O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

PROTECTING THE ENFORCEABILITY OF YOUR MARITAL PROPERTY AGREEMENT IN THE EVENT OF A DIVORCE

In Wisconsin, people who are contemplating marriage or who are already married are permitted to enter into contracts with each other regarding their financial affairs to suit their needs and values and to achieve certainty, both during the marriage and in the event of a divorce. These contracts or marital property agreements are commonly known as pre- or post-nuptial agreements.

Wisconsin divorce law is clear that, as it relates to the division of property, any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution shall be binding upon the divorce court, unless the terms of the agreement are inequitable to either party. Because the divorce court is required to presume any such agreement to be equitable as to both parties, the party challenging the agreement has the burden of producing evidence and persuading the divorce court that the agreement is unfair and unenforceable.

For an agreement to be unenforceable, it must fail to meet the requirements of procedural fairness or substantive fairness. To assess procedural fairness, the court assesses whether each party makes fair and reasonable disclosures regarding his or her financial status by disclosing assets, liabilities, and debts; and whether each party entered into the agreement voluntarily and freely. When assessing whether a party voluntarily and freely entered into the agreement, a divorce court examines whether a party had a meaningful choice. Divorce courts are instructed to consider whether each party was represented by independent counsel, whether each party had adequate time to review the agreement, whether the parties understood the terms of the agreement and their effects, and whether the parties understood their financial rights in the absence of an agreement. To assess substantive fairness, the court assesses whether the agreement was fair at the time of execution. If circumstances significantly change since execution, then substantive fairness is also assessed at the time of the divorce.

A marital property agreement that is fair at its execution is not unfair at divorce just because the application of the agreement at divorce results in a property division which is not equal between the parties or which a court might not currently order under the property division

statute. If, however, there are significantly changed circumstances after the execution of an agreement, a divorce court must evaluate those circumstances and expectations from the perspectives of the parties at the time they entered into their agreement, not at the time of the divorce. Marital property agreements can (and should) be drafted in such a way as to address some of these contingencies.

While it is true that marital property agreements are binding contracts regarded with favor in Wisconsin, it is clear that, the parties to the agreement must keep in mind and adhere to the standards used to determine the enforceability of these agreements upon divorce, both when negotiating and drafting an agreement and during the marriage. To do otherwise is to risk an unpleasant surprise when a divorce court determines that the agreement is inequitable and, therefore, unenforceable at the time of divorce.