

Antenuptial/Postnuptial Agreement
Presentation
Minnesota State Bar Association 11/14/09

- I. **Procedural Fairness.** The procedural fairness requirements for a valid Antenuptial Agreement/Postnuptial Agreement are set forth in Minn. Stat. § 519.11. Prior to drafting either an Antenuptial Agreement or Postnuptial Agreement the attorney should review the requirements of Minn. Stat. § 519.11 to make sure the Agreement is in compliance therewith. A brief overview of the procedural fairness requirements is as follows:
- A. The agreements must be made between a man and a woman of legal age, which currently means both parties must be 18 years of age or older. Minn. Stat. § 519.11, subd. 1, states, “A man and woman of legal age may enter into an antenuptial contract or settlement prior to solemnization of marriage...” Id.
 - B. The power of attorney cannot be used in place of the statutory requirements. Minn. Stat. § 519.11, subd. 2, specifically states, “A power of attorney may not be used to accomplish the purposes of this section.” Id.
 - C. There Must be Full and Fair Disclosure by Both Parties of Their Earnings and Property. Each party is required to provide a “full and fair disclosure of earnings and property.” Minn. Stat. § 519.11, subd. 1. In putting together the full and fair disclosure it is not required that it be attached to the Antenuptial Agreement, but it is strongly encouraged that the disclosure be attached to the Agreement so anyone seeking to enforce the

Agreement at some point in the future will know exactly what disclosure was made. See Pollock-Halvarson v. McGuire, 576 N.W.2nd 451 (Minn. App. 1998). Although the term property is not defined in the statute, it is prudent for the drafter to list both assets and liabilities to determine a party's net worth in the financial disclosure. The financial disclosure should be provided significantly in advance of the execution of the Antenuptial Agreement and the parties' marriage so both parties have a fair opportunity to review the disclosure and ask any questions or obtain any additional information they may need. If there is an anticipated change to a party's financial circumstances that should be provided for in the financial disclosure.

- D. Consultation with an Attorney. The statute requires both parties have the opportunity to consult with an attorney of their own choice, but does not require either party to actually consult with an attorney. Minn. Stat. § 519.11, subd. 1. It is strongly encouraged that both sides be represented when entering into an Antenuptial Agreement. If a party has not consulted with an attorney, particularly a non-moneyed spouse, then the potential the Court will find overreaching at the time of execution is much higher than if both parties were represented by attorneys. One attorney should not represent both parties in an Antenuptial Agreement. Both parties must have "unrestrained access to and advice from independent counsel." McKee-Johnson v. Johnson, 444 N.W.2nd 259, 266 (Minn. 1989).

- E. The Agreement Must be in Writing. The Antenuptial Agreement or Postnuptial Agreement must be in writing. Minn. Stat. § 519.11, subd. 2. The Courts cannot enforce oral agreements between parties prior to their marriage even if said agreements would otherwise meet with all the other criteria for a valid Antenuptial or Postnuptial Agreement.
- F. The Agreement Must be Executed Before Two (2) Witnesses. Make sure both parties have their own witnesses and the notary is not serving as one of the witnesses. Minn. Stat. § 519.11, subd. 2. Although the Court of Appeals upheld an Antenuptial Agreement in the case of Pollock-Halvarson v. McGuire, where one of the witnesses was a notary, it is not encouraged that the notary serve in that role. However, compare this with Siewart v. Siewart, 691 N.W.2d 504 (Minn. App. 2005) where the Court of Appeals held an Antenuptial Agreement was not enforceable because there was only one witness.
- G. The Agreement Must be Acknowledged Before a Notary Public or Person Authorized to Administer Oaths Under Minnesota Law. The statute requires an Antenuptial Agreement/Postnuptial Agreement to be “acknowledged by the parties, executing the same before any officer or person authorized to administer an oath under the laws of this state.” Minn. Stat. § 519.11, subd. 2. In Pollock-Halvarson v. McGuire the Court allowed an Antenuptial Agreement to be enforced despite the fact the notary’s commission had expired because the parties believed the notary was a valid notary.

H. The Agreement Must be Executed Prior to the Date of Marriage. It is strongly encouraged the parties execute the Antenuptial Agreement well in advance of their marriage to avoid any appearance of over reaching at the time of execution and to allow the parties to enjoy the festivities leading up to their marriage.

II. **Additional Procedural Fairness Requirements for Postnuptial Agreements.**

A. When entering to a Postnuptial Agreement both parties are required to be represented by attorneys for the Postnuptial Agreement to be valid and enforceable. Minn. Stat. § 519.11, subd. 1a(c).

B. If either party to a Postnuptial Agreement commences a legal separation or marital dissolution proceeding within two (2) years of the execution of the Postnuptial Agreement, it is presumed to be invalid and unenforceable unless the spouse seeking to enforce it can establish the Postnuptial Agreement is “fair and equitable.” Minn. Stat. § 519.11, subd. 1a(d).

III. **Substantive Fairness.**

A. In analyzing the substantive fairness of an Antenuptial Agreement or Postnuptial Agreement the Court is to look at whether the Agreement was substantively fair both at the time of execution and at the time of enforcement. See McKee-Johnson v. Johnson, 444 N.W.2d at 267.

B. In analyzing the substantive fairness at the time of execution the Court looks to see if there has been overreaching by the parties. McKee-Johnson v. Johnson, 444 N.W.2d at 267. For instance, was one party represented by an attorney while the other was not, did both parties have

complete access to the other's financial disclosure documents, is there any consideration for the parties in entering into the Antenuptial Agreement at the time of execution, are the parties of a significant age difference where they have had different life experiences and one may be more sophisticated in contracts and financial matters, is the future wife pregnant, do either of the parties have mental health issues that may impact their understanding of an Antenuptial Agreement, and other such factors. The drafter should make sure these are protected against. It is particularly important to make sure there is adequate consideration at the time of execution. Although the client may want an Antenuptial Agreement that does not provide anything for their future spouse, this maybe unfair considering both parties' financial circumstances, particularly if one has substantially more wealth than the other.

- C. Drafting Antenuptial Agreements for substantive fairness at the time of enforcement are often more difficult because one does not know when the Agreement may become enforceable. In determining substantive fairness at the time of enforcement the Court is to determine "if the premises upon which they were originally based have so drastically changed that enforcement would not comport with the reasonable expectations of the parties at the inception to such an extent that to validate them at the time of enforcement would be unconscionable." McKee-Johnson v. Johnson, 444 N.W.2nd 259, 267 (Minn. 1989). The Court will look to see if the terms of the Antenuptial Agreement "have become unconscionably unfair

by the time of enforcement as the result of circumstances originally not foreseen by the contracting parties.” Id. Accordingly, it is important for the drafter to understand the foreseeable consequences the parties may have.

1. Do the parties plan on having children?
2. Does one of the parties plan to stay home and to be homemaker and/or to care for children while the other spouse works?
3. How will the parties grow their assets during the marriage?
4. Does one of the parties anticipate retiring at some point in the future?
5. Is one party seeking a career change?
6. Is there an anticipated increase or decrease in a party’s assets and or liabilities?
7. Do either of the parties have any physical or mental health issues that may impact them in the future?

The above are just a few examples of things the drafter should consider and ask his or her client when putting together an Antenuptial Agreement. Certainly, the circumstances for the parties can be as diverse as the various situations that two couples can have.

IV. Estate Planning Considerations.

- A. In addition to addressing the division of the parties’ assets upon legal separation or a dissolution of marriage, many Antenuptial and Postnuptial Agreements also address the division of assets, liabilities, and income

upon the death of either party. It is strongly encouraged that a practitioner who primarily practices in family law associate or have an attorney who is familiar with estate planning review their documents to ensure they comply with the law in that area.

V. **Spousal Maintenance.**

- A. Antenuptial and Postnuptial Agreement are allowed to address the issue of spousal maintenance. However, the standard for agreements are subject to a more stringent review than other provisions of an Agreement. See Hill v. Hill, 356 N.W.2d 49, 57 (Minn. App. 1984), which quotes Newman v. Newman, 653 P. 2d 728 (Colo. 1982) “Unconscionability as applied to a maintenance agreement exists when enforcement of the terms of the agreement results in a spouse having insufficient property to provide for his reasonable needs and who is otherwise unable to support himself through appropriate employment.” 356 N.W.2d at 56. Hill also quotes Marschall v. Marschall, 477 A.2d 833 (NJ Supra 1984), stating a maintenance waiver is unenforceable if it “would provide a standard of living far below that which was enjoyed both before and during the marriage.” Id.
- B. Therefore when drafting spousal maintenance provisions it is wise to consider the law in that area and counsel your client accordingly. Certainly, the drafter may want to review the factors in Minn. Stat. § 518.552, which addresses spousal maintenance awards in marital

dissolution proceedings, to assist in trying to draft provisions that will be found to be substantively fair.

VI. **Conclusion.**

- A. Always review the statutory requirements for procedural fairness to make sure you have complied with those requirements. The easiest way to invalidate an Antenuptial Agreement is to argue that any of the procedural fairness requirements were not met.
- B. When designing an Antenuptial Agreement to comply with substantive fairness requirements, it is often best to have a document that can change as the parties' circumstances change. By way of example, having a property division that awards a percentage to the parties, with said percentage growing the longer the parties are married is a good way to make sure that neither party is treated unfairly.