Marital contracts can reassure spouses and provide for the future

"Should I stay or should I go now?" is a question many spouses ask themselves when they believe divorce is not a question of "if" but "when." When couples divorce, all assets and debt acquired during the marriage are divided. In North Carolina, it is presumed that the marital estate will be divided equally. For a spouse who believes that the likelihood of divorce is more probable than not, continuing to increase the value of the marital estate by investing in retirement plans, building value in spouse-owned companies and building equity in real estate only increases the assets that will be transferred upon separation. Spouses who have concerns about the stability of their marriage may want to enter into a marital contract called a postnuptial agreement.

The Postnuptial Agreement

A postnuptial agreement is a contract between spouses entered into after marriage that outlines the distribution of financial assets and debt in the event of divorce. Entering into such an agreement may help calm concerns about splitting assets in the event of divorce and may promote harmony in the marriage by reducing tension and fighting associated with financial differences.

Hope for the Best, but Plan for the Worst

Bill was poised for a promotion and a substantial increase in income. Bill and Ellen had been married for 20 years. They had three children all in either high school or college. Their marriage was troubled and had been for years. Bill contemplated divorce and what that would mean on all fronts, including financially. He hoped that he and Ellen wouldn't divorce, but he did not want to continue contributing to investments and retirement accounts, only to lose half. Now that his future included a substantial increase in income, the timing of his decision to stay or go would have a significant impact on their finances.

In the case of Bill and Ellen, entering into a postnuptial agreement may give Bill an incentive to continue working on his marriage without feeling the pressure and concern of the value clock ticking in the background.

Contracting for Harmony

In addition to providing for the distribution of assets, postnuptial agreements can set out responsibilities and obligations for the duration of the marriage. John owned a real-estate-development company, and his wife, Julie, was a teacher. He viewed debt as a way to finance growth. Julie valued stability and was consumed with worry that the couple would lose its house if it served as collateral on the debt John needed for a new project. Both spouses wanted to plan for their future, but their visions were very different, and the tension put strain on their marriage.

In this case, a postnuptial agreement could outline the financial responsibilities and obligations of the spouses. For example, it could provide that any debt that John incurred would be in his name only. He would not ask Julie to personally guarantee any loan, and he would not use the couple's home as collateral. Although contracting with one's spouse seems awkward, the most substantial and important financial decisions that a person makes are made during marriage. Planning for a wedding rarely, if ever, includes discussions on how the spouses will handle their finances. However, money is one of the main sources of disagreement between spouses. A postnuptial agreement makes sense when spouses wish to protect their individual financial futures.

It is important to note that a postnuptial agreement cannot provide for the waiver of or the provision for alimony or spousal support, since such a provision is against public policy in this state. Consequently, it is important to seek the advice of a family-law attorney who knows what the law will allow.

Premarital Agreements

Before marriage, parties can enter into a premarital agreement that will provide for the distribution of property and, unlike postnuptial agreements, terms regarding spousal support. This is often recommended when one party brings more wealth to the marriage than the other or when one spouse is an owner in a family business or other closely held entity where such interest is intended to stay within the immediate family or the existing shareholders.

Addressing Financial Issues While Goodwill Abounds

Nicole and Jim were engaged to be married. Jim works for his family's business, and Nicole will be entering medical school. Because Jim has wealth that he received from his family, he is going to pay Nicole's tuition, and he will pay for their expenses while she is in school.

Jim is just starting out in the family business and has been gifted shares of stock in a number of closely held companies owned by various family members. He receives periodic distributions to pay taxes and distributions for his own personal use. The shareholder agreements for the various entities provide that the shares cannot be owned by any person outside of the immediate family. Spouses of family members may not hold shares.

Jim and Nicole are among the ranks of many couples today who are entering into premarital agreements to determine the distribution of their assets in the event of divorce. This requires the couple to discuss how they want to handle their income and assets in the future at a time when they are in love. Their discussion on these same issues would likely be very tumultuous and expensive if they were trying to make this same determination at a time when the marriage is ending.

All couples should discuss the future distribution of assets before getting married to make sure their future plans are compatible. For example, if Jim incurs expenses of $100,000 to put Nicole through medical school, he may expect to be reimbursed if Nicole graduates and ends the marriage within the first 10 years of marriage. In the alternative, if Nicole earns $300,000 a year as a physician after enduring medical school, a residency and long hours in her practice, she may want an agreement that says she will not have to pay alimony to Jim should he choose to work part-time for the family business and live off of distributions he receives from his ownership.

If Nicole cannot receive any of the wealth associated with Jim's business interests, they will need to determine what Nicole would be entitled to receive if they divorced. This will be especially important if there are children born to the marriage and if there will be a large disparity in the standard of living for each of the spouses if they divorce.

Contracting With My Spouse — Who Does That?

Premarital and postnuptial agreements were once considered contracts for the very wealthy. Today, couples of ordinary means often rely on premarital agreements for their own reasons. One spouse may have children from a previous marriage, and he or she may want to secure specific assets for their children. Some couples wish to keep certain finances separate. Contracting with one's spouse or intended spouse may feel uncomfortable, wrong or as if one is not committed to the marriage. When spouses divorce, all issues to be resolved, other than those regarding children, are related to money and the distribution of assets. Negotiating or litigating the distribution of assets and the calculation of spousal support is frightening and nerve-wracking for divorcing parties. If such decisions can be made before people are at their worst, the outcome will likely be more equitable. In addition, it may help to reduce the cost and uncertainty of divorce proceedings if there is an agreement already in place.

Ultimately, premarital and postnuptial agreements allow spouses to contract with each other regarding the matters most important to their financial future. These alternatives may provide the security needed to help a marriage survive troubled times.

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Cathy Hunt has been recognized by her peers as a member of *Business North Carolina*'s Legal Elite in Family Law. Before joining Gailor, Wallis & Hunt PLLC in 2001 she practiced corporate law with Womble, Carlyle, Sandridge and Rice in Raleigh and McGuire, Woods, Battle and Booth in northern Virginia. Her experience provides her with the expertise necessary to advise divorcing parties with complex financial cases such as business valuation and other corporate matters.

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