no written disclosure. Evidence inadequate to show full disclosure.	After death	
Ortel v. Gettig, 116 A.2d 145 (Md. Ct. App. 1955)	H made no financial disclosure for PMA and W waived all rights at death. PMA invalid.	After death	H's gifts during marriage and provisions in his will did not save otherwise invalid PMA
Hartz v. Hartz, 234 A.2d 865 (Md. Ct. App. 1967)	PMA upheld after death of H where parties made no formal disclosure, each had general knowledge, both parties had substantial estates of approx. equal value, agreement was substantively fair to both.	At dissolution	Note that W initiated the PMA to protect her children from prior marriage; but, after death, H's estate relied on the PMA, therefore bore the burden of proof.
Head v. Head, 477 A.2d 282 (Md. Ct. Spec. App. 1984), *cert. den.*, 483 A.2d 754 (Md. Ct. App. 1984)	MSA settling W's challenge to validity of PMA was valid where H disclosed value of his company (Head skis; Prince tennis rackets) at $2.5M based on carrying value; W, a lawyer, knew carrying value different from real value; H's sale of company 6 mo. later for $45M was not fraud.	At dissolution	Agreement was the product of negotiations; both parties had lawyers.

Premarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
Harbom v. Harbom, 760 A.2d 272 (Md. Ct. Spec. App. 2000)	List of H's family business interests, without values, coupled with W's general knowledge was sufficient for validity of PMA; key is whether there was overreaching, not absence of disclosure.	At dissolution	That the PMA was the product of a negotiation was significant to the decision.
Cannon v. Cannon, 865 A.2d 563 (Md. Ct. App. 2005)	No formal financial disclosure for PMA; parties had some discussion about H's assets before marriage when H applied for a mortgage to purchase home for parties and his financial affairs were uncomplicated; PMA valid.	At dissolution	Trial judge believed H's testimony; what if credibility determination had gone the other way? Court of Appeals retained long-standing precedent holding that parties to a premarital agreement are in a confidential relationship as a matter of law.
Stewart v. Stewart, 76 A.3d 1221 (Md. Ct. Spec. App. 2013)	Rejecting W's claim financial disclosure for PMA was inadequate because it did not include accountant's statement or information from which she could calculate H's future earnings.	At dissolution	
Michniewicz v. Michniewicz, No. 0266, 2018 WL 1747897 (Md. Ct. Spec. App. Apr. 11, 2018)	PMA failed where W unaware of H's "$40,000 of unlisted cash stored in the basement ceiling of his home."	At dissolution	
Schechter v. Schechter, 37 N.E.3d 632 (Mass. App. Ct. 2015)	Prenuptial agreement invalid due to lack of full disclosure where H "made inconsistent statements about who owned [his primary asset] and the true nature of his actual income."	At dissolution	

Premarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
In re Marriage of Bliss, 367 P.3d 395 (Mont. 2016)	PMA valid although W failed to include her two businesses (cat breeding and pet grooming) in written disclosure where parties lived together before marriage, W operated one from home, H occasionally worked in the other.	At dissolution	Why omit the businesses? Wouldn't it have been easy to include them?
In re Est. of Shinn, 925 A.2d 88 (N.J. Super. Ct. 2007)	Written disclosure listing various assets valued at $850,000 inadequate where H listed other assets without statement of values and where his life insurance application stated $6M net worth. PMA invalid.	After death	Sounds like fraud though the court did not call it that.
Dobre v. Dobre, No. A-1315-15T2, 2018 WL 1882968 (N.J. Super. Ct. Apr. 20, 2018)	PMA invalid where W's disclosure schedule referenced attached property appraisals, account statements and tax returns, none of which were attached.	At dissolution	
Carter v. Fairchild-Carter, 133 N.Y.S.3d 316 (N.Y. App. Div. 2020)	PMA void in its entirety where key benefit for W (50% of appreciation of marital home) premised on H's fraudulent statement of then-current value.	At dissolution	H engaged in other sleazy conduct on leadup to signing.
Parrett v. Wright, No. 2017-CA-59, 2017 WL 6398840 (Ohio Ct. App. Dec. 15, 2017)	PMA invalid because deceased W did not fully disclose assets and agreement did not include statement waiving full disclosure of assets.	After death	Neither party made financial disclosure. One page agreement. No lawyers. H's nondisclosure and concealment of an asset did not constitute waiver. In dicta, court speculated whether waiver is permissible. Decedent's estate had burden of proof.

Premarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
Walker v. Walker, No. M2018-01140-COA-R9-CV, 2020 WL 507645 (Tenn. Ct. App. Jan. 31, 2020)	H failed to disclose he owned condominium with former girlfriend, purchased during hiatus in premarital relationship with W; PMA invalid.	At dissolution	No info in opinion about value relative to other assets; so, was it material? Court seemed heavily influenced by H's deliberate omission of this info. H's lawyer told parties to bring asset lists to his office but did not ask questions.
McKoy v. McKoy, No. CL16-6180, 2017 WL 11380084 (Va. Cir. Ct. Jan. 6, 2017)	Statement in PMA, repeated three times, that parties made disclosures, and referred to attached schedules, did not save the agreement when statements were false and therefore fraudulent, no schedules were attached.	At dissolution	Terms of PMA were also unconscionable. What if terms were not unconscionable? Would H have gotten away with the fraud?

Postmarital Agreement Cases

Postmarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
Northington v. Northington, 257 So. 3d 326 (Ala. Civ. App. 2017)	Postmarital agreement executed after W caught in extramarital affair, as condition for reconciliation. W was aware of 14 parcels of real estate H owned as well as H's business. H gave W amount of debt on real estate and purchase price, showing net equity of $324K. H refused to give W FMVs, though H had given this info to banks, showed net equity of $1.6M, instead advised W about other methods she could use to get valuations. Postmarital agreement was valid.	At dissolution	Trial court rejected W's claim of fraud in the inducement due to refusal to provide values.
In re Marriage of Burkle, 43 Cal. Rptr. 3d 181 (Cal. Ct. App. 2006)	H not required to furnish W all details in writing when W offered access to all information. W argued that H had a fiduciary duty to furnish her, in writing, and without demand, sufficient information concerning the merger transaction so as to afford her the opportunity to properly exercise her rights and duties as a partner in the assets. Court of Appeal disagreed, relying on *Boeseke v. Boeseke*, 519 P.2d 161 (Cal. 1974): "The pertinent rule is that a spouse who foregoes investigation and accepts a proposed settlement 'may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts.'"	At dissolution	

Postmarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
Smith v. Smith, 11 MFLM Supp. 93 (Ct. Spec. App. 2010) (N.J. unpublished)	Postmarital Agreement valid. Financial disclosure is not a prerequisite to validity.	At dissolution	
Petracca v. Petracca, 956 N.Y.S.2d 77 (N.Y. App. Div. 2012)	Disclosure of assets valued at $22M was inadequate where understated by $11M; postmarital agreement invalid.	At dissolution	Terms of agreement were manifestly unfair, and process marked by over-reaching.
Keith v. Keith, 156 N.W. 910 (S.D. 1916)	Postmarital agreement void where W agreed to pool assets with H based on his fraudulent concealment of his insolvency.	At dissolution	
Daniel v. Daniel, 779 S.W.2d 110 (Tex. App. 1989)	H, a lawyer and CPA, could have discovered marital estate earned $1M in trust controlled by W by examining joint tax returns; postmarital agreement upheld.	At dissolution	
Morris v. Morris, No. 13-0742, 2014 WL 1272517 (W. Va. Ct. App. Mar. 28, 2014)	Postmarital agreement invalid where H's financial disclosure was fraught with glaring omissions [$14.3M of retained earnings in his business] and gross inaccuracies [gross understatement of income].	At dissolution	Good example of outright fraud. Did H actually think he was going to get away with this?
In re Marriage of Van Ert, 54 N.E.3d 928 (Ill. App. Ct. 2016)	H failed to disclose offer to purchase business for $16M, consummated two hours after divorce; W's petition alleging fraud entitled to hearing.	At dissolution	
Amburgey v. Amburgey, No. 2017-CA-000235-MR, 2018 WL 3702492 (Ky. Ct. App. Aug. 3, 2018)	Neither party disclosed income or net worth and postmarital agreement did not identify parties' assets. Postmarital agreement unenforceable.	At dissolution	

Postmarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
In re Marriage of Bernard, 137 Wash. App. 827, 835-36, 155 P.3d 171 (2007)	The Washington S. Ct. found prenuptial agreement was substantively unfair because, among other reasons, (i) it severely restricted the creation of community property, especially if death or dissolution occurred within ten years of marriage, (ii) community property rights were completely eliminated in the short term, yet H was allowed to enrich his own separate property at the expense of the community, and (iii) because it made inadequate provisions for W relative to H's means. The court found the agreement procedurally unfair because W was presented with a draft agreement days before the wedding, and concerned that H would call off the wedding. W signed a side letter agreeing to renegotiate the agreement after the wedding, but the points that the side-letter left open for renegotiation were too narrow to cure the defects in the original agreement. The Court found the amended agreement was also substantively unfair. It should also be noted that the Court of Appeals based its procedural unfairness conclusion, in part, on the fact that W's attorney did not accurately advise her of her rights.	At dissolution	This analysis only applies to agreements where the parties have waived the right to a just and equitable distribution of their jointly held property. In the absence of a waiver, the court has full discretion to equitably distribute the property, so an analysis of the fairness of the agreement is unnecessary.

Postmarital Agreement Cases	Case Facts about Disclosure	Enforcement sought/ challenge made	Comments
In re Marriage of Sanchez, 33 Wn. App. 215, 654 P.2d 702 (1982), *In re Marriage of Fox*, 58 Wn. App. 935, 795 P.2d 1170 (1990)	Agreement upheld because it was based on a full disclosure of relevant facts, it was fair in its execution, and the parties strictly observed the agreement in good faith.		