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Prenuptial & Postnuptial Agreements

Who needs a prenuptial agreement? Some attorneys answer “everyone.” In reality, a prenup may make sense for you... and it may not. Generally speaking, prenups are a good idea for folks with more assets to protect. One court put it this way:

> Today, divorce is a common-place fact of life... As a result there is a concurrent increase in second and third marriages – often of mature people with substantial means and separate families from earlier marriages. The conflicts that naturally inhere in such relationships make the litigation that follows even more uncertain, unpleasant, and costly. Consequently, people with previous “bad luck” with domestic life may not be willing to risk marriage again without the ability to safeguard their financial interests. In other words, without the ability to order their own affairs as they wish, many people may simply forgo marriage for more ‘informal’ relationships. Prenuptial agreements, on the other hand, provide such people with the opportunity to ensure predictability, plan their future with more security, and, most importantly, decide their own destiny[1]

Still, prenuptial agreements, by definition, beget unfairness. This is so because, in a divorce, “fair” is what a judge says it is when a judge says it; that is, at the end of a divorce case. Any result that differs from what a judge would order is, at least to a divorce lawyer, technically unfair. To the extent a prenuptial agreement obtains a result that is different from what a divorce court would award, the result is unfair. Still, “one man’s unfairness may be another’s justice;” and as long as the husband and wife are satisfied, who else could care?

Also to be considered, however, is the fact that prenuptial agreements can oftentimes serve to undermine the very vows of the marriage. Protected by a solid agreement, one spouse may decide to breach the marriage vows secure in the knowledge that, even if the breach is discovered, the aggrieved spouse will face the dilemma of either accepting the breach, condoning the betrayal, and preserving the marriage – or accepting the possibly costly and punishing terms of the prenuptial agreement and ending the marriage.

The most commonly sought objective in most prenuptial agreements is to ensure that one’s property passes to the children or other relatives from a first marriage rather than to the second spouse or his or her family. Illinois’ divorce laws define “marital property,” but spouses (before or after the marriage) may agree to a different definition. They may identify certain properties as marital or non-marital. For example, they may agree that one spouse’s pre-marital homestead be considered to be marital property; or that any businesses created during the marriage be considered the entrepreneurial spouses non-marital property. The spouses agree to a specific division of property (say, 50/50) or to the allocation of a particular item (“the wife shall receive a new, full-size, automobile and cash equal to four-year’s tuition at Harvard University). . Likewise, they may agree on maintenance (alimony) payments (both amount and duration) and lump sum payments (“if we divorce within five year’s of the date of marriage, husband shall pay to wife one million dollars; if we divorce after five but within ten years of marriage, husband shall pay to wife five million dollars”).

Effective Date: Prenuptial agreements become effective upon marriage.[2] If you sign a prenuptial agreement, but the marriage is called off, the prenup has no effect.

Legal Representation: Illinois law does not require that a fiancé consult with an attorney or that an attorney approve a prenuptial agreement for the agreement to be held valid. Nevertheless, when asked to invalidate an agreement, courts routinely consider whether the disadvantaged spouse had adequate legal representation during the negotiation of the agreement. Courts are far more willing to find “duress” – and invalidate a prenuptial agreement – where a fiancé lacked legal representation and where the fiancé was not informed of his or her right to consult an attorney prior to signing the agreement.[3]

Duress and Coercion: Illinois law says that to be valid, a prenuptial agreement must be VOLUNTARILY signed by both parties. In other words, a signature obtained under duress or coercion will not result in a valid prenuptial agreement. In 1962 the Illinois Supreme Court defined duress as “a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive [the individual] of the exercise of free will.”[4] The bar

is set pretty high. In one case, a bride-to-be threatened to expose the groom's adulterous affair – but that was not enough to prove his "duress."[5] In another case, the court refused to find coercion where the groom adamantly demanded a prenup and made a prenuptial agreement a precondition to marriage.[6]

Unconscionability: Gross unfairness ("unconscionability") of a prenuptial agreement is not enough to invalidate it. Other factors (see below) must be present in addition to the alleged unconscionability in order to set aside a prenuptial agreement.

Unconscionability has been defined as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party... A contract is unconscionable when it is improvident, totally one sided or oppressive."[7] When asked to consider the "conscionability" of a prenuptial agreement the court considers the circumstances that existed at the time the agreement was signed; not circumstances that may have arisen since the agreement was executed. That is, for the court, the question is "regardless of how the agreement looks or works at the time of divorce, was it unconscionable at the time it was executed?"

In addition to oppressiveness or one-sidedness, to invalidate a prenuptial agreement on grounds of unconscionability, a spouse must also prove that he or she 1) did not receive a fair and reasonable disclosure of the property or financial obligations of the fiancé, 2) did not voluntarily waive the right to disclosure,[8] *and* 3) lacked an adequate knowledge of the fiancé's assets or obligations.

In other words, if the court concludes that the agreement was conscionable at the time it was executed, the requirements about disclosure are not considered. If, however, the divorce court concludes that the prenuptial agreement was unconscionable when signed, it will still be enforceable so long as either 1) financial disclosure was made, 2) financial disclosure was waived, or 3) the challenging spouse had adequate knowledge of the finances even without financial disclosure.

Concealment of Assets: An otherwise valid prenuptial agreement may be rendered void if one of the parties conceals assets during the negotiation of the agreement. One of the purposes of the agreement, after all, is to get out on the table the respective financial circumstances of the spouses-to-be. Where one spouse conceals assets, the lack of disclosure prevents the disadvantaged spouse from making an informed decision when deciding whether or not to enter into the agreement – and that fact undermines the validity of the agreement.[9]

If the agreement calls for the payment of maintenance that is largely disproportionate to the value of the payor's estate, the court will presume that assets were concealed and the paying spouse will have the burden of proving that full disclosure was made during the negotiations.[10] Failure to meet that burden will result in the invalidation of the prenuptial agreement.

Waiver of Spousal Rights in Retirement Benefits: All qualified retirement plans are regulated by the Employment Retirement Income Security Act of 1974 ("ERISA"). The federal law requires that benefits be payable in the form of either a "qualified and joint survivor annuity" or a "qualified pre-retirement annuity." Those forms of benefit may be waived, but only with spousal consent. Spousal consent, however, is effective only if certain requirements are met.[11]

When spousal rights in retirement benefits are waived in a prenuptial or postnuptial agreement, the waiver will not be effective – and will not be recognized or honored by the plan – if the waiver fails to follow the requirements of ERISA. Failure to satisfy ERISA requirements, contrary to the terms of any prenuptial agreement, will result in the spousal share of the plans at issue to be awarded to either the divorced spouse of the participant or the participant's surviving second spouse.

Perhaps the most frequent mistake made by non-attorneys is to have a soon-to-be-spouse sign a prenuptial agreement and the spousal waiver. The waiver will be found to be ineffective as it was not signed by a spouse – because it was signed prior to he marriage. The proper way to achieve an effective spousal waiver of retirement benefits is to have the prenuptial agreement signed prior to the marriage and the spousal waiver executed after the marriage.

Amendments: Prenuptial agreements may be amended, but any amendment must be in writing and signed by both parties. Amendments do not require consideration to be valid.

Revocation: Prenuptial agreements may be revoked, but any revocation must be in writing and signed by both parties. Revocations do not require consideration to be valid.

Confidentiality of Prenuptial Agreements: Prenuptial agreements are not protected by the "marital privilege." In

one case, a former husband was forced to reveal to his former wife the terms of his prenuptial agreement with his second wife. Although prenuptial agreements "address intimate aspects of marriage, they are not protected under a right to privacy because their confidentiality is not a fundamental right necessary to the concept of ordered liberty."[12]

Postnuptial Agreements Inferior: The issue of conscionability of a postnuptial agreement is not analyzed in the same way as with prenuptial agreements. The additional requirements of reasonable and fair disclosure, or waiver of disclosure, or knowledge of finances do not come into play. A court may invalidate a post-nuptial agreement simply on grounds of unconscionability; regardless of disclosure, waiver of disclosure, or knowledge of finances.

This article was written by the law office of Cowell Taradash, P.C., whose attorneys are familiar with the latest court decisions, recent changes in the law and even the tendencies of many judges. We can help. Contact us at 866.987.6723 or info@illinoisdivorce.com.