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3S

Postnuptial Agreements

P. ANDRÉ KATZ
Katz & Stefani, LLC
Chicago and Bannockburn

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II. TYPES OF POSTNUPTIAL AGREEMENTS IN ILLINOIS

A. [3S.3] Marital Settlement Agreements Pursuant to the IMDMA

Add at the end of the last full paragraph on p. 3-4:

Although it was filed under Supreme Court Rule 23 and may not be cited except in the limited circumstances allowed under Rule 23(e)(1), *see also Van Dyck v. Purdhani*, 2012 IL App (1st) 110557-U (unpublished; available in Westlaw) (during time bifurcated judgment of dissolution of marriage was pending on appeal, parties entered into oral settlement agreement that was incorporated into supplemental judgment of dissolution of marriage, and court held that although bifurcated judgment was vacated on appeal, supplemental judgment approving and incorporating settlement agreement was not vacated and was thus valid and enforceable postnuptial contract).

E. Classic Postnuptial Agreements

2. [3S.8] Caselaw

Add at the end of the carryover paragraph at the top of p. 3-12:

Although, in Illinois, the standard is whether the agreement is unconscionable, *see also, e.g., Petracca v. Petracca*, 101 A.D.3d 695, 696 – 698, 956 N.Y.S.2d 77 (N.Y.App.Div. 2012) (slip op.). In this case, the wife would receive only a maximum of \$36,000 per year in maintenance from the husband — who had a net worth of approximately \$22 million at the time the agreement was signed — and the wife waived her right to an interest in the husband’s business, as well as her right to an elective share. The postnuptial agreement was set aside as being “manifestly unfair.” 101 A.D.3d at 699.

In the first full paragraph on p. 3-12, “The appellate court applied the fraudulent misrepresentation” is revised to read “The Richardson appellate court applied the fraudulent misrepresentation.”

The second full paragraph on p. 3-14 is revised:

Only after *Brosseau* was it clear that parties can remain living together after entering into a property settlement agreement and still have the agreement be considered valid, provided the agreement is not a true separation agreement.

3. [3S.9] Basic Requirements

Item h on p. 3-16 is revised:

h. Full disclosure of assets is recommended but may not be required. The appellate court in *Tabassum, supra*, questioned whether financial disclosures were required in classic postnuptial agreements. The court relied on *In re Marriage of Burkle*, 139 Cal.App.4th 712, 746, 43 Cal.Rptr.3d 181 (2d Dist. 2006), which held that statutes requiring financial disclosures before

parties to dissolutions agreed to resolve property issues did not apply to postnuptial agreements that contemplated reconciliation and were not executed in contemplation of imminent dissolution. Additionally, in *Spurlin v. Spurlin*, 289 Ga. 818, 716 S.E.2d 209, 211 (2011), the Georgia Supreme Court held that as the former wife had entered the Spurlin family business financial information into a computer, handled the husband's paychecks, and paid the family bills, this constituted sufficient disclosure to hold the postnuptial agreement valid. However, a practitioner is well-advised to be careful and encourage the parties to fully disclose their assets, as it is clearly suggested for §502 agreements. *See, e.g., Nitkiewicz v. Nitkiewicz*, 369 Pa.Super. 504, 535 A.2d 664 (1988); *D'Aston v. D'Aston*, 808 P.2d 111 (Utah App. 1990); *Stoner v. Stoner*, 572 Pa. 665, 819 A.2d 529 (2003).

5. [3S.11] Drafting Tips

Add at the end of item f on p. 3-17:

Additionally, avoid incomplete, vague, uncertain, or indefinite terms as well as any conditional statements that are dependent on unforeseen circumstances or have a possibility of never occurring. *See Eversbusch v. Eversbusch*, 293 Ga. 60, 743 S.E.2d 418, 420 (2013) (*i.e.*, implied assumption that child will attend and graduate from college).

The first sentence of item h on p. 3-17 is revised:

All waivers should be specific and explicitly stated.

III. [3S.12] ENFORCING POSTNUPTIAL AGREEMENTS

The Moy citation in item c on p. 3-19 is replaced:

See Tires 'N Tracks, Inc. v. Dominic Fiordiroso Construction Co., 331 Ill.App.3d 87, 771 N.E.2d 612, 616, 264 Ill.Dec. 908 (2d Dist. 2002).