

PRE-NUPTIAL AND POST-NUPTIAL AGREEMENTS

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Pre-Nuptial and Post-Nuptial Agreements

- Pre-Nuptial Agreements are executed prior to marriage
 - ▣ Also termed as Pre-Marital Agreement or Ante-Nuptial Agreement
- Post-Nuptial Agreements are executed after marriage
- Type of contract
- Primary purpose is to provide for the distribution of assets upon divorce or at death

Why Are Pre- and Post-Nuptial Agreements Necessary?

- Approximately 30% of all marriages end in divorce
- Pursuant to IC 31-15-7-5, the presumption is that an equal division of marital property is “just and reasonable”
 - ▣ This presumption is rebuttable, but the burden is on the party seeking to rebut
 - Don’t be that party
- Divorce can be catastrophic to a farming operation where the single largest asset is land, which must generally either be sold or mortgaged due to its illiquid nature

Spousal Allowance and Taking Against the Estate

- Pursuant to IC 29-1-4-1, a surviving spouse is entitled to an allowance in the amount of \$25,000
- Also, pursuant to IC 29-1-3-1, a surviving spouse may take against the will to the tune of $\frac{1}{2}$ of the net personal and real property
 - ▣ A surviving spouse who is a subsequent spouse and who had no children with the decedent where the decedent had children with a prior spouse is entitled to $\frac{1}{3}$ of the net personal property and $\frac{1}{4}$ of the net real property
- Rights may be waived in writing pursuant to IC 29-1-2-13 and IC 29-1-3-6, respectively

Difference Between Pre- and Post-Nuptial

- Pre-Nuptial
 - ▣ Governed by Indiana Code 31-11-3
 - Based on the Uniform Premarital Agreement Act
 - ▣ If valid, must generally be enforced as written
- Post-Nuptial
 - ▣ Two types
 - Reconciliation agreement
 - Dissolution settlement
 - ▣ Enforcement is dependent upon type

Post-Nuptial Agreement

- Post-Nuptial
 - ▣ Two types
 - Reconciliation agreement (Flansburg v. Flansburg, 581 N.E.2d 430, 433 (Ind.Ct.App.1991))
 - Intended purpose is to preserve marriage
 - Court stated that there is “no reason to treat [a] reconciliation agreement any differently than an antenuptial agreement.”
 - In other words, enforceable as written
 - Dissolution settlement (Pond v. Pond, 700 N.E.2d 1130 (Ind.1998))
 - Entered into when dissolution appears likely
 - Governed by the Indiana Dissolution of Marriage Act
 - Subject to trial court’s discretion

Requirements

- According to IC 31-11-3-4, a pre-nuptial agreement must:
 - Be in writing, and
 - Signed by both parties
 - Additionally, both parties should have their own independent legal counsel to ensure effectiveness
- May be amended or revoked in writing pursuant to IC 31-11-3-7
- Consideration (the something given) is not required
 - Courts do not enforce gift contracts, which is why consideration is generally required, but pre-nuptial agreements are an exception to this rule
- Agreement becomes effective upon marriage (IC 31-11-3-6)

Components of Pre-Nuptial Agreement

- Recitations
- Description of property involved
- Terms and events of disposition
- Schedule listing husband's property
- Schedule listing wife's property
- Disclosures must be full and accurate and parties must understand the terms of the agreement

What Does a Pre-Nuptial Agreement Cover?

- “The rights and obligations of each of the parties in any property of either or both of them whenever and wherever acquired or located.” IC 31-11-3-5
- With respect to property, the right to buy, sell, use, exchange, encumber, etc.
- The disposition of property upon separation, dissolution, death, or other event
- Modification or elimination of spousal maintenance
- Making of estate planning documents
- Ownership rights in and disposition of life insurance
- But cannot adversely affect child support

How is a Pre- or Post-Nuptial Agreement Enforced?

- Enforcement becomes an issue at the termination of the marriage, either through death or divorce
- During dissolution proceedings
 - ▣ Used to avoid the manner of division provided for by statute and to substitute division based on the terms of the agreement
- During estate administration
 - ▣ Functions as a waiver of spousal statutory entitlements to decedent’s estate

What Can Result in a Pre-Nuptial Agreement Being Unenforceable

- A pre-nuptial agreement is not enforceable if
 - ▣ It is not executed voluntarily
 - ▣ The agreement was unconscionable when executed
 - Black's Law Dictionary defines unconscionable as "affronting the sense of justice, decency, or reasonableness"
 - ▣ Marriage is determined to be void, except to the extent necessary to avoid an inequitable result

Other Methods for Protecting Assets

- Be aware of the consequences of owning assets jointly with children
- Restrictions on transfer in Operating Agreements
- Buy-Sell Agreements
- Giving assets in trust as opposed to outright distribution

Consequences of Co-Ownership

- Assets owned jointly with others, such as children, become subject to their creditors, including divorcing spouses
- The amount that such an asset becomes subject to attack is based on the amount of ownership that the other party has received
 - ▣ For example: Land held 50/50 with a child would be half on the hook
- Depending on the circumstances, joint ownership may not be bad, but be careful

Restrictions on Transfer

- LLC Operating Agreements (and corporate By-laws) can be drafted to prohibit transfer except to certain parties
 - ▣ For example, transfer may be limited:
 - To a Member's Trust
 - To a Member's lineal descendants
 - To a Member's spouse (or not)
- A transfer of ownership interest to any other person results in that person receiving economic rights, but no voting rights
- Divorcing spouse may still be entitled to value, but no control

Buy-Sell Agreements

- A Buy-Sell Agreement specifies the conditions (such as death, disability, etc.) upon which the Member must sell and the Company must buy
 - ▣ Divorce could be listed as such a condition
- Buy-Sell Agreement also specifies price to be paid for ownership interest
- Divorcing spouse may still be entitled to value, but would be removed from organization

Giving Assets in Trust

- Benefits of leaving assets to children in trust
 - ▣ Allows access to assets
 - ▣ Provides protection against divorcing spouses and other creditors
- Technically, the beneficiary does not own the assets that are held in trust even though he or she is entitled to the use and benefit
- For example: Put farmland into an LLC and then put that LLC into a Trust and distribute to sub-trusts for children at death

How does this apply to the case?

- Goodacres own 1,400 acres and farm an additional 1,400 acres
- Currently a sole-proprietorship
- Three children (some of whom may be interested in farming)
 - ▣ Two married and one engaged

Issues

- Tom's wife is willing to sign a post-nuptial agreement
 - ▣ How should we go about this to ensure that the agreement is valid and effective?
 - In writing and signed
 - Make sure that Tom's wife gets her own independent counsel
- Jane's fiancé is not willing to sign a pre-nuptial agreement
 - ▣ What should we do to address this?
 - Avoid co-ownership of assets
 - Restrict transfer
 - Buy-Sell Agreement

Questions?