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Post-nuptial agreement or separation may be viable option for some clients

While post-nuptial agreements, legal separations and divorce have drastically different effects, all three options are governed by various sections of the Illinois Marriage and Dissolution of Marriage Act.

The parties remain married when creating a post-nuptial agreement and when entering into a legal separation. In contrast, the parties' marriage completely dissolves when a judgment is entered in a divorce.

Post-nuptial agreements and legal separations are less traversed paths, however; these options may be appropriate over divorce depending on the client's personal needs or desires.

Post-nuptial agreements

A post-nuptial agreement is a contract entered into by married parties and is not prepared in anticipation of a divorce. Rather, it serves as a guideline for how parties would divide their assets and income in the event of death, divorce or separation.

The purpose of a post-nuptial agreement is to limit contested issues should the couple later decide to divorce or if one party dies. Post-nuptial agreements strive to promote harmony in the present and future.

Similar to a pre-nuptial agreement, issues of child support, custody and visitation should not be included. Rather, post-nuptial agreements often include background information about the parties and their children, financial disclosures, property (current and future), provisions in the event of death, should the couple divorce, and property division.

A post-nuptial agreement may be a good option for a client looking to protect nonmarital assets — any assets acquired before the marriage or by gift or inheritance during the marriage.

Both parties must participate in

the negotiation to ensure adequate disclosures and to avoid future issues surrounding the enforceability of the agreement. It is recommended that each party be represented by his or her own attorney to increase the chance of the agreement being enforceable.

For ensured enforceability, the parties and attorneys should gather with a court reporter and fully review the agreement before signing it. Both attorneys should direct their clients to disclose all income, assets and liabilities to minimize the risk of future litigation.

It should come as no surprise that courts have a major say in the validity of a post-nuptial agreement. Courts are authorized to find post-nuptial agreements unconscionable even if the party was provided with adequate financial disclosures or waived his or her right to disclosures and possessed adequate knowledge of finances.

Furthermore, the principles of contract law apply to post-nuptial agreements. Courts often look to whether the agreement has adequate consideration to be enforceable. See *In re Marriage of Ozma Tabassum*, 377 Ill.App.3d 761, 770 (2008).

When an agreement is challenged, there is no hard-and-fast rule provided by the courts and post-nuptial agreements are examined case by case.

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Legal separation

A legal separation is sought by parties who wish to remain married but desire to live apart. According to Section 402 of the IMDMA, the parties may reside together at the time a legal separation is sought but may not re-

COLLABORATIVE CONCEPTS



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side together when the judgment is granted.

The purpose of a legal separation is to provide clients with an alternative to divorce as well as the right to support. A legal separation may be appropriate for clients who are opposed to divorce for religious or moral reasons, do not wish to remarry or wish to formalize their separation before deciding whether divorce is ultimately the route they take.

Common topics in separation agreements include custody, support, property division, tax considerations and health insurance.

Herein lie many of the distinctions between legal separation, post-nuptial agreements and divorce and when counsel may direct a client in a particular direction.

Unlike a post-nuptial agreement, the parties in a legal separation may determine issues related to child custody including who gets residential custody, whether joint custody is appropriate and how much parenting time the non-custodial parent will have.

The guidelines for calculating child support and maintenance are the same as if the parties were divorcing; however, unlike divorce, maintenance in a legal separation is always modifiable.

Liability for debts and expenses by one party after a legal sep-

aration poses a challenge, since third parties may have the ability to collect from the spouse not incurring the debt. This differs from divorce, where a spouse is not liable for debts incurred by a former spouse after the divorce.

Unlike in divorce, courts do not have intrinsic authority to award property in a legal separation. The court obtains authority to award and divide property only when the issue is put before it. Such issues are decided using Section 503 of the IMDMA, which is the same statute used in divorce. Property obtained after a legal separation is considered nonmarital, which becomes important if a divorce is later sought.

When a judgment for legal separation is entered, the parties may no longer file joint tax returns and must choose either "single" or "head of household." Maintenance payments may be included as payee income and deductible by the payor.

There are several similarities with divorce on the tax front, namely tax-filing status is determined by Dec. 31, the parties can apportion dependency exemptions, and the property transfer of the separation is a nontaxable event.

Legal separation often allows a spouse and dependent children to remain on a health insurance plan. Under the Consolidated Omnibus Budget Reconciliation Act, or COBRA, legal separation triggers continuity of coverage for employers with 20-plus employees for a maximum of 36 months.

The permanency of divorce may not fit every client's needs when they meet with counsel. Both post-nuptial agreements and legal separations are viable options, providing couples with mechanisms for working out their personal and financial situations, while remaining married.

If parties ultimately decide to divorce, they may decide to adopt all or some of the terms created in a post-nuptial or legal separation agreement.