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Agreeing to Agree — Contracts Concerning Marital Rights

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Rising divorce rates, second marriages, dual income families and the change in the laws governing property issues have prompted more and more couples to use some kind of marital contract. A marital contract can help a couple prevent questions and conflicts in the future about issues such as:

- Rights and responsibilities during the marriage.
- Rights of the survivor if one spouse dies.
- Rights and responsibilities if they divorce.

Marital contracts are referred to in one of three ways:

- Antenuptial agreement. An agreement made before marriage.
- Postnuptial agreement. An agreement made during marriage.
- Separation and property settlement agreement. An agreement made at the time of separation or dissolution.

Antenuptial agreements

This type of agreement generally concerns two issues. The matter of spousal rights in the event of death of the other and the possibility of divorce.

An antenuptial agreement cannot be enforced unless each person agreed to the contract freely. Each person must clearly understand the consequences of the agreement.

If the contract results in one spouse giving up some of his/her rights, that choice must be free from fraud or coercion, and the decision must be based on complete disclosure of all of the pertinent facts regarding what was being given up.

Antenuptial agreements usually address most of these issues:

- Giving up any right (by inheritance or any other legal right) to take property from the deceased spouse's estate.
- The right to dispute the will of a deceased spouse.
- The waiver of the right to claim ownership of specific properties that would ordinarily be considered marital property in the event of a divorce.

- The waiver of the right to seek financial support from the other spouse in the event of a divorce.

There are several legal requirements that must be met to ensure the validity of an antenuptial agreement.

- The agreement must be in writing.
- It must be entered into only after full disclosure of holdings by both parties.
- Parties must intend that the agreement be a full discharge of rights of inheritance from the estate of the other and marital rights.
- There must be fair consideration in exchange for the waiver of rights of inheritance or other statutory rights of the surviving spouse.
- In addition, case law seems to require that each spouse be advised by a separate attorney regarding their rights and liabilities under such a contract.

Antenuptial agreements are commonly related to the estate planning wishes of one or both of the prospective spouses. Depending on the consideration being exchanged by the agreement, there may be gift tax or income tax consequences involved. Attention to these tax consequences is critical in order to avoid unwanted taxes for either party or their respective families. It is essential that a professional assess the impact any marital contract might have on taxes.

Postnuptial agreement

The law with regard to a spouse giving up his/her right to contest a will makes no distinction between antenuptial and postnuptial contracts. Therefore, the essentials of full disclosure of property and marital rights apply here also.

There must be sufficient consideration, a clearly expressed intention of the parties and a fair and just agreement.

Mutual releases in the property of the other spouse, while not precisely equal, may still constitute sufficient consideration for the contract.

The law presumes that there is a special relationship of trust and confidence between spouses, so the possibilities of fraud and coercion will be more closely reviewed where a postnuptial contract has been made.

Separation and property settlement agreements

An agreement that goes into effect at the time of separation or divorce is called a separation or property settlement agreement. It should be approved by the court to protect the parties. Missouri laws encourage couples to settle their problems this way by stating that the court is bound by their agreement if it is reasonable and fair.

This means that if the couple fairly carries out the agreement and the agreement is fair in its terms, the court cannot make any orders concerning property, debts or maintenance (alimony) that differ from the couple's agreement. Courts usually order what parents have agreed for their children, as well. However, the court always has the power to ignore the parents' wishes concerning children and to make custody and support orders that are best for the children's welfare.

Most attorneys recommend that a separation agreement cover all possible money, tax, property and child custody issues that could arise. If the couple is unable to agree on specific problems, these could be presented for the court to decide. Unless the agreement provides otherwise, it will become part of the court's official decree and will be enforceable and modifiable as a court judgment.

A separation agreement is the legal way for a divorcing couple to avoid extended and expensive trials and to privately settle details of their ended marriage. The couple and their attorneys should be seeking compromises that result in agreement reasonably satisfactory to both.

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