

# LEGAL VIEWS

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## Marital Agreements in Colorado

by Philip Kay, Esq.

A marital agreement is a contract either between prospective spouses made in contemplation of marriage or between present spouses. A marital agreement between prospective spouses is usually called a “pre-nuptial” agreement. A marital agreement between present spouses is usually called a “post-nuptial” agreement. The usual purpose of a marital agreement is to set forth a division of property and each spouse’s financial rights and obligations in the event of divorce.

Many people think that marital agreements are only for the wealthy. However, according to a February 2010 survey by Harris Interactive, nearly one-third of single adults say they would ask a significant other to sign a marital agreement. Among the divorced, 15% say they regret not having a marital agreement in their most recent marriage, with men more likely than women to have this regret (19% vs. 12%). Nearly 40% of divorced Americans say they would ask their significant other to sign a marital agreement if they remarried. According to American Academy of Matrimonial Lawyers President Marlene Eskind Moses, quoted in a recent *USA Today* article, “More and more of these agreements are being drafted. It’s not just something for the rich and famous any longer. It’s for people that have assets and/or income that they want to protect.” (“Prenuptial Agreements: Unromantic, But Important,” *USA Today*, March 11, 2010).

In Colorado, marital agreements are governed by the Colorado Marital Agreement Act (“the Act.”) The Act sets forth the legal requirements necessary for marital agreements to be valid and enforceable. For example, the Act requires all marital agreements to be in writing and signed by both parties. Further, the marital agreement must be signed by the parties prior to the filing of an action for divorce or for legal separation.

The Act also sets forth the types of matters that the parties may address in the marital agreement. Specifically, the Act provides that the parties may contract as to:

- (1) The rights and obligations of each of the parties and any of the property

of either or both of them whenever and wherever acquired or located;

- (2) The acquisition, disposition, management, and control of any property;
- (3) The disposition of property upon separation of the parties, dissolution of the marriage, death of either party, or the occurrence or non-occurrence of any other event;
- (4) The determination, modification, or elimination of spousal maintenance;
- (5) The making of a will, trust or other arrangement to carry out the provisions of the marital agreement;
- (6) The ownership rights in and disposition of the death benefit from a life insurance policy;
- (7) The rights and obligations and benefits available or to be available under an employee benefit or retirement plan, except to the extent federal law prevents a binding agreement with respect to such rights and obligations;
- (8) The choice of law governing the construction of the agreement;
- (9) Any other matter, including the personal rights or obligations of either party, not in violation of public policy or any statute imposing a criminal penalty.

The Act specifically provides that a marital agreement may not adversely affect the right of a child to child support. Therefore, an agreement between the spouses to reduce or eliminate future child support obligations is not legally enforceable.

The Act provides that an amendment or revocation of an effective marital agreement

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may be accomplished only by a written agreement signed by both parties. Accordingly, the parties cannot verbally amend or revoke a marital agreement.

For a marital agreement to be enforceable in Colorado, each party must provide the other with a fair and reasonable disclosure of his or her property and financial obligations prior to execution of the agreement. So, if a party “hides” his or her assets from the other, the agreement will be unenforceable.

Additionally, a marital agreement is not enforceable if the party challenging it proves that he or she did not execute the agreement “voluntarily.” Often, a spouse challenging a marital agreement on “voluntariness” grounds claims that he or she signed the agreement “under duress” in that he or she was presented with the agreement shortly before the wedding ceremony, after wedding guests have already purchased travel tickets (or have already arrived for the wedding), flowers and cake have already been paid for, etc. Whether a spouse executed a marital agreement “voluntarily” is decided by the court on a case-by-case basis.

In Colorado, courts sometimes order one spouse to pay “spousal maintenance” (commonly known as “alimony”) to the other spouse upon divorce. In light of this, parties to marital agreements often attempt to limit or waive the right of one or both spouses to spousal maintenance upon divorce. The Act generally permits this type of arrangement. However, the Act provides that even if a marital agreement is otherwise valid and enforceable, the provisions of the agreement pertaining to spousal maintenance may be unenforceable if the court finds that such provisions are “unconscionable at the time of enforcement of such provisions.” The term “unconscionable” generally means “grossly unfair” and the question of conscionability is decided by the court on a case-by-case basis. For example, if one spouse would not have enough income or property to provide for his or her reasonable needs after divorce and that spouse is unable to procure appropriate employment, a court might find that enforcement of the maintenance waiver is

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Attorneys and Staff of Fleishman & Shapiro P.C.

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We do not believe that the practice of the law should be one of those. We make decisions in your case based on what we believe is in your best interests. We support charitable and civic activities and encourage our employees to participate in them. We recognize our obligations to our families, employees, clients and the community in which we live and work. We are results driven and view our ultimate objectives as meeting your goals within a reasonable time of a cost which is appropriate to achieve the results you demand and are entitled to.

## Marital Agreements in Colorado *(continued from front)*

unconscionable. In that event, the court might enforce the remainder of the agreement as written but order the "wealthier" spouse to provide the other spouse with spousal maintenance despite the agreed-upon maintenance waiver.

If the marriage of the parties is later declared to be invalid, such as by annulment, a marital agreement entered into by the parties still may be enforceable, but only to the extent necessary to "avoid an inequitable result." This question is decided by the court on a case-by-case basis as well.

The law in Colorado pertaining to marital agreements is complex. To be enforceable, such agreements must meet certain specific requirements. Even then, marital agreements may be challenged in certain circumstances and the court may declare the agreement unenforceable in full or in part. Despite these obstacles, any person contemplating marriage or already married should consider whether a marital agreement is advisable to help protect his or her income and assets upon divorce. While it may not be romantic, a marital agreement may very well make good economic sense.

## FLEISHMAN & SHAPIRO ON THE MOVE

• **Craig Fleishman** was recently elected to be a member of two outstanding organizations here in Colorado. He will serve as a member of the Board of The Colorado Neurological Institute (CNI), where he was also elected to the Strategic Planning Committee. CNI is an outstanding resource in the Rocky Mountain Region for individuals or families of individuals with a neurological illness or disorder. It maintains a membership of 50 physicians and specialists in the field of neurosciences who work collaboratively to treat patients, from diagnosis through rehabilitation and recovery. In addition, **Craig** was elected as a member of the Board of the Epilepsy Foundation of Colorado, where he will assist the prestigious organization with its mission to prevent, control and cure epilepsy and to ensure people with seizure disorders are able to participate in all life experiences.

The Firm would also like to congratulate **Craig** for being selected as a Colorado 2010 Super Lawyer. All recipients of this prestigious distinction are evaluated and selected based on twelve categories of peer recognition and professional achievement.

• **Melissa Winthers** was also recently elected to a board position. She has accepted a position as a member of the Board of

Directors for the Brain Injury Association of Colorado (BIAC). BIAC is the only Colorado non-profit organization devoted solely to assisting those individuals and families of individuals with brain injuries. In May, **Melissa** also conducted a seminar for the Colorado Women's Chiropractic Association involving record keeping procedures and documenting injuries of patients as well as ethical issues regarding working on liens. She and **Steve Shapiro**, along with several medical professionals, will be speaking at an upcoming brain injury seminar for the Colorado Chiropractic Association entitled "The Collaborative Management of Cervical Spine Injuries and Patient Centered Care: Using Best Evidence Synthesis to Help Patients Recover and Document What's Wrong." For any information regarding this seminar, please do not hesitate to contact our firm or **Melissa** directly at [mwinthers@colorado-law.net](mailto:mwinthers@colorado-law.net).

• **Marlo Greer** spent last quarter working as co-chair for Montessori Academy of Colorado's (MAC) annual gala. MAC is a non-profit school dedicated to educational excellence. The event raised nearly double what was raised in the previous years due in part to **Marlo's** commitment.