



# PROPERTY AGREEMENTS FOR COUPLES

*Property Agreements from an Estate Planning Perspective*

*by Layne T. Rushforth<sup>1</sup>*

## 1. A COUPLE'S PROPERTY AGREEMENT FOR ESTATE PLANNING

**1.1 What is A Couple's Property Agreement?** A property agreement for a couple is a contract between a husband and a wife, domestic partners, or even cohabiting partners that establishes each party's rights to their respective assets<sup>2</sup> and their responsibility as to their respective liabilities.

(a) There is no technical or required title to the agreement.

(1) If the agreement is signed before the parties are to be married, it is a "prenuptial agreement" or "premarital agreement".

(2) If it is signed after the parties are married, the agreement is often called a "postnuptial agreement" or "postmarital agreement".

(3) If the agreement is signed by domestic partners who are registered under NRS Chapter 122A,<sup>3</sup> it is sometimes called a "domestic partner agreement".

(b) In Nevada, prenuptial agreements are governed under the Uniform Premarital Agreement Act (NRS Chapter 123A), and NRS Chapter 122A makes that applicable to registered domestic partners.

(c) Postnuptial agreements are governed under contract law and are specifically permitted under Nevada law.<sup>4</sup>

**1.2 Default Law.** Nevada law defines community property as property acquired during the duration of the marriage or domestic partnership except by gift, inheritance, or personal injury award.<sup>5</sup> Conversely, each party's separate property consists of property acquired by that party prior to the marriage or domestic partnership and property acquired at any time by gift, inheritance, or personal injury award. Under Nevada law, income from and appreciation of separate property is

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<sup>2</sup> "Assets", "property", and "property rights" are legal synonyms.

<sup>3</sup> "NRS" refers to the "Nevada Revised Statutes".

<sup>4</sup> NRS 123.220. NRS Chapter 122A makes this applicable to registered domestic partners.

<sup>5</sup> See NRS 123.220 and 123.130.



separate property, and income from and appreciation of community property is community property. Compensation for personal services rendered during the marriage or domestic partnership is community property. This not only includes a regular paycheck, bonuses, and commissions, but also includes retirement benefits and the growth of business values due to otherwise uncompensated personal services. While these are the default rules, they can be modified by agreement.

**1.3 Why Should There Be a Property Agreement?** Most people view a property agreement as an agreement in contemplation of divorce or separation<sup>6</sup>, and no one wants to start a relationship planning for its termination. Yes, a well-written property agreement will be binding in a divorce or separation proceeding, but estate planning is the primary focus of property agreements prepared by our office.

(a) The two main objectives of a property agreement are (1) to keep control of assets and (2) to avoid complications with the disposition and distribution of a party's assets upon death.

(b) A property agreement is needed by a couple who have the different estate planning goals, different beneficiaries, children from prior relationships, and/or separate property.<sup>7</sup> The property agreement can help the surviving party defend against claims made the heirs or beneficiaries of the predeceased party.

**1.4 Making the Agreement Effective; Murphy's Law.** To make the agreement more effective, you need to summarize your purpose for doing the agreement. Answering the following questions may help you outline what you want to accomplish:

(a) As mentioned above, the compensation of a party or domestic partner is community property. Do you want to change that rule and provide that each person's compensation is separate property?

(b) Are there business interests that you want to remain separate property even though the business is built up through the personal services of one party? Is there a buy-sell agreement or other entity-owners' agreement that the nonparticipant party should agree to be bound by?

(c) Is there other property you want to remain separate, even if community property is used to pay mortgages or other debt related to that property?

(d) Do either of you have a trust with assets that should remain separate property?

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<sup>6</sup> "Divorce" includes the termination of a domestic partnership.

<sup>7</sup> Under Nevada law, the "separate property" of a married person is property (assets) acquired prior to the marriage or acquired during the marriage by gift, by inheritance, or as an award for personal injury. [See NRS Chapter 123.] NRS Chapter 122A makes this same rule applicable to domestic partners.



(e) Will there be any jointly owned property? If so, what rights does the survivor have after one party dies? What rights do the predeceased party's family and/or beneficiaries have in that property, and to what extent can they interfere with the survivor's possession, control, and management of the property? What is to happen after both of you are deceased?

(f) Are there to be jointly held assets that the surviving party can use during his or her lifetime? If so, after you are both deceased, what happens to those assets?

(g) Are there provisions you want included to protect the surviving party from claims or challenges from the predeceased party's heirs or beneficiaries?

(h) Are there specific debts for which one party wants to assume sole responsibility? Are there debts that you want to specifically declare as being joint debts?

(i) Do you want to discuss in the agreement what happens in the event of divorce?

(1) If so, do you want to provide for a waiver of support (alimony), for a fixed amount of support, or for an amount of support based on the number of years of the marriage, domestic partnership, or cohabitation?

(2) If so, do you want to be specific about the division of property in the event of a divorce?

**1.5 Beyond the Agreement.** A property agreement may not be all you need to do. It is important to supplement this agreement with coordinated estate planning documents, including your will or living trust, especially if you have jointly owned or community property. The more specific you can be, the better. For example, if you share a home, does the survivor have the right to continue to live in the home, and who pays what expenses if the survivor does live there? As you draft your will or trust, consider each asset that is likely to generate any dispute. Your will or trust might be drafted or amended so that anyone who challenges the rights of the other party (or such party's family) will be deemed a contestant or otherwise have their share reduced. The will or trust should specifically state that it is to be enforced subject to the terms of the property agreement.

## **2. IMPROVING THE AGREEMENT'S ENFORCEABILITY**

**2.1 Asset Disclosure.** Nevada law requires that the two of you make an adequate disclosure of your assets and liabilities to each other or that you waive such a disclosure. This agreement assumes that you both are satisfied with what you know, and you waive your right to know anything further. At a minimum, I recommend that you each make a general disclosure of assets and liabilities, and those disclosures should be attached to the agreement itself.

**2.2 Separate Attorneys.** Agreements are more easily enforced if they clearly reflect that each party was represented by counsel.



### 3. CONCLUSION

The agreement should clearly specify what is to happen during your marriage, domestic partnership, or cohabitation, and you cannot ignore what might happen in the event of divorce or other termination of your relationship. A complete agreement will also deal with what happens after death. As you negotiate and craft the terms of your property agreement, keep in mind that the first law of estate planning is Murphy's Law<sup>8</sup>.

#### 3.1 Key Questions. Each of you should ask yourself these questions:

(a) *Lifetime*. "While we are married, who has control over what property, and who has responsibility for which debt?" "As the relationship endures, what should change?"

(b) *Divorce*. "If we are divorced, who gets what and who pays for what?"

(c) *Death*. "What is likely to go wrong for my beneficiaries or for my party if I am the first party to die?" and "What is likely to go wrong for me or for my party's family if my party dies first?"

3.2 **Doing It Right.** To avoid poor drafting and hurt feelings, a property agreement should not done in haste. Take the time to discuss your mutually acceptable objectives, as well as both parties' potential objections. To be workable and legally enforceable, a property agreement must be designed to be a mutually beneficial ("win-win") agreement.

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<sup>8</sup> If anything can go wrong, it usually will, and usually at the worst possible time under the worst possible circumstances.