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PLANNING FOR DIVORCE

An Estate Planner's Guide to Advising Couples About Divorce

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Estate planners can do a great service to their clients by advising them regarding divorce—no matter what the clients' marital status. Ignoring divorce, as this article explains, leaves estate planning incomplete.

To many, the word "estate" connotes death. Oddly enough, however, advisors involved in estate planning often first meet a client during the happiest times of a client's life, such as a marriage or the birth of a child. When the impetus to do such important planning is a joyous event, how does an estate planner then introduce the topic of divorce?

Why divorce, you may ask? The divorce rate has increased significantly over the last few decades, and now almost half of all marriages end in divorce. [1] As a result, more clients are on their second marriage, are getting married later, and have children from previous marriages. Incorporating divorce planning into standard estate planning becomes even more important when one considers the ancillary effects of divorce on the traditional family structure.

Estate planners explore with clients all contingencies related to death, but the fact is that any particular client (excluding elderly or ill clients) is statistically more likely to get divorced in the next five years than he or she is to die. In light of the statistics, how can an estate planner truly serve a client's best interests without discussing divorce?

Particularly when a joint representation is involved, addressing divorce can be tricky. First, this article will examine the ethical and emotional challenges the estate planning attorney faces when representing a couple contemplating marriage or the possibility of divorce, including a discussion of separate property and a brief guide to drafting premarital agreements. Second, this article will analyze how to incorporate a discussion of divorce when representing clients who are already married, as well as the use of postmarital agreements. Third, this article will summarize (1) the procedures involved in advising a couple (or spouse) contemplating divorce and (2) the necessary follow-through once a divorce decree is entered.

Advising clients contemplating marriage

Raising the possibility of divorce with couples before divorce is even considered, preferably when a couple is contemplating marriage, is important. There are reasons to believe that planning early for the possibility of divorce is less stressful. [2] When a relationship is newer and a wedding is imminent, the "newlywed phase" may lead to a more cooperative attitude. [3] Early in a relationship, each spouse may be more willing to compromise and act reasonably, whereas later, antagonism developed over the course of the relationship may complicate conciliation—particularly if marital strife is the reason for a postmarital agreement. [4]

No doubt, the topic of divorce is difficult to broach with clients anticipating marriage. Premarital planning for divorce, though, may actually ease some concerns associated with dissolution of marriage and may remove conflict from future marital decisionmaking by initiating open communication regarding difficult topics.

Although it is crucial not to avoid discussing divorce merely because it is an uncomfortable topic, it is also

important to get to know the clients before laying the issue on the table. One way to incorporate the subject into an initial meeting may be to introduce it following the initial discussion with clients regarding their family, assets, and goals for the estate planning.

It may be useful to work the topic into the analysis of the clients' particular circumstances. For example, if a client mentions he expects an inheritance, use a conversation about expectations regarding those assets as transition to a discussion of divorce in general.

Yet another method is to introduce the bare statistics. Switching the focus to the general population and away from the clients can be a useful method to break down the communication barrier regarding divorce.

Many clients respond positively to having the attorney break the ice and provide a forum to express concerns the clients have kept silent. If a client reacts negatively, you can simply move on, knowing you have tried and done your duty to the client by noting the issue. Once the topic is on the table, counseling the client regarding some or all of the following techniques may be appropriate.

Premarital agreements

Premarital agreements have become increasingly popular in the last 20 years as a method to address the financial risks incident to divorce. [5] Although premarital agreements are useful in any situation where the cost of preparation is appropriate in relation to the assets at risk, these agreements will be especially helpful in certain circumstances. Examples include couples: (1) with disparate wealth, (2) where one party does not work, (3) with disparate amounts of debt, (4) where at least one party has children from a prior marriage, (5) where a party has previously been through a contentious divorce, (6) where one party owns an interest in a family business, and (7) when there is an anticipated inheritance. [6]

Couples who do not enter into a premarital agreement may not do so for several reasons. Premarital agreements are a non-traditional intrusion upon a tradition-oriented event. For some, a premarital agreement may be contrary to ingrained social customs or religious beliefs. Others feel a premarital agreement voices doubt about the relationship, threatening the stability of the union rather than strengthening the marriage by creating a deeper understanding of each other. Foremost, a spouse may feel that requesting a premarital agreement shows compromised devotion. [7]

It is important to explain to reluctant couples the benefits a premarital agreement may provide both to the marriage and in the event of divorce. The premarital agreement allows the couple to alter the default statutory scheme with a divorce plan specific to their situation. Moreover, the planning process required for a premarital agreement may benefit the couple by communicating expectations of each party and exposing incompatibilities. [8]

Although some clients seek out an estate planner to assist with a premarital agreement, many clients already have the agreement in place before beginning preparation of an estate plan. For a couple that does have a premarital agreement, the agreement may have been drafted by an attorney who did not understand fully the impact estate planning may have on property subject to division upon divorce or a spouse's forced share rights upon death. A common oversight by attorneys not conversant in estate tax reduction techniques results in a premarital agreement that penalizes the wealthier party upon divorce if assets are transferred between spouses for tax planning purposes. Therefore, a review of existing premarital agreements is a crucial step in preparing any estate plan.

The most effective review of a premarital agreement incident to estate planning is possible only if the reviewer understands the law of the governing jurisdiction regarding enforceability of premarital agreements. The introductory guide to preparing a premarital agreement that follows serves also as a general guideline for reviewing premarital agreements; however, it is important to become familiar with the particular requirements of the governing jurisdiction to ensure effective estate planning consistent with the terms of the premarital agreement.

Enforceability of premarital agreements. Premarital agreements have a past history of hostile treatment by the courts, which held that premarital agreements were against public policy because they were thought to

encourage divorce. [9] As the divorce rate increased to its current level, courts and legislatures recognized premarital agreements as more attractive than clogging the dockets with large numbers of contentious divorces. [10] Many jurisdictions now authorize couples to enter into these contractual agreements that, like business transactions, result from arm's-length negotiations where both parties knowingly determine their rights in relation to one another. The distinguishing characteristic of the premarital agreement is the emotionally charged relationship of the negotiating parties. [11]

About half the states have adopted the Uniform Premarital Agreement Act (UPAA) in its entirety or with minor modifications. [12] Under the UPAA, a premarital agreement is presumed valid and enforceable. A party seeking to void the agreement has the burden of proving it was unconscionable and there was nondisclosure of property or financial obligations by one of the parties. Even without consideration, a premarital agreement is enforceable under the UPAA if it is signed by both parties.

Although the UPAA has been adopted in the majority of states, a few states still leave the governance of such agreements to common law. The requirements for a valid premarital agreement may vary across jurisdictions; however, three common criteria normally apply. [13] First, the agreement must not be a product of fraud, duress, mistake, misrepresentation, or nondisclosure of material fact. Second, the agreement must not be unconscionable when executed. Third, changed circumstances must not make enforcement of the premarital agreement unfair and unreasonable. Generally, the inquiry under the UPAA requires less disclosure for a valid premarital agreement than does the common law. [14]

Though compliance with procedural requirements typically is the focus of a court reviewing a premarital agreement, courts also analyze the agreement for substantive fairness. There are some limits as to the types of provisions a court will enforce. Generally, provisions that regulate day-to-day marriage issues, such as frequency of sexual relations or visits by the in-laws, are unenforceable. [15] Some suggestions of provisions that a court would enforce include the duration of the contract, division of property, division of income, treatment of debt, specification of support and living expenses, decisions regarding surnames, birth control, children, housework, domicile, religion, wills and inheritance, a plan for the resolution of arguments, and dissolution of the marriage. [16]

Premarital agreements most often are challenged on the ground that there was duress, lack of knowledge regarding the terms, overreaching, and unconscionability. [17] But a well-drafted and properly executed premarital agreement is likely to be upheld. The effect of the emotional nature of the agreement usually is not a defense to enforcement. [18] A threat to call off the marriage—even if the spouse is pregnant—will not often constitute duress. [19] Representation by counsel may preclude a claim of duress. The statute of limitations on duress typically begins when the agreement is signed, and a claim of duress may be waived unless timely asserted. [20] Furthermore, a refusal to read and endeavor to understand the agreement will not allow avoidance of terms. [21]

Ethical considerations for advising clients regarding premarital agreements. Attorneys are accustomed to joint representation in the estate planning context where the interests of the spouses often are aligned (at least at the time the estate plan is prepared) and joint representation does not present an ethical issue. [22] Even if spouses have different goals, an attorney is not necessarily precluded from representing both of them. [23] In fact, representation of the couple (jointly or separately) by one attorney or firm often can be efficient and beneficial. [24] Early in any joint representation, whether interests are aligned or differ somewhat, an estate planning attorney should advise both clients of potential conflicts and the extent to which information will be shared as between the parties and the attorney. [25] Engagement letters are strongly recommended, both as evidence that the implications of a joint representation were discussed, and to ensure that the clients have an opportunity to consider the structure of a joint representation.

In contrast to joint representation in an estate planning context, representation during the signing of a premarital agreement requires complete loyalty to the interests of a single party, whose interests more than likely are directly adverse to the interests of the future spouse. Rule 1.7 of the Model Rules of Professional Conduct prohibits one attorney (or firm) from representing a client with interests directly adverse to another client. The rule also prohibits a lawyer from representing a client when the representation would be materially limited by representation of another client.

Even though Rule 1.7 does allow a client to consent to representation despite the conflict, separate representation is strongly recommended. [26] Representation after consent may present ongoing risks of escalating the current conflict, placing the attorney in an ethical quandary, and possibly even opening the door for either party to challenge the enforceability of the premarital agreement. [27]

Even with separate representation, the emotional charge of premarital agreements can be surprising, and attorneys should always proceed with caution. [28] Many commentators opine that independent counsel is so important it should be required for premarital agreements, even though imposing legal representation may infringe on an individual's freedom to contract. [29]

Considerations for drafting an enforceable premarital agreement. One of the most difficult challenges in drafting premarital agreements stems from the fact that it is virtually impossible to envision all the possible directions the couple may take in the future (children, careers, inheritances, etc.), as well as to contemplate the direction the law may take when a spouse seeks to enforce the agreement, possibly 15-20 years later. [30] Frequently, a party will attack the validity of the premarital agreement, alleging that the agreement is unfair given the new set of circumstances at the time of the divorce. Although it is virtually impossible to foreclose every avenue for challenge of a premarital agreement due to the uncontrollability of the future circumstances in which the couple may find themselves, certain drafting techniques can reduce substantially the effectiveness of an attack on a premarital agreement.

Drafting in a manner that sets forth a separate provision for every possible contingency creates inflexibility and ignores the unimaginable event. The recommended drafting approach, therefore, is to create an agreement that modifies itself over time by reference to external factors—either contingent or specific—in order to provide a flexible structure that will stand the test of time. Even a document that is designed to adapt to probable future realities and desires can become unreasonable in light of unforeseeable events. [31] Taking the "modifying" approach helps maintain the fairness of the agreement over time. In a situation where the growth potential of assets of one party due to employment during the marriage causes the other party to have concerns that the agreement will not be fair after the passage of substantial time, one solution to address this concern is to have the agreement extinguish itself entirely or in part, contingent on certain events, generally the passage of time.

For example, suppose that Spouse A is a successful physician with two children from a prior marriage. Spouse B is a successful sales manager who agrees to stay home and care for the children of Spouse A because A's income is ten times the income of B. B is concerned that if the parties are married for a length of time, say 15 years, and then decide to divorce, B will be in a situation where B has given up a career to enable A to further A's career, and B feels equally entitled to share in the financial benefits of that joint endeavor. This is the type of situation where it may be appropriate to terminate the property division provisions of the premarital agreement and leave the decision to the courts or to agreement of the parties in the event of divorce.

One of the most important technical requirements of a premarital agreement is providing full and complete financial disclosure to ensure an educated understanding of the agreement (aided by counsel). [32] The more detailed the information, the better the disclosure protects the disclosing party. In addition, the information should be updated to ensure that it is as accurate as possible when the premarital agreement is signed.

As evidence of disclosure, it is recommended that a net worth statement be attached to the agreement. [33] Regardless of the form of the attachment, the client should be advised that the disclosure is a legal requirement, which may encourage forthright disclosure. Disclosure often prompts additional negotiations, so provide the financial statement on a schedule that gives the other party ample time to review and respond. To foreclose later arguments of inadequate disclosure, have the opposing party and his or her counsel acknowledge receipt of the disclosure. [34]

Disclosure is essential, because courts often view disclosure as the equivalent of fairness. [35] If the client has concerns about leaving the disclosure documentation in the hands of other individuals, arrange to have all copies returned and provide in the agreement that the information will be produced only in the event of litigation between the parties regarding the premarital agreement and only under protective order. [36]

Besides the difficulties of ensuring proper disclosure and addressing concerns regarding fairness, the most

frequent problems in drafting arise in defining premarital property and income, and in resolving estate rights, disposition of the marital residence, spousal support, and bequests in conflict with the agreement. [37] Property owned before the marriage should be addressed clearly in the premarital agreement. Although property acquired prior to the marriage may be considered a party's separate property under the laws of the governing jurisdiction, clients need to be protected from inadvertent commingling with marital property or conversion to community property.

With regard to growth of premarital assets, it is important to analyze whether appreciation and income from those assets will be treated as marital property or as separate property. Failure to clearly identify and address premarital assets in the premarital agreement can leave the client to face the often impossible task of tracing the assets back to premarital property when the parties subsequently divorce, which may be many years later.

Including a definition of separate property is important, as is ensuring that the definition is clear and consistent with the parties' intent regarding division of assets upon death or divorce. One useful technique is to attach to the premarital agreement a separate schedule of each party's separate property, which at least provides a starting point if tracing does become necessary. In certain situations, it may even be advisable for clients to file separate tax returns following the marriage to continue reinforcing the separate property designations. [38]

Not surprisingly, premarital agreements often are prepared with such a focus on divorce that the estate planning effects are all but ignored. Defining separate or premarital property, however, will not affect the application of a surviving spouse's statutory forced share (elective share) rights under state law. To ensure that the premarital agreement is effective upon death as well as in the event of divorce, the agreement must contain a general waiver of the spouse's state law rights as against the estate of the deceased spouse. [39] The waiver may be a general waiver or a specific waiver as to a certain category of property, such as separate property (as defined in the premarital agreement). [40]

As with property settlements, one way to maintain flexibility of the document and to maintain a level of fairness is to increase the surviving spouse's share of the decedent's estate over time. Another option is to terminate the waiver after the parties have been married a certain number of years, thereby leaving the spouse full rights to demand a spousal forced share. Because the spousal forced share may be defeated by the establishment of a trust under the law of some states, [41] it may be preferable to define the rights under the agreement rather than reverting to state estate rights. In any event, defining what assets are included in the estate is important, as is requiring that the parties be living together (and married) at the time of death in order for the survivor to receive any share of the estate. [42]

Particularly with second marriages or later-in-life marriages, a couple may reside in a home previously owned by one spouse. If the spouse with title to the house dies first, it is important to consider a living arrangement for the surviving spouse and decide who will be responsible for the payment of mortgages, taxes and upkeep. It may also be necessary to prescribe the use of home furnishings. Heirlooms used by the parties but intended for other than the surviving spouse should be excluded from the household furnishings that remain available to the survivor so that these items can be distributed consistent with the deceased spouse's estate plan. Not only with respect to heirlooms, it is crucial that the estate planner be certain to incorporate the provisions of the premarital agreement into the client's estate plan so that the two coordinate and are not inconsistent or ambiguous, thereby opening the door to estate litigation. The premarital agreement is designed to avoid litigation, and the estate plan should be as well.

Consistent with the goal of avoiding lengthy litigation over property, a premarital agreement customarily includes a provision that neither party will contest the other's will. [43] In light of this clause, can a bequest to a spouse in the will amend a premarital agreement without a written modification of the agreement and consent of both parties? To avoid unintentional modification of the premarital agreement and to foreclose the argument that the premarital agreement was nullified by a party's actions in preparation of the party's estate plan, the premarital agreement should include a statement that the waiver of spousal rights does not preclude a party from actually bequeathing more than is required under the agreement, and neither does the waiver preclude the survivor from accepting such a bequest.

Spousal support may be waived in the premarital agreement. If spousal support is not waived, it must be

either provided for in the agreement or left to the courts. To increase the fairness of the agreement when there is a limited period of spousal support, consider structuring the period of support based on the length of the marriage. [44] If the agreement provides spousal support, a "disaster clause" that relieves the payor of the obligation in the event of a reversal of fortunes may be warranted.

Keeping separate property separate

Whether or not a couple signs a premarital agreement, it is important to educate clients about the law governing marriage and property in their state. Even without a premarital agreement, it is possible—upon divorce—to keep the separate property in the hands of the person who brought it to the marriage. It is important to advise estate planning clients regarding the conversion of premarital or separate property into marital or community property, and the consequences.

Tracing separate property over the course of a marriage can be problematic. If clients decide to forego a premarital agreement, they should be advised of the importance of maintaining separate records. Clients should be advised not to add funds to premarital bank or investment accounts in order to prevent commingling. Furthermore, it is recommended that the client open new bank and investment accounts to receive all income earned during the marriage and to be used during the marriage by the couple for their "marital" financial activities.

Even if there is a premarital agreement, keeping separate property segregated may be required by the definition of "separate property" set forth in that agreement. This type of definition can produce disastrous results upon divorce if the estate planner advises transferring assets to the less wealthy spouse for estate tax or creditor protection purposes. If a rigid definition of separate property will hinder effective estate planning, the estate planner should either recommend an amendment to the premarital agreement or, at the very least, encourage the parties to sign a letter agreement that the transfers are made solely for tax and estate planning purposes, and are not intended to alter the character of the property as defined in the premarital agreement.

Advising married clients

Discussing divorce with married clients is no easier than broaching the topic with couples anticipating marriage. Even though the couple is already married, planning for divorce may initiate important open communication regarding difficult topics. In fact, married couples may be more honest (which can be good or bad) than couples contemplating marriage.

As with clients contemplating marriage, it is crucial not to avoid discussing divorce merely because it is an uncomfortable topic. In addition, it remains important to get to know the clients before laying the issue on the table.

Married clients should be advised as to the state law regarding property rights upon divorce and death as part of the estate planning conversation. Surprisingly, married clients often react positively and have thoughtful talks regarding divorce, and those conversations help in the estate planning process. Clearly, though, not all clients will appreciate the mention of divorce, and it is important to weigh the benefit of preparing an estate plan without including a discussion of divorce against antagonizing a client to the point where no estate plan is prepared and the client risks intestacy.

If, during the course of planning discussions, clients reveal that they have commingled separate property unintentionally and both spouses desire to remedy the situation, a postmarital agreement may be appropriate. Postmarital agreements also may be warranted following a reconciliation of estranged spouses or when a couple later decides to have a child and one of the spouses has a child from a prior marriage.

Enforceability of postmarital agreements. Courts have been even slower to accept postmarital agreements than premarital agreements, largely due to the issue of consideration. Courts enforcing postmarital agreements conclude that the waiver of statutory rights created by marriage constitutes consideration for the agreement. [45] No jurisdiction will support a postmarital agreement where a spouse agrees to do what the spouse is already obligated to do by law. [46] The trend in the law, however, is toward

upholding these contracts when there is adequate consideration.

In jurisdictions that enforce postmarital agreements, the criteria generally are the same as the criteria for enforcing premarital agreements. [47] Full financial disclosure is probably the most important factor to determine fairness. Once again, a court will review an agreement for procedural and substantive fairness. The typical attacks on postmarital agreements are the same as those with respect to premarital agreements, with the added challenge to postmarital agreements based on lack of consideration. [48]

Ethical considerations for advising clients regarding postmarital agreements. As with premarital agreements, attorney representation during the signing of a postmarital agreement protects the interests of a client with interests directly and openly adverse to those of the other spouse. Model Rule 1.7 prohibits representing both spouses. Even though Rule 1.7 does allow a client to consent to representation despite the conflict, separate representation is virtually required and is strongly recommended. [49] The ongoing risks of the conflict are even more intense with postmarital agreements due to the higher threshold for court enforcement.

Drafting a postmarital agreement. Issues that arise when drafting a postmarital agreement generally are the same as those that arise when drafting a premarital agreement, considering that both agreements can serve the same purposes. The only issue that should be analyzed more seriously with a postmarital agreement is the consideration for enforceability.

Postmarital agreements generally are perceived as stemming from conflict, and therefore, are thought of as more difficult to prepare. Often, though, postmarital agreements are easier to draft because the couple is more likely to have one or a few specific issues that bring them to the table. Moreover, depending on the length of the marriage, it may be easier to narrow future contingencies that need to be addressed in the agreement. For instance, the couple may already have children, own a home together, etc. Those issues can be addressed directly and perhaps more concisely than they would be in a premarital agreement.

Advising clients contemplating divorce

A divorcing spouse's first call should be to his or her matrimonial attorney. The second call should be to his or her estate planning attorney. An existing plan may need revision, and a client without an estate plan must assess the need for one, given laws regarding intestate share, spousal forced share rights, guardianships and trusts for children.

Estate planners should encourage divorcing clients to review and update their estate plans. The first step in this review is determining whether the plan comports with the requirements of any premarital or postmarital agreement. An estate plan contradictory to the terms of an agreement could result in protracted estate litigation if the client dies while the divorce is pending. Estate litigation will spend down the assets available to other legatees on attorney's fees, expenses, and court costs, and may prevent other legatees from receiving any benefits from the estate for several years.

Next, the estate planning attorney should advise the client to gather evidence as to the character of property. For example, the client may have documents that enable the client to trace shares of stock to a gift or inheritance, which would make the shares separate property. Funding schedules on trust agreements also can be useful.

Property that is traceable as separate property is not subject to division or transfer by the divorce decree. For this reason, clients who have been receiving annual gifts from family members should either request that the gifts cease until the divorce is final or that the donor establish a separate trust to receive those gifts while the divorce action is pending. Separate assets can be transferred or otherwise dissipated in theory, but in practice it is best to have the client consult with the matrimonial attorney before any asset transfers are made.

Often, married couples designate their spouse as the beneficiary of life insurance, retirement plans, or other property that passes by beneficiary designation. Although the soon-to-be former spouse's signature may be required to change certain beneficiary designations (e.g., 401(k) accounts), beneficiary designations should be changed if appropriate and if the matrimonial attorney is in agreement. In addition, a revocable trust may be desirable to help avoid the spousal forced share rights under state law in the event the client dies before the divorce is final. In many states, as long as the assets pass through a non-probate environment (e.g., joint

ownership, beneficiary designations, Totten trusts, and revocable or irrevocable trusts), they are not subject to the spousal elective share. [50]

Amending the estate plan documents to remove the soon-to-be former spouse as a successor trustee, executor, agent for powers of attorney, and other fiduciary positions also is advisable in many divorce situations. The estate plan, whether new or revised, should address appropriate arrangements for minor children, such as guardianships and trusts. Again, the matrimonial attorney should be consulted before any changes are made to the client's estate plan. The strategic elements of a divorce action may dictate that the client postpone altering the estate plan until the court has addressed certain issues. If changes are not possible while the divorce is pending, the estate planner should work with the client to prepare the amendments so they can be signed immediately after the divorce is final.

One problem clients frequently face in divorce is the uncontrolled spending of a vengeful spouse. A discussion with the matrimonial attorney regarding severing joint tenancies and/or withdrawing all funds in joint accounts is important where spendthrifts are involved. Estate planning can be a useful tool in this context to demonstrate goodwill and the desire to preserve assets for the parties and their children. One effective technique is to establish a separate trust to hold for safekeeping assets pulled from joint accounts. Use of strategies to cut off a spendthrift must be done with care to avoid impoverishing the spouse with the financial disadvantage and to avoid antagonizing the judge presiding over the divorce. Asset transfers considered to be fraudulent conveyances will be set aside. [51]

Regardless of whether or not planning was done while the divorce was pending, an estate plan review is necessary once the divorce decree is final. Even seemingly minor last-minute changes to a settlement agreement may create a conflict with the estate plan, disrupting the intentions of the testator and opening the door to estate litigation if not resolved during the client's lifetime.

Conclusion

Estate planners can do great service to their clients by advising them regarding divorce—no matter what the clients' marital status. Ignoring divorce, which is the likely result of approximately 50% of all marriages, leaves estate planning incomplete. Knowing the law regarding separate property, premarital agreements, and postmarital agreements is crucial to effective estate planning and representing the best interests of clients.

PRACTICE NOTES

The recommended drafting approach for a premarital agreement is to create an agreement that modifies itself over time by reference to external factors—either contingent or specific—in order to provide a flexible structure that will stand the test of time.

1

"Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers," 4 J.L. Fam. Stud. 5, 5 (2002). See also Number, Timing and Duration of Marriages and Divorces: 1996 (Feb. 2002) available at http://www.census.gov/prod/2002pubs/p70-80.pdf last visited 2/9/04. This increase in divorce can be attributed to cultural influences (including high marital expectations), economic independence of women, social acceptance of divorce, later marriages or second marriages, and no fault divorce laws. *Id.* at 5-7. See also *Divorce Statistics Collection* available at http://www.divorcereform.org/stats.html last visited 2/9/04. This site contains more statistics concerning the factors influencing the divorce rate.

2

Stake, "Mandatory Planning for Divorce," 45 Vand. L. Rev. 397, 419 (1992).

3

Id.

4

Id.

5

From 1978-1988, the number of premarital agreements tripled, and approximately 5% of marrying couples (50,000) sign premarital agreements each year. Marston, "Planning for Love: The Politics of Prenuptial Agreements," 49 Stan. L. Rev. 887, 890 (1997).

6

See Haupt, "For Better, For Worse, For Richer, For Poorer: Premarital Agreement Case Studies," 37 Real Prop., Prob & Tr. J. 29, 29-43 (2002).

7

Stake, *supra* note 2, at 425.

8

Marston, *supra* note 5, at 890.

9

Schembri, "Prenuptial Agreements and the Significance of Independent Counsel," 17 St. John's J. Legal Commentary 313 (2003).

10

Id.

11

Id.

12

States that have adopted the UPAA in its entirety or with minor modifications include Ariz., Ark., Cal., Conn., Del., D.C., Hawaii, Idaho, Ill., Ind., Iowa, Kansas, Me., Mont., Neb., Nev. N.J., N.M., N.C., N.D., Ore., R.I., S.D., Tex., Utah, and Va. See also Uniform Premarital Agreement Act of 1983 §1 et. al.

13

Schembri, *supra* note 9, at 333.

14

Id. at 335.

15

Unenforceable provisions have also included (1) safekeeping of a treasured snowball collection in the freezer, (2) walking the dog, or (3) authorizing a husband to sue for divorce if his wife gains more than 15 pounds. A

court, when deciding on the enforceability of a provision that the husband's mother could live with the married couple, stated that prospective spouses, in their marriage enthusiasm, may make promises to one another outside of human nature, and these promises violate public policy. Marston, *supra* note 5, at 900, and Belcher and Pomeroy, "A Practitioner's Guide for Negotiating, Drafting and Enforcing Premarital Agreements," 37 Real Prop., Prob. & Tr. J. 1, 19 (2002).

16

Marston, *supra* note 5, at 900, and Belcher and Pomeroy, *supra* note 15, at 19.

17

Practising Law Institute Tax Law and Estate Planning Course Handbook Series, 300 PLI/Est 9, 30.

18

300 PLI/Est 9, 38.

19

300 PLI/Est 9, 36-37. The attacking party may even be estopped from asserting the agreement is unenforceable. If the spouse acknowledges the marriage would not have occurred but for the agreement, the parties entered the marriage in reliance upon the agreement.

20

300 PLI/Est 9, 38-42. In some cases, a claim for duress even can be waived when the statute of limitations has not completely run.

21

300 PLI/Est 9, 31-34.

22

Model Rules of Professional Conduct (MRPC) 1.6. See also *American College of Trust and Estate Counsel (ACTEC) Commentaries on the Model Rules of Professional Conduct*, p. 65 (second edition, adopted Mar. 1995).

23

ACTEC Commentaries, *supra* note 22, at 65.

24

Id. at 85.

25

Id. at 65-66.

26

MRPC 1.7. First the attorney must reasonably believe that representing both clients would not adversely affect either client. In addition, both clients must consent after consultation. Under the revision of the Model

Rules in 2000, the consent must be in writing. Regardless of whether a writing is required by a particular jurisdiction, it is always recommended.

27

MRPC 1.7. See Schembri, *supra* note 9, at 338. "Lack of independent counsel is not fatal to a premarital agreement. The mere fact that a party was not represented is not enough, per se, to have a marital settlement agreement vacated or modified. The parties must have an opportunity to consult with an attorney, however, the lack of counsel in the formulation of a premarital agreement can be a factor or serve to corroborate a claim of fraud, deceit, duress, non-disclosure, coercion or overreaching."

28

Marston, *supra* note 5, at 894. It is important to document the communication of the terms and their meanings to your client, given the emotions that may be present. Also document issues intentionally not addressed by the agreement. With documentation, advice (or lack thereof) can be demonstrated during an action for duress or a claim of malpractice. 300 PLI/Est 9, 47.

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Marston, *supra* note 5, at 890, and Schembri, *supra* note 9, at 338.

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300 PLI/Est 9, 18.

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300 PLI/Est 9, 21.

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300 PLI/Est 9, 43-44. It is important to take this disclosure seriously. Though it is commonly expected that spouses have duties to each other, many jurisdictions also hold that a fiancé has a fiduciary obligation to a future spouse.

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300 PLI/Est 9, 45-46. Some important factors contributing to net worth include existing future obligations to former spouses, testamentary obligations to children, transferability of stock or shareholders agreements, prospects for inheritance, and general reasonable expectations of increases or decreases in income or assets.

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300 PLI/Est 9, and Practising Law Institute Tax Law and Estate Planning Course Handbook Series, 184 PLI/Est 51.

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184 PLI/Est 51.

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184 PLI/Est 51.

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300 PLI/Est 9.

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184 PLI/Est 51.

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It is important also to consider limitations on a surviving spouse acting as administrator or executor, or serving the estate in some other fiduciary capacity.

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300 PLI/Est 9.

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See, e.g., Johnson v. LaGrange State Bank, 383 NE2d 185 (Ill., 1978); Johnson v. Farmers & Merchants Bank, 379 SE2d 752 (W.Va., 1989); and In re Estate of Wechsler, 225 A.2d 785, 786 (N.Y. App. Div., 1996).

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300 PLI/Est 9.

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300 PLI/Est 9.

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184 PLI/Est 51.

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184 PLI/Est 301, 303.

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Id.

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Id.

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Id.

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MRPC 1.7. First, the attorney must reasonably believe that representing both clients would not adversely affect either client. Moreover, both clients must consent after consultation.

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Baskies, "Family Law: Step Two in Any Divorce Proceeding: See an Estate Planning Attorney," 72 Fla. B.J. 80 (1998). See, e.g., Johnson v. LaGrange State Bank, *supra* note 41; Johnson v. Farmers & Merchants Bank, *supra* note 41; and In re Estate of Wechsler, *supra* note 41.

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Zolla, "An Interdisciplinary Approach to Modern Family Law Practice," 23 Los Angeles Law. 19 (July/Aug. 2000).