

## Prenuptial Agreements

### 1. 25-202- Addresses the Enforcement of Prenuptial Agreements (PNA)

- a. Requirements
  - i. In writing and signed by both parties
  - ii. No consideration is required
  - iii. Effective upon marriage
- b. Enforcement- PNA's are enforceable unless the party *challenging* the enforceability proves that:
  - i. They did not execute the agreement voluntarily
  - ii. The PNA was *unconscionable* when it was entered *AND*:
    - 1. They were not provided fair and reasonable disclosure of the property and financial obligations
    - 2. They did not voluntarily and expressly waive that disclosure
    - 3. They did not have, or reasonably could not have, had adequate knowledge of the property and financial obligations
- c. Notes
  - i. Unconscionability is determined by the court as a matter of law
  - ii. This is a clear and convincing standard

### 2. 25-203- Scope of PNAs

- a. Allowed: rights and obligations for property, ability to buy/sell/use/transfer/encumber etc. property, what happens to property on divorce/separation/death, modification or elimination of spousal maintenance, making estate planning documents to carry out PNA agreements, rights and benefits related to life insurance policies, choice of law, and other things that DON'T violate public policy or criminal laws
- b. Not Allowed: Child support, parenting time, anything against public policy (think what would that state not feel comfortable enforcing)

### 3. 25-204- Amendment or Revocation of PNAs

- a. They can be amended or revoked but ONLY in writing and signed by the parties
- b. The amendment or revocation is enforceable without consideration
- c. Note- This is important because an amended PNA is NOT a Postnuptial Agreement, so it still carries the enforcement benefits of a PNA

#### 4. 25-205- Defenses for Enforcement Timing

- a. The SOL tolls during the marriage
- b. BUT equitable defenses limiting time for enforcement, like laches and estoppel, are available

#### 5. Important Cases

- a. In re Marriage of Pownall, 197 Ariz. 577, 5 P.3d 911 (Ct. App. 2000)
  - i. Party seeking declaration that premarital agreement is unenforceable bears the burden of proving its invalidity. A.R.S. § 25–202, subds. A, C.
  - ii. Standard of unconscionability to be used for purposes of the Uniform Premarital Agreement Act (UPAA) is that used in commercial and contract law. A.R.S. §§ 25–201 to 25–205.
- b. Maxwell v. Fid. Fin. Servs., Inc., 184 Ariz. 82, 907 P.2d 51 (1995)
  - i. When novation is presented as defense to claim of unconscionability, existence of novation depends in part on validity of underlying contract.
  - ii. Determination of unconscionability of contract is to be made by court as matter of law. A.R.S. § 47–2302.
  - iii. “Substantive unconscionability” of contract concerns actual terms of contract and examines relative fairness of obligations assumed.
  - iv. Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise innocent party, overall imbalance in obligations and rights imposed by bargain, and significant cost-price disparity.
  - v. Under statute governing unconscionable contract or clause, claim of unconscionability can be established with showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies. [A.R.S. § 47–2302](#).
- c. Hrudka v. Hrudka 186 Ariz. 84, 919 P.2d 179, (App. Div.1 1995).
  - i. With regard to prenuptial agreements executed prior to effective date of Uniform Premarital Agreement Act, spouse who was coerced into signing agreement but later seeks to enforce it must show by clear and convincing evidence that spouse opposing enforcement executed agreement voluntarily, and with fair and reasonable disclosure of property and financial obligations of other spouse.

- d. Nanini v. Nanini, 166 Ariz. 287, 802 P.2d 438 (Ct. App. 1990)
  - i. Illinois law governed antenuptial agreement, even though parties' divorce action was brought in Arizona, where agreement provided that law of Illinois governed contract, it was entered into in state of Illinois, and parties were Illinois residents when agreement was signed.
  - ii. Valid antenuptial agreement governed distribution of property in parties' divorce despite fact that agreement did not mention the word "divorce" or effect of a divorce.
- e. Alulddin v. Alfartousi, 255 Ariz. 436, 442, 532 P.3d 1172, 1178 (Ct. App. 2023)
  - i. The doctrine of "ecclesiastical abstention," derived from the establishment and free exercise clauses, precludes civil courts from inquiring into ecclesiastical matters, such as those concerning theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required for them. [U.S. Const. Amends. 1, 14](#).
  - ii. BUT Superior courts have jurisdiction to enforce Agreements (like Mahrs and Ketubahs) by applying the neutral principles of law that govern premarital agreements.
- f. Victor v. Victor 177 Ariz. 231, 866 P.2d 899, (App. Div.1 1993)
  - i. "Ketubah," which recorded husband's financial obligations toward wife under Jewish law, was not sufficiently specific to constitute enforceable antenuptial agreement under which husband could be ordered to obtain religious divorce document known as "get," where ketubah contained no specific terms describing mutual understanding that husband would secure Jewish divorce.
  - ii. Must be sufficiently specific for enforcement.

## **Postnuptial Agreements**

### **1. General Information**

- a. Postnuptial agreements are not defined by statute, but by case law.
- b. Definition- An agreement entered during marriage to define each spouse's property rights in the event of death or divorce.
- c. Enforcement- Postnuptial Agreements are approved and deemed valid where:

- d. Free of fraud, coercion, or undue influence
- e. The parties acted with full knowledge of the property involved and the rights therein
- f. The Agreement is fair and equitable at the time it was entered
- g. The party seeking enforcement bears the burden to prove by clear and convincing evidence that the postnuptial agreement is valid
- h. LLCs and Estate planning documents can be postnuptial agreements

## 2. Important Cases

- a. In re Harber's Est., 104 Ariz. 79, 80, 449 P.2d 7, 8 (1969)
  - i. Marital partners may validly divide their property presently and prospectively by a post-nuptial agreement but such an agreement must include built-in safeguards to ensure the agreement is “free from any taint of fraud, coercion or undue influence; that the wife acted with full knowledge of the property involved and her rights therein, and that the settlement was fair and equitable.” Id. at 88, 449 P.2d at 16. Accordingly, although “all contracts or agreements between husband and wife in Arizona are [not] presumptively void or fraudulent,” our supreme court held that spouses may enter a contract to divide their property outside a divorce or separation, but that when such a postnuptial agreement is attacked by a spouse on the grounds that the transaction was fraudulent or coerced, or is inequitable and unfair, the attacking spouse may have a judicial determination at that time whether the agreement is invalid as to that spouse, and that it is the spouse seeking enforcement’s burden to prove by clear and convincing evidence that the agreement was not fraudulent or coerced, or that it was not unfair or inequitable.
- b. Austin v. Austin, 237 Ariz. 201, 348 P.3d 897 (Ct. App. 2015)
  - i. Operating agreements of limited liability company (LLC) created by husband and wife in conjunction with family trusts met definition of post-nuptial agreement, and, therefore, Harber's Estate applied, requiring built-in safeguards to ensure freedom from fraud, fairness, and spouse's knowledge of property and rights involved, where agreements were made during parties' marriage, when separation or divorce was not imminent or contemplated, and altered each spouse's property rights in the event of death; accordingly, court did not err in requiring husband to demonstrate by clear and convincing

evidence that wife was aware of property subject to operating agreements' arbitration provision or advised of the effect of that provision, or her rights therein.

- ii. Despite the sophistication of the legal instruments employed, the mere use of a limited liability company (LLC) to effectuate changes to the property rights of spouses did not transmute LLC's operating agreements into arm's-length business transactions so as to except them from requirements of Harber's Estate for post-nuptial property division agreements, where substantial evidence supported the trial court's finding that the net effect of the operating agreements was to place permanent and significant limitations on wife's property rights, arguably including the transformation of separate property to community property, and impact of the operating agreements was no less severe than a more traditional postnuptial agreement.

c. Sowards v. Sowards, 255 Ariz. 527, 533 P.3d 959 (2023)

- i. Structured personal injury settlement agreement was not valid postnuptial agreement with respect to annuity payments, although annuity payment schedule conditioned payments to wife on husband's death; settlement agreement was between husband and wife, as a couple, and settling defendants in personal injury lawsuit concerning husband's unnecessary open heart surgery, settlement agreement never delineated husband and wife as individuals for purposes of express agreement between them or provided that payments were sole and separate property of husband or that wife had no interest in payments, and settlement agreement indicated husband and wife, as the settling plaintiffs, were to receive payments under a schedule that simply laid out how payments were to be made.
- ii. A postnuptial agreement must clearly express the spouses' intent to divide and delineate their separate property interests.

d. Saba v. Khoury, 481 P.3d 1167 (Ariz. Ct. App. 2021), as amended (Feb. 23, 2021), as amended (Mar. 23, 2021), vacated, 253 Ariz. 587, 516 P.3d 891 (2022)

- i. For purposes of determining whether property acquired during marriage is community property, disclaimer deeds are not analyzed as postnuptial agreements; whereas postnuptial agreements necessarily require both spouses' involvement and define each spouse's property

rights in the event of death or divorce, disclaimer deeds are unilateral and simply renounce ownership in property, effectively rebutting the presumption of community property. Ariz. Rev. Stat. Ann. § 25-211(A).