

The Potential for Post-Marital Agreements

When the Virginia General Assembly passed its version of the Uniform Premarital Agreements Act in 1986 (§§ 20-147 to 154), it also added a statute expressly recognizing marital agreements (§ 20-155). That section, entitled Marital Agreements, took effect a year later in 1987. Prior to that time, there was no Virginia authority clearly authorizing spouses to enter into an agreement that was not a separation or marital settlement agreement. The terms “marital agreement” and “post-marital agreement” are generally treated as synonymous.

In the intervening 30 years since 1987, there have been far more premarital agreements than post-marital agreements. One definition of a post-marital agreement is that it is the premarital agreement the parties might have had if they knew then what they know now.

The obvious difference between a post-marital agreement and a separation or marital settlement agreement is that the latter agreements are designed to end the marriage, whereas the former is for marriages that are intended to continue. So what is the potential for using a marital agreement to save a marriage? If a marriage has problems, why not have an agreement that seeks to resolve them, as an alternative to divorcing?

If a marriage counselor helps the parties reconstruct their marriage and then drafts a memo to be signed, isn't the drafting an unauthorized practice of law? And if a lawyer does the counseling part, wouldn't that be doing marriage counseling without a license? Let's look more closely at these issues.

When a marriage counselor drafts a memo about how the parties will relate to each other and share marital responsibilities, the memo on those spousal interactions would probably not be enforceable in court. That would be very different from a marital agreement on retitling the house from one party's name to both names, or specifying how their children from prior marriages are treated in their estates.

Marriage counselors deal with subjects such as disputes about marital communication and negotiation, compatibility, adapting to changes, sharing responsibility for marital tasks, career matters, parenting styles, problems with intimacy, and extended family relationships. Lawyers handle issues about financial obligations, property ownership, the structure of family businesses, family estates, and revising premarital agreements. These boundaries are relatively clear. There are some other situations, however, where the borders between law and marriage counseling are less defined.

Consider, for example, a case where the main problems in the marriage are mostly about disagreements over the role of each party in a family business. There will likely be strong emotions at play, and at the same time there may be a

need for a legal restructuring of the business. Any written agreement might contain some provisions of the type courts enforce and also commitments of the parties to change their interactions, which may not be enforceable as such.

A common post-marital issue in marriages is financial transparency and control. There are ways that an agreement on these matters can be structured so as to be legally enforceable. However, the issues between the parties may run deeply enough that just a legal restructuring will not suffice to save the marriage.

There is another perspective on marital agreements that can be even more sensitive. Many premarital agreements deal with the fact that every marriage ends in one of two ways, both of which start with “D,” namely divorce and death. Those two sections of such an agreement can be quite different from each other, because they often raise separate issues.

So it is also with marital agreements. An agreement intended to preserve the marriage may also contain provisions on what happens if there is an eventual divorce. The Virginia statute on marital agreements, § 20-155 of the Code, is a single paragraph, but it expressly incorporates the provisions of the Premarital Agreement Act, starting at § 20-147. These include provisions as to the legitimate content of such an agreement in § 20-150. These are mainly “legal” in nature. In subsection 8, however, they include “Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.” In § 20-151, there are also provisions as to when such an agreement may be set aside.

So the “catchall” provision quoted above may cover the therapist issues as well as attorney issues. And there may be marriage counselor issues lurking behind the legal issues. This article was never intended to argue that a provision that would probably be unenforceable in court should never be included in a written agreement. Consider that every marital settlement agreement contains a separate lives provision. Has anyone ever seen that provision enforced in court?

The Uniform Premarital Agreement Act does require “fair and reasonable” disclosure or a waiver of such disclosure, but it does not include the old common law rule that the parties be represented by separate counsel. This would also apply to marital agreements. So the terms of a marital agreement could be reached by negotiation between the parties and/or their attorneys, by mediation, or in collaborative practice.

If the issues are sensitive and both emotional and legal, which probably indicates a difficult case, any negotiations should be constructed with appropriate professional input. The written result of such negotiations could add legal consequences when a party does not carry out its unenforceable provisions, provided they are not contrary to public policy.

The incidence of marital agreements appears to be increasing. Attorneys have become more aware of the Marital Agreements statute, in that the Virginia courts have also ruled that its terms apply to conventional marital settlement agreements.

As divorce professionals interact more frequently than in the past, the opportunity for written agreements that restructure the marriage in both therapeutic and legal ways will likely increase. It's time to consider more fully the potential of this option.