Marital Agreements in Colorado

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Trust and Estate articles are sponsored by the CBA Trust and Estate Section. They focus on topics including trust and estate planning and administration, elder law, probate litigation, guardianships and conservatorships, and tax planning.

This article addresses premarital and postmarital agreements in Colorado and discusses the history and requirements of marital agreements. A version of this article will be added to the *Colorado Estate Planning Handbook* in the 2007 Supplement. The 2007 Supplement will be available February 2007 from CBA–CLE.

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Marital agreements are becoming more common in estate planning for a number of reasons. Because pre- and postmarital agreements can impact a client's estate plan, it is important for the effective estate planning attorney to be aware of the numerous issues surrounding marital agreements, including the requirements of enforceable agreements and current case law interpreting marital agreements. This article provides a brief historical background of marital agreements and discusses grounds for attacking such agreements. In addition, provisions in marital contracts pertaining to divorce and death issues are analyzed. Finally, practical suggestions for practitioners who prepare marital agreements are provided.

Historical Overview

Modern premarital agreements evolved out of "jointure," an early common law estate in lands intended to provide for the lifetime of a wife on the death of her husband. Until 1970, premarital agreements that addressed issues relating to divorce were void as against public policy.[1] Colorado's first case giving validity to premarital agreements that contained divorce provisions was decided in 1975.[2] Now, all states and Washington, D.C. accept premarital agreements as a permissible means of contracting between spouses, as long as such agreements are validly made.

Absent an agreement to the contrary, spouses in all states acquire legal or equitable rights in property that are not dependent on which spouse holds legal title. Consequently, marital agreements are available to alter both legal and equitable rights. Reasons for using marital agreements are numerous and include protecting family property from marital claims in a divorce proceeding, protecting property for children from a prior marriage, and protecting business interests or certain assets in the event of divorce or death.

Uniform Premarital Agreement Act

Before 1983, states did not have statutes specifically authorizing premarital agreements. Consequently, courts made decisions about such agreements on a case-by-case basis. In response to the resulting lack of uniformity and due to the increase in demand for these agreements, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Premarital Agreement Act (UPAA) in 1983.[3] By 2005, the UPAA was adopted in twenty-five states and the District of Columbia in whole or in part.[4] Some states have adopted a modified version of the UPAA, and states that have adopted the UPAA have differing enforceability standards. Thus, uniformity has not been achieved, and this can create issues for "mobile" clients or those who own property in more than one jurisdiction.

The UPAA defines a "premarital agreement" as an agreement between prospective spouses made in contemplation of marriage to become effective on marriage. Parties are allowed to contract on all matters, including divorce. To be valid under the UPAA, these agreements must be in writing, as must any amendments and revocations to the agreement. No additional consideration is required for an agreement to be enforceable—the marriage itself is the consideration. The UPAA does not recognize postmarital agreements.

Colorado Statutes Permitting Marital Agreements

Colorado has two acts that recognize the validity of marital agreements. These are the Colorado Uniform Dissolution of Marriage Act[5] and the Colorado Marital Agreement Act (CMAA).[6] The CMAA is Colorado's version of the UPAA, and was enacted in 1986. Unlike the UPAA, the CMAA recognizes premarital and postmarital agreements. Colorado marital agreements entered into before July 1, 1986 are governed by prior case law. Part of the CMAA was amended and applies to agreements that became effective on or after July 1, 1996.[7]

Requirements for Enforceable Colorado Marital Agreements

To be enforceable in Colorado, a marital agreement must meet the following requirements:

1. A marital agreement must be in writing and must be signed by both parties.[8]
2. The parties must enter into the agreement voluntarily.[9]
3. Each party to a marital agreement must provide to the other party a fair and reasonable disclosure of his or her property or financial liabilities before executing the agreement.[10]
4. The agreement becomes effective on marriage if signed by both parties prior to the marriage, or on the signature of both parties if signed during the marriage.[11]
5. After the agreement becomes effective, it can be amended or revoked only by a written agreement signed by both parties.[12]
6. A marital agreement may not violate public policy.[13]
7. A marital agreement may not adversely affect the right of a child to child support.[14]
8. A marital agreement will not be enforceable if any provisions are found to be unconscionable.[15] Determination of unconscionability is made at the time of enforcement and not at the time the agreement is signed.[16] The burden of proof is on the party challenging the agreement.[17]

Grounds for Attacking Marital Agreements

There are several bases on which marital agreements may be invalidated, regardless of when executed.[18] These are discussed below.

Unconscionability or Lack of Fairness

Unconscionability of an agreement is decided by a court as a matter of law.[19] If the terms of an agreement are so unfair and the parties' bargaining position is so disproportionate as to render the agreement unconscionable, it will be invalidated.[20] The current trend of courts is to enforce a premarital agreement, even if it appears to be unfair, when the parties have entered into the agreement voluntarily and there has been adequate disclosure.

Change in Circumstances

Factors considered in determining whether a change in circumstances warrants invalidating an agreement include: (1) the length of marriage; (2) the birth of children; and (3) changes in detrimental reliance on the marriage.[21] Some courts find that the underlying state interest in the welfare of divorced spouses outweighs the freedom to contract, and that the state has a valid interest in mitigating potential hardship to a spouse resulting from the breakup of the marriage and a strict interpretation of the agreement.[22]

Violation of Public Policy

When terms of an agreement are seen as encouraging divorce or some form of discrimination, a court will invoke public policy as a reason for not enforcing an agreement.[23] For example, the Colorado Court of Appeals invoked public policy to invalidate an agreement containing terms that mandated specific religious training for children.[24]

Involuntary Execution, Fraud, Duress, or Undue Influence

In determining whether an agreement was entered into voluntarily, courts may look to the absence of independent legal counsel or the length of time between entering the agreement and the marriage."[25] To prevail on a claim of fraud, a party must prove that the other party knowingly made false representations with intent to deceive. For duress to void a contract, it must consist of "threats of bodily or other harm or other means amounting to coercion, or tending to coerce the will of another and actually inducing him to do an act contrary to his free will."[26] The threat of not marrying is not considered duress.[27]

Lack of Independent Legal Counsel

The UPAA does not require that parties have separate legal counsel; no state has this requirement, either. Although no Colorado court has found a marital agreement unenforceable due to lack of legal representation, courts can consider the issue of legal representation when evaluating whether parties knowingly entered into the agreement.

Lack of Financial Disclosure

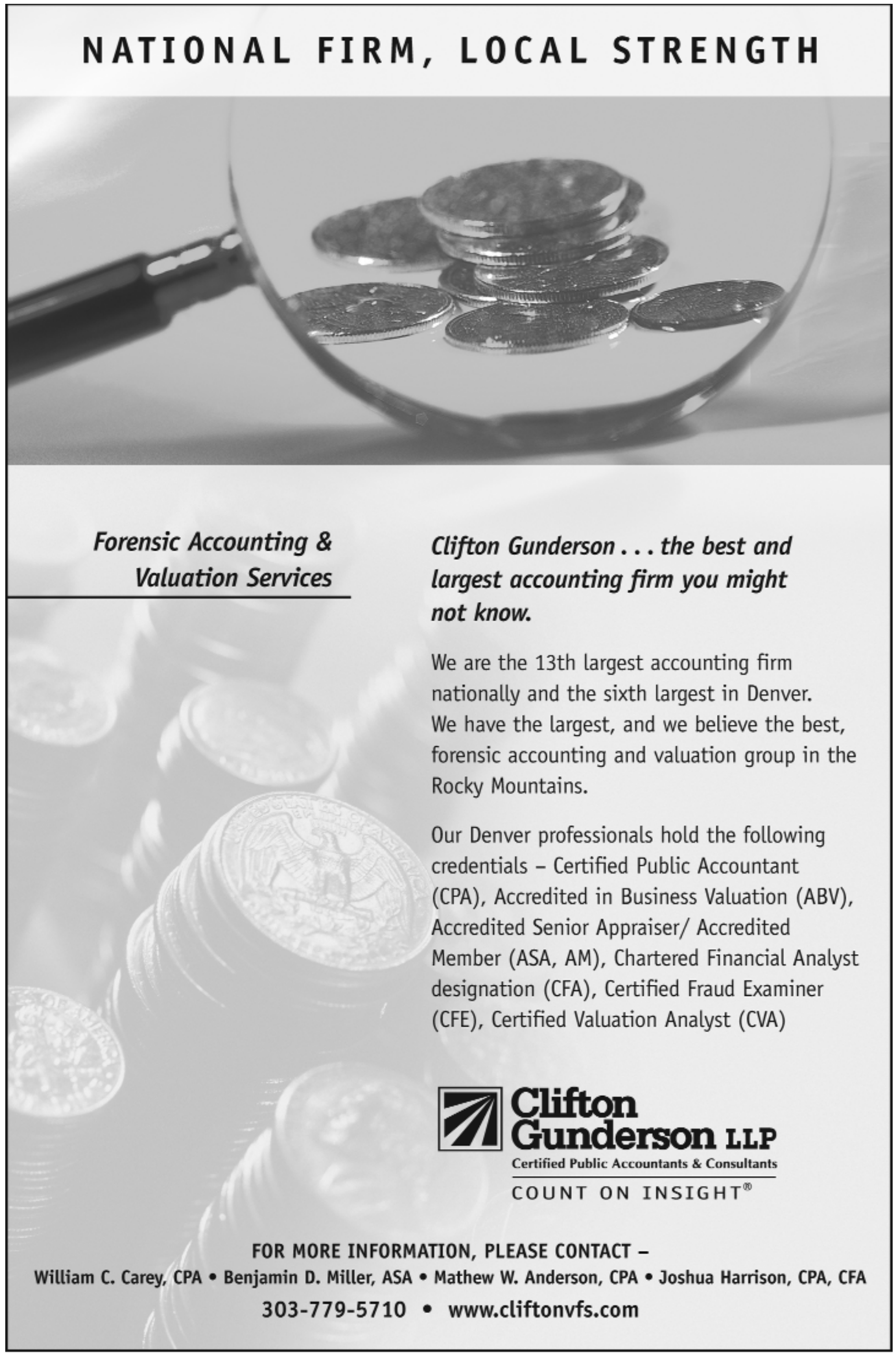
The UPAA and every state that allows marital agreements require financial disclosure for an agreement to be valid. The amount of disclosure required varies from state to state. The UPAA allows for this disclosure to be waived. However, for Colorado marital agreements, the best practice is to disclose financial status with as much detail as possible, including contingent and prospective assets and liabilities, and to attach such information as exhibits to the agreement.

Property Division on Divorce

One of the most important provisions to a client in a marital agreement is the delineation of marital and separate property in the event of a termination of the marriage by divorce or legal separation. Under Colorado law, without a marital agreement, separate property is awarded to the party to whom it belongs, and marital property is equitably (not necessarily equally) divided between the parties.[28]

Marital and Separate Property

Marital agreements can define separate property according to Colorado law, so that all assets owned on the date of the marriage or received as a gift (even from the other spouse) or bequest are the separate property of the recipient spouse. Agreements often expand this definition



by including all income from and appreciation on such property as each party's separate property and can further include third-party trust income and appreciation.

This is especially useful to avoid the impact of the *Balanson* line of cases, which treat as marital property the appreciation in an irrevocable third-party trust of which one spouse is a beneficiary during the marriage.[29] The legislature has removed only revocable trusts from such treatment.[30] On appeal, the *Balanson* case discussed how to value such trust appreciation.[31]

Defining marital and separate property is especially difficult when dealing with the income or earnings of one spouse or additions to separate property. Practitioners must carefully consider the possible conversion of separate property to marital property. Under Colorado law, without a marital agreement, separate property owned on the date of marriage can be converted to marital property by commingling or failing to segregate and trace separate property through the marriage.[32] Likewise, the contribution of earnings during the marriage (which is considered marital property)[33] or efforts to a separate property can convert that separate property to marital property.[34] Definitions of separate property and marital property clearly expressed in a marital agreement could avoid an unexpected conversion of separate property or related litigation.

If a home is separate property, care should be taken to specify who will pay the mortgage, repairs, and improvements, and whether sweat equity can be created. The marital agreement should specify whether marital property will be created for each such addition and how the value will be computed. For example, the following issues should be addressed by the marital agreement:

1. If one spouse makes the down payment on a home, but both spouses pay the mortgage and do the repairs, will the second spouse earn an interest in the house?
2. Will such actions create marital property of only the increased value or convert the entire asset to marital property? Future flexibility also can be permitted through the creation of marital property by joint titling of assets, if so defined in the marital agreement.

Conversions from marital to separate property can occur when one spouse transfers his or her interest in marital property, by gift or sale, to the other spouse. Most marital agreements expressly define gifts between spouses as creating separate property for the recipient spouse. This allows a marital agreement to be more flexible in action, while such permitted gifts remain purely discretionary, creating no rights in either spouse.

Property titles can be determinative as to separate or marital property regardless of past titling or past character, if so specified in a marital agreement. This may be desirable to avoid tracing of assets during the marriage. The effect of asset titles should be discussed with the clients and included in the agreement. Assets should not be carelessly or erroneously titled during the marriage if the agreement or law gives the ownership title determinative value for marital or separate property characterization.

Marital and Separate Debt

A marital agreement should define marital and separate debt, in addition to assets. Debt incurred during the marriage can be marital debt under Colorado law. Because debt can negate any property value, expressly stating in an agreement what will be separate debt and what will be marital debt is essential. Separate debt during the marriage can include any liability incurred as an encumbrance on, used for, or arising from one party's separate property. The parties should be counseled about taking a mortgage on one spouse's separate property (or a loan from a retirement account) and using the funds for marital purposes if the debt will not be marital debt under the agreement, because it attaches to one spouse's separate property.[35] Providing for possible conversions of marital debt to separate debt and vice versa can be specified in the agreement.

Property in Other Jurisdictions

When drafting a marital agreement, the practitioner should consider that the couple may not always reside in Colorado and may own property in other jurisdictions. Therefore, the agreement should discuss community property, tenants by the entirety, homestead, and dower rights. It is easiest simply to waive those rights granted by other jurisdictions and bring the agreement under Colorado law for interpretation and application.

Some couples might wish to retain community property ownership of real property created in another state, to have a stepped-up basis at the first spouse's death. For them, the agreement could permit the creation of community property, specifying that it would be marital property or, alternatively, the separate property of the one spouse contributing the funds, for purposes of divorce or legal separation under the agreement. A post-marital agreement should discuss the treatment, as separate or marital property, of any assets previously obtained or held in another jurisdiction.

Marital Agreements as Financial Planning Tool

Older marital agreements typically would define separate property to be everything owned, earned, or obtained during the marriage so that the couple was never financially "married." Over time, it has become more acceptable to have a marital agreement not as a blueprint for divorce but as a foundation for successful financial planning. Because the marital agreement is enforceable as a contract, the provisions can be determined by the couple. Sometimes, one spouse will want to protect only one family asset, such as a ranch or a business, while providing security to the other spouse by making all other assets marital property. It is even possible to compute the shares of marital property based on the value of all the couple's assets, while prohibiting the allocation of certain properties to satisfy one spouse's share. Thus, each spouse would receive a full value of the property created during marriage, but one spouse would not receive any portion of a protected asset with the value alternatively allocated from other assets to the extent possible.

Retirement Accounts

Retirement accounts should be addressed when entering into marital agreements. Although one spouse can give a blanket waiver of his or her rights in the other spouse's retirement accounts, care must be given in advising such waivers. First, the waiver of a qualified plan is effective only if waived in writing after the marriage,[36] because the waiving spouse does not have any spousal rights to waive before the marriage. Second, each plan's documents will determine any additional waiver requirements. Because there are many types of retirement plans[37] and each plan's documents may control over federal and state law, an expert should be consulted to give full disclosure for a waiver.

Even if the plan provisions are fully understood, blanket waivers of retirement accounts may not be prudent for a client. If one spouse contributes significantly more to a retirement plan during the marriage than the other spouse, he or she could create a disproportionately large separate property asset, and thus circumvent the intent of the marital agreement. This is a real possibility when a marital agreement defines retirement accounts as separate property but compensation as marital property. A blanket waiver also could be detrimental to an underemployed spouse if the marriage lasts until the parties are in their fifties or sixties, because the underemployed spouse might have little or no retirement assets or ability to accrue them.

Dividing Property

After marital and separate property are clearly defined in the agreement, provisions should specify what will happen to each type of property on the occurrence of a divorce or legal separation. Most often, couples follow Colorado law and give separate property to the owning spouse and equally divide marital property (rather than equitably under the law).[38] When one spouse is significantly wealthier than the other spouse, there may be a provision for a specified sum of money or assets to be transferred to the poorer spouse. This can be incrementally increased or decreased, depending on circumstances such as the completed years of marriage, birth or number of children, and relative wealth at the time of termination.

Although the law may divide the marital property unequally to be equitable, the marital agreement can contain provisions for dividing property that locks in each party's respective cost or financial security should the marriage fail. This may permit the parties to more fully invest in the relationship instead of worrying about the costs of divorce.

Alimony

After property has been divided, without any marital agreement to the contrary, a court looks to the needs of the parties and each party's ability to provide for himself or herself.[39] If the court determines that one spouse has insufficient assets and income to support himself or herself, the other spouse may be ordered to pay maintenance (alimony). For many clients, this is the most-feared cost of divorce, and with so many dual income couples, alimony often is waived by both parties in marital agreements.

If both parties remain gainfully employed at relatively equal compensation, they will be equally impacted by the waivers in divorce. However, consideration should be given to the future consequences of such waivers. One spouse could become a caregiver, develop poor health, or for marital reasons become underemployed. The waiver could seriously harm a long-term underemployed spouse and maintenance might be needed for the spouse to return to gainful employment. Therefore, a prudent waiver might include a sunset or termination provision after a period of time or event, such as the birth of a child or disability.

Where one spouse is significantly wealthier than the other, the poorer spouse may insist on some maintenance in the marital agreement should the marriage fail. The agreement may specify maintenance payments, limiting the number and period of payments, along with the amounts that may increase for the number of completed years of marriage or the birth or number of children. The agreement could provide for amendment at specified times or events, which would permit future revision even if the couple moves from Colorado to a state that does not recognize postmarital agreements.

Any maintenance specified in a Colorado marital agreement should be structured to qualify as alimony under the federal tax code, if the tax benefit of that qualification is intended.[40] This can be a bargaining point in determining the amount of alimony but also can be a trap for the unwary. The agreement may specify that alimony will be guaranteed through the purchase of a life insurance policy on the payor's life that is payable to the spouse receiving maintenance. This can be beneficial for the couple who buys the life insurance early in the marriage, when premiums are cheaper, making insurance proceeds available even if the insured spouse dies during the marriage and not after a divorce.

Waiver of Rights at Death

In addition to modification or elimination of property rights in the event of divorce, marital agreements often address the rights a surviving spouse has in the estate of the decedent spouse. CRS § 14-2-302 lists the rights a surviving spouse has in the estate of a decedent spouse. The rights include:

1) the right to make a claim in the deceased spouse's estate for family and exempt property allowance;
2) the right to act as personal representative (unless another is named in decedent's will);
3) the right to claim a share of the intestate estate;
4) the right to claim a homestead exemption in the estate; and
5) the right to claim an elective share of the deceased spouse's estate.

If a party wishes to leave his or her entire estate to someone other than the surviving spouse, it is imperative that these rights be waived. Even a desire to devise a portion of an estate to a non-spouse could require a waiver of these rights. A spouse's carefully crafted estate plan providing for children from a previous marriage, for example, could be disrupted by the survivor's elective share claim to a percentage of the augmented estate. Colorado's modification of the UPAA, which permits an agreement to be made after the marriage takes place, can remedy this potential pitfall.

If the parties wish to waive all rights, the agreement simply may state that each party waives the rights listed in the statute, or the agreement may separately state each right the parties are relinquishing. Although marital agreements often provide for a blanket waiver, parties need not waive all rights at death and may tailor the agreement to fit their own situations.

Rights in Retirement Plans

Retirement plans that provide rights to spouses of participants often have very specific requirements for waiving these rights. One example is a retirement plan controlled by the Employee Retirement Income Security Act (ERISA). Those rights must be waived after the parties are married. An agreement waiving rights in an ERISA retirement plan that is signed before the parties are married will not be effective to waive those rights.[41]

Providing for the Surviving Spouse

Parties need not make promises to benefit the surviving spouse in an agreement; however, parties often wish to make such arrangements. Spouses may make a will intended to benefit the surviving spouse or to make the surviving spouse the beneficiary of life insurance or retirement benefits.[42] A common agreement in second marriages involves making provisions for the surviving spouse, while ensuring that the deceased spouse's children ultimately receive the property. Such promises often include the use of a trust for the lifetime of the surviving spouse. For couples who may be subject to the estate tax, it is important that a trust or any other provision for the surviving spouse qualify for the marital deduction.

Estate Planning

Parties to a marital agreement who have waived rights in the estate of the other must be advised to create and execute new testamentary documents. Wills signed before the marital agreement that devise property to the other party will be interpreted as if the survivor disclaimed all devises and renounced the right to act as personal representative.[43] An estate planning attorney should always ask if clients have signed a marital agreement and carefully consider the provisions of such agreement when crafting the estate plan.

Other Property Rights

Parties should consider other property rights that might affect marital agreements. These include the right of survivorship, rights related to life insurance proceeds, and community property rights.

Joint Ownership of Real and Personal Property

Parties should be informed that property held by the parties as joint tenants with the right of survivorship will belong to the survivor outright by operation of law. If the parties intend to hold property in joint tenancy, this possibility should be stated in the agreement.

Life Insurance

The parties may wish to provide the survivor with proceeds of an insurance policy in lieu of other rights that have been waived. The agreement should list the amount of insurance and give the receiving party the right to ask the insurance company whether the policy is in force. If a policy required by the agreement is not in exis tence at the date of one party's death, the survivor will have a claim in the estate of the deceased party.

Community Property

Colorado is not a community property state and no new community property can be created in Colorado by Colorado residents.[44] However, many marital agreements contain a waiver of community property rights afforded by other states because of the mobility of clients and the possibility that the parties may, at some time, create community property.

Provisions for Breach of Agreement

Marital agreements often include a provision allocating responsibility for attorney fees and costs in the event of a challenge to the agreement. If the agreement gives a surviving spouse rights in the decedent's estate and the decedent spouse has failed to make the testamentary transfer, the surviving spouse must make a claim on the decedent's estate, normally within four months after publication of the notice to creditors. The agreement could permit a surviving spouse additional time of up to one year after the date of death to file a claim and grant attorney fees and costs for failure to fulfill testamentary promises of the agreement. Without such a provision, the injured surviving spouse might be left to request the imposition of a constructive trust.[45]

Taxes

Because estate planning and separation agreements must include tax considerations, marital agreements addressing property dispositions on death or divorce likewise should do so. There are many types of taxes that may be involved, so an expert may need to be consulted.

Income Taxes

Parties to a marital agreement may specify that all income taxes owed during the marriage will be paid pro rata by the parties. Care should be taken to define what numbers will be used to determine the pro rata allocation. Adjusted gross income or taxable income would seem to be more appropriate than total income for this computation, because deductions would have been included. The best basis for pro rata determinations would be complete preparation of returns as if the parties were single, although even these numbers can be skewed by depreciation deductions, business losses, or excessive or bunched medical expenses. Regardless of the basis for the allocation, it may require the preliminary preparation of three tax returns—his, hers, and their joint return to determine the pro rata tax payments required.

Indemnity: The marital agreement that is valid under state law will not be binding for federal tax purposes.[46] The taxes on a joint return are joint and several.[47] An indemnity in a marital agreement nonetheless can give an injured spouse a claim on which he or she may be able to recoup some of the loss for taxes paid by one spouse but incurred by the other.

Business Taxes: The marital agreement can specify that business taxes are separate debt, as arising out of the business that is the separate property of one spouse. If the parties are co-owners of the business, each spouse should be liable only for business taxes, interest, and penalties in proportion to his or her ownership. Any taxes withheld from employees will be owed jointly and severally by "responsible persons," which can include any officer, director, partner, or person having financial responsibilities who should have known about the withheld taxes and could have paid them.[48] The liability for these business-related taxes, interest, and penalties should be specifically allocated in a marital agreement, because an uninvolved spouse may be asked to be an officer or director of a company or may have the ability to sign on the company bank account and, thus, could unknowingly incur 100 percent liability for any unpaid withholding taxes.

Gift Taxes

There is no gift tax liability for gifts between spouses who are U.S. citizens while they are married or legally separated.[49] A gift tax could be incurred when either spouse makes a gift to any third party that exceeds $12,000 per year per donor or that does not qualify for the annual gift tax exclusion.[50] Each married couple can give up to $24,000 per year in qualified gifts to each person they choose.[51] When gifts exceed this amount or do not qualify for the annual exclusion, the donor's lifetime gift exclusion amount can be used to avoid any gift tax liability.[52] This lifetime exclusion amount is currently $1 million for all recipients over the donor's life.[53]

Parties to a marital agreement can specify that any gift tax is the liability of the person who made the gift. The agreement should indemnify the parties for potential tax liability under federal tax law that differs from their liability under the agreement. However, allocation of an exclusion amount cannot be changed by a marital agreement, so the parties should indemnify each other for any tax liabilities that might result.

Taxes on Insurance Proceeds

If insurance policies are required under the marital agreement, the ownership of such policies by the insured will cause the insurance proceeds to be taxed in the insured party's estate.[54] This is a concern if either of the parties have a taxable estate.[55] An irrevocable life insurance trust should be considered to hold the life insurance policy where estate tax or future use of the proceeds is a concern.

If an insurance trust is desired, the marital agreement should require its establishment and the purchase of a policy having a specified death benefit as soon as possible after the marriage. The agreement also should specify the basic terms of the trust, including the trustees, beneficiaries, purposes and timing of distributions, and termination date. Tax law requirements for exclusion from each party's taxable estate should be included in the agreement.

If estate taxes are not a concern, the marital agreement can require one party to purchase the policy with a specified death benefit and name the spouse as a beneficiary. If the spouse is the beneficiary, he or she may not have an insurable interest for purchasing a new policy until after the marriage. Any transfer of an existing policy before marriage can create a gift tax liability.

Taxes on Divorce

When the decree of divorce is entered, the parties no longer are spouses and any transfers between them are not subject to the unlimited marital gift tax deduction.[56] To avoid gift tax on such transfers, they must qualify as "incident to the divorce," meaning the transfers are approved by the court, made within one year following the decree and "related to the cessation of the marriage."[57] Qualifying transfers cause no recognition of gain or loss and retain the same basis (for capital gains purposes) that the property had in the hands of the transferor ex-spouse.[58] The marital agreement should carefully comply with these requirements for all property transfers. Different rules apply if either spouse is not a U.S. citizen.[59]

Maintenance specified in a marital agreement can qualify as alimony for tax purposes, as long as the payments are made in cash; no payments are required after the death of the recipient ex-spouse; the payments are not specified as "nontaxable"; and the couple is not cohabiting.[60] Rent or mortgage payments and legal fees paid by one spouse for the ex-spouse's benefit can qualify as alimony, if so structured.[61] If treatment as alimony is desired, the marital agreement should carefully comply with all tax requirements in providing for maintenance on divorce or legal separation.

Taxes on Death of First Spouse

The marital agreement should consider tax efficiency for all provisions made for the surviving spouse. If the surviving spouse is a U.S. citizen and either spouse has a taxable estate, full estate tax planning should be incorporated into the marital agreement. If a trust is to be created for the surviving spouse, the terms of the trust should be agreed to in the marital agreement, along with the amount to be transferred. Depending on the family circumstances and the desires of the parties, a qualified terminal interest property (QTIP) trust may hold the spouse's share, and a family (or credit shelter) trust may benefit the family with or without the spouse as a beneficiary.[62] The agreement should include the names of the trustee(s) and successors, the amount and nature of funding, distributions during the surviving spouse's life, any powers of appointment granted to the surviving spouse, and the disposition on a specified terminating event. The parties may agree to execute estate planning documents having provisions specified in the agreement. Contractual wills are not recommended, as they are inflexible for the surviving or only competent spouse. Sometimes the QTIP trust is funded on marriage and qualifies for the unlimited gift exemption between spouses.[63] If one of the spouses is not a U.S. citizen and the decedent spouse has an otherwise taxable estate, the marital agreement should require that transfers to the non-citizen surviving spouse be held in a qualified domestic trust.[64]

Finally, if the parties expect to have an estate tax, care should be taken to allocate estate taxes to or away from any transfers to the surviving spouse, so that the amount agreed to pass to a surviving spouse is not reduced by 45 percent for estate taxes. Because the estate also must pay income taxes during administration, allocation of any estate income taxes should be specified to be either paid or not paid from the transfers directed to the surviving spouse to accomplish the parties' intent.

Practical Suggestions

Marital agreements involve a multitude of issues and should be carefully drafted. The attorney drafting marital agreements must be knowledgeable about family law and estate law, as these two areas of law are inextricably entwined. For a client to make a knowing and voluntary waiver, the attorney must clearly explain his or her rights in both the divorce and death contexts. To that end, and depending on the situation, it may be advisable for estate planning attorneys and family law attorneys to co-counsel.

Additionally, the attorney must know what is required for an enforceable agreement and be aware of cases interpreting agreements. Due to the mobility of society, counsel should advise the client about the impact that moving to another state may have on a marital agreement prepared under Colorado law. For example, most states do not recognize postmarital agreements. Also, clients should be advised of the ramifications of modifying the marital agreement by conduct and apparent mutual agreement.[65]

An attorney preparing a post-marital agreement should determine what is separate property and what is marital property at the date of the agreement. Ascertaining current titling and recognition of the types of property may necessitate the retitling of assets to effectuate the agreement.[66] This same analysis should occur with respect to liabilities and how to divide debts. Indemnification should be addressed, as well.

It is vital that the estate planning documents coordinate with a pre- or postnuptial agreement. Similarly, if the parties are waiving rights to ERISA plans, the parties must sign an ERISA waiver after they are married, or the waiver will be ineffective.

Although the statute does not require separate legal counsel for each party, it is recommended to have such separate representation. If a party refuses to have separate counsel, the parties should expressly acknowledge the waiver of independent counsel in the agreement.[67]

Voluntariness is at the core of enforcing marital agreements. It is important to negotiate and draft the agreement sufficiently in advance of the marriage; an agreement that is introduced to a party at the last minute is more likely to be invalidated.[68] For example, parties should avoid contracting on religious matters, because courts may invalidate an agreement that violates public policy.[69]

The CMAA does not specify what constitutes fair and reasonable disclosure. A general understanding of wealth and liabilities typically is adequate disclosure, and some cases have indicated that written disclosure is not required. However, parties should make full and detailed written disclosure of their financial circumstances to prevent allegations of fraud, material nondisclosure, concealment, or lack of good faith.[70] The agreement should include written exhibits that document the assets and liabilities of each party.

Conclusion

Due to the current and frequent of use of marital agreements and their resultant impact on estate planning, it is vital for attorneys who practice in the estate planning arena to familiarize themselves with the intricacies of such agreements. These agreements must be crafted and reviewed with great care. The attorney must be knowledgeable about the legal rights that benefit a surviving spouse in the probate administration context, as well as spousal rights in the divorce context. Knowledge of Colorado statutes, as well as the cases interpreting the law and tax consequences of certain provisions, is necessary for effective representation of clients wishing to enter into marital agreements.

NOTES

1. *See* Green and Long, *Marriage and Family Law Agreements* (Shepard's McGraw-Hill, 1984 and 1997 Supp.).
2. *In re Marriage of Franks*, 542 P.2d 845 (Colo. 1975).
3. The text of the Uniform Premarital Agreement Act (UPAA) is available at http://www.law.upenn.edu/library/ulc/fnact99/1980s/upaa83.txt.
4. *See* http://www.law.cornell.edu/uniform/vol9.html, which lists the following states as adopting UPAA in whole or in part: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, and Virginia.
5. CRS §§ 14-10-101 *et seq.*
6. CRS §§ 14-2-301 *et seq.*
7. CRS § 14-2-310.
8. CRS §§ 14-2-302(1) and -303.
9. CRS § 14-2-307(1)(a).
10. CRS § 14-2-307. *See, e.g., In re Estate of Lopata*, 641 P.2d 952 (Colo. 1982); *In re Estate of Lewin*, 595 P.2d 1055 (Colo.App. 1979); *In re Marriage of Ross*, 670 P.2d 26 (Colo.App. 1983); *In re Marriage of Ingels*, 596 P.2d 1211 (Colo.App. 1979); *In re Marriage of Stokes*, 608 P.2d 824 (Colo.App. 1979).
11. CRS § 14-2-305.
12. CRS § 14-2-306.
13. *In re Marriage of Wolfert*, 598 P.2d 524 (Colo.App. 1979) (agreement mandating specific religious training for the children was found to violate public policy and thus was invalidated).
14. CRS § 14-2-304(3).
15. CRS § 14-2-307(2).
16. *In re Marriage of Dechant*, 867 P.2d 193 (Colo.App. 1993).
17. *Estate of Abbotts*, 571 P.2d 311 (Colo.App. 1977).
18. *See* Casteel, "Guidelines for Planning and Drafting Effective Premarital Agreements," 33 *Estate Planning* 16 (Aug. 2006).
19. CRS § 14-2-307(2).
20. *See, e.g., Ingels, supra* note 10.
21. *See* Casteel, *supra* note 18.
22. *Id.*
23. *See Wolfert, supra* note 13.
24. *Id.*
25. *See Tidwell v. Critz*, 282 S.E.2d 104, 107 (Ga. 1981).
26. *See* Casteel, *supra* note 18.
27. Skoloff *et al.*, *Drafting Prenuptial Agreements* (Aspen Law & Business, 1994 and 2002 Supp.) at (C)(7).
28. CRS § 14-10-113. *See also In re McGinnis*, 778 P.2d 281 (Colo.App. 1989); *In re Morehouse*, 121 P.3d 264 (Colo.App. 2005).
29. *In re Marriage of Balanson*, 25 P.3d 28 (Colo. 2001); *In re Marriage of Gorman*, 36 P.3d 211 (Colo.App. 2001).
30. CRS § 14-10-113(7); *In re Balanson*, 107 P.3d 1037 (Colo.App. 2004); *In re Dale*, 87 P.3d 219 (Colo.App. 2003).
31. *Balanson, supra* note 29. *See also* Chorney, "The Continuing Evolution of *Balanson*: Trusts as Property in Divorce," 34 *The Colorado Lawyer* 89 (June 2005).
32. *In re Dale*, 87 P.3d 219 (Colo.App. 2003); *In re Stumpf*, 932 P.2d 845 (Colo.App. 1996).
33. *In re Johnson*, 576 P.2d 188 (Colo.App. 1977).
34. *Thompson v. Thompson*, 489 P.2d 1062 (Colo.App. 1971).
35. *In re Burford*, 26 P.3d 550 (Colo.App. 2001).
36. *In re Marriage of Rahn*, 914 P.2d 463 (Colo.App. 1995).
37. Types of retirement plans include qualified, not qualified, subject to the Employee Retirement Income Security Act (ERISA), and not subject to ERISA. *See* IRC §§ 401 to 409A for ERISA, and various federal and state laws for the many other types of retirement plans.
38. CRS § 14-110-113.
39. CRS § 14-110-114.
40. I.R.C. § 71. *See* tax discussion in this article, *infra*.
41. Holt and James, "Prenuptial Agreements and Retirement Plans Assets," 33 *The Colorado Lawyer* 43 (Feb. 2004); Mills, "Retirement Funds 'Beware of the Trap,' Marital Agreements and ERISA Benefits," 23 *The Colorado Lawyer* 577 (March 1994).
42. CRS § 14-2-304.
43. CRS §§ 15-11-107(1)(c) and 14-2-207(2)(c).
44. CRS § 15-20-103.
45. Kirch, "The Imposition of Constructive Trusts and Other Concepts at Probate," 27 *The Colorado Lawyer* 4 (Dec. 1998).
46. Chief Counsel Advice 200119052; *Okerson v. Comm'r*, 123 T.C. 14; Rev. Rul. 77-137, 1977-1CB 178; T.C. Memo 2001-115.
47. I.R.C. § 6013(d)(3).
48. I.R.C. § 6672; *Rem v. Comm'r*, 38 F.3d 634, 94-2 USTC ¶ 50537.
49. I.R.C. § 2523.
50. I.R.C. § 2503.
51. The gift can be made from a joint account; half from each spouse's separate property; or, if

the other spouse consents on a gift tax return, entirely from one spouse's separate property, and qualify for the gift tax annual exclusion.

52. I.R.C. § 2505.

53. I.R.C. § 2513.

54. I.R.C. § 2042.

55. A taxable estate currently exists when an individual has more than $2 million in asset value, including the insurance proceeds and retirement accounts, and reduced by previous taxable gifts. I.R.C. § 2010(c).

56. I.R.C. § 2623.

57. I.R.C. § 1041.

58. *Id.*

59. *Id.*

60. I.R.C. § 71.

61. *Id.*

62. I.R.C. § 2056(b).

63. I.R.C. § 2523(b).

64. I.R.C. § 2056(a).

65. *See In re Marriage of Young*, 682 P.2d 1233 (Colo.App. 1984) (addressing issue of abandonment of an agreement; that acts constituting abandonment must be positive, unequivocal, and inconsistent with the intent to be further bound by the contract).

66. Mills, *supra* note 41.

67. *See, e.g., Ross, supra* note 10 (separate representation); *Lopata, supra* note 10 (separate representation).

68. *See Ross, supra* note 10.

69. *See Wolfert, supra* note 13 (holding that a provision in a marital agreement requiring a custodial parent to provide certain religious training for the children violated public policy and was unenforceable).

70. *See, e.g., In re Marriage of Seewald*, 22 P.2d 580 (Colo.App. 2001). *But see In re Marriage of Rahn, supra* note 36 (full and fair disclosure occurred when parties disclosed the general and approximate value of their assets and debts). ■