

Nuptial Agreements for Estate Planners

Meighan A. Harmon and Kim Kamin



Meighan Harmon is a Partner with Schiller DuCanto & Fleck LLP, in Chicago. Her practice focuses on complex family law cases. In 2011, she was elected by her peers to be President of the Illinois Chapter of the American Academy of Matrimonial Lawyers. In 2004, the Law Bulletin Publishing Company named Meighan as one of the

“40 Attorneys Under 40 in Illinois to Watch,” and she has since been named in Best Lawyers in America, Leading Lawyers Network, and Illinois Super Lawyers. A frequent lecturer on family law topics, she is also a published author, she co-authors a chapter for the Illinois Institute for Continuing Legal Education and has published articles in the *Matrimonial Strategist*, the *Chicago Daily Law Bulletin*, *The Family Advocate*, and other publications.



Kim Kamin is a Principal at Gresham Partners, LLC where she serves as Chief Wealth Strategist and a Client Advisor. In that capacity, she leads Gresham’s development and implementation of estate, wealth transfer, philanthropic and fiduciary planning activities, and advises clients. Until recently she was a partner in the Private Clients, Trusts and Estates Group at Schiff Hardin LLP where for many years her legal practice involved all aspects of trust

and estate planning, administration and dispute resolution; advising individuals, families and closely held businesses on a wide array of wealth preservation, asset protection and succession planning issues; representing fiduciaries, custodians, and beneficiaries in estate administration and contested trust and estate matters; and serving as counsel for the formation and operation of not-for-profit entities. Kim is a Fellow with the American College of Trust and Estate Counsel. Kim is a member of the Chicago Bar Association and the American Bar Association.

I. INTRODUCTION

- A. A nuptial, or marital, agreement is an agreement entered into by a couple before or during marriage, whereby they contractually agree (i) on how their assets would be divided upon divorce or upon the death of one party, (ii) on spousal support or alimony in the event of divorce, and (iii) sometimes even on economic responsibilities during the term of the marriage.
- B. If a married individual does not have an enforceable written agreement, generally he or she has certain rights in the property of the other upon termination of the marriage under state law, whether by death or divorce. Typically the law of the state where the individuals reside during the marriage apply to determine such property rights.
- C. If a marriage terminates by divorce and there is no written agreement, generally a spouse (i) is entitled to division of the property acquired during the marriage and (ii) may also be entitled to some form of spousal sup-

port. The exact entitlement is determined through negotiation of the parties at the time of divorce or by a court proceeding, and is subject to a myriad of factors including the duration of the marriage; the age, health, occupation, skills and employability of each spouse; the contribution or service of each spouse to the family unit; the amount and sources of income, debts and needs of each spouse; and the conduct of the parties. If a marriage terminates by death, the surviving spouse generally has the right to (i) a statutory share or property owned by the deceased spouse, (ii) exempt property of certain items of tangible personal property located in the residence, (iii) a small living allowance during the year following death, and (iv) serve as personal representative of the deceased spouse's estate.¹

- D. Many marrying or already married couples wish to set forth their own wishes regarding property division and entitlement in the event of divorce or death in lieu of what would be provided under state law. For a variety of reasons, parties to a marriage find themselves wanting to alter the rights which otherwise apply to their status as husband and wife. This appears to be especially true for persons remarrying after a prior union has been dissolved by death or divorce. Such persons often seek to protect their assets for the benefit of children from a prior marriage. In other instances such persons are embittered by a prior dissolution proceeding or probate action and wish to avoid a recurrence of such conflict by structuring their own and their spouse's expectations. The couple may wish to protect assets from the claims of creditors of the other spouse, or to provide support for an economically disadvantaged spouse upon the termination of a marriage either by divorce or death.
- E. Often, prenuptial agreements are desired by the parents and grandparents of a younger individual marrying for the first time who already has "family money" in trusts established by older family members, or who will be receiving a substantial inheritance on the death of his or her parents. Sometimes the individual is involved in a family business, and the family members have an interest in keeping the family business in the blood line. Numerous other factors may prompt individuals to seek arrangement of their rights by private agreement in advance of (or during) marriage.²
- F. More and more, however, couples are entering into nuptial agreements, not because of family businesses or wealth, nor because of a second marriage situation, but because one or the other has already accumulated substantial wealth and wishes to control that wealth. Whatever the reason, couples are aware of the divorce statistics. According to one source, some 20% of remarried couples use prenuptial agreements, and such agreements have quintupled overall in frequency in the past twenty years.³

¹ Dennis I. Belcher, *How to Tie a Tight Knot with a Marital Agreement*, 2001 Inst. on Est. Plan. 4-3, 4.4.

² See Robert Roy, Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R. 4th 22, 28 (1987).

³ Donna Beck Weaver, *The Collaborative Law Process for Prenuptial Agreements*, 4 Pepp. Disp. Resol. L.J. 337 (2004).

- G. Accordingly, a primary concern for the estate planning practitioner is understanding what a surviving or divorcing spouse would be entitled to under state law absent a nuptial agreement waiving those rights and providing otherwise contractually. Second, the practitioner needs to know what is required under state law in order for a prenuptial agreement to be respected and under what circumstances a court could void an agreement.⁴ Some states have adopted statutory requirements and other states rely on common law without the benefit of a statute. The law of each state is beyond the scope of this outline, so the practitioner drafting a prenuptial agreement should become familiar with the law of his or her jurisdiction and any other relevant jurisdiction prior to accepting an engagement to advise on or draft a nuptial agreement.
- H. Traditionally, nuptial agreements were used to address only the disposition of assets upon the death of a party, usually in the case where there were children from a prior marriage. Where agreements became operative at the death of a contracting spouse, the courts generally found that it was good public policy to favor nuptial agreements as a class, voiding only those found defective in execution or result. The courts reasoned that such agreements promoted the parties' welfare by removing one of the frequent causes of family disputes, that is, contentions regarding property and allowance to the wife.⁵
- I. At the same time, the courts' favorable view of nuptial agreements to take effect at death generally did not extend to agreements anticipating divorce or separation, since such agreements were seen as encouraging discord, separation, or ultimately divorce, thereby violating legal principals requiring marriage until death and the husband's support of his wife within the limits of his financial ability.⁶
- J. But, as marriage became more of an economically based partnership, the law began to recognize the ability of individuals to enter into contracts governing the parties' economic relationship.⁷ Courts began to recognize that the cementing of expectations by contract could harmonize with public policy favoring enduring marriages. The landmark Florida case, *Posner v. Posner*⁸, was one of the first cases to recognize the enforceability of contractual provisions relating to property division and support obligations in the event of divorce. Legislative developments soon followed. The Uniform Marriage and Divorce Act, enacted in 1970, provides in Section 307 that a court apportioning property incident to divorce or separation "shall" consider any prenuptial agreement executed by the parties. The Uniform Marital Property Act,

⁴ Robert Roy, Annotation, *Enforceability of Premarital Agreements Governing Support or Property Rights Upon Divorce or Separation as Affected by Circumstances Surrounding Execution – Modern Status*, 53 A.L.R.4th 85, 2[b] (noting on the basis of public policy, a premarital agreement may be enforced under the law of the jurisdiction where it was executed regardless of "choice of law" clauses or where the divorce is pending).

⁵ See 41 Am. Jur. 2d, Husband and Wife, § 107 (2015).

⁶ Roy, *supra*, note 2, at 28.

⁷ Belcher, *supra*, at 4-6, 4.7.

⁸ 233 So.2d 381 (Fla. 1970), *quashed on other grounds*, 257 So.2d 530 (Fla. 1972).

approved in 1983, provides that prenuptial agreements may cover property distribution and the modification or elimination of spousal support.

- K. As mentioned above, the need for a nuptial agreement can be particularly pronounced in the case of a second marriage, which may take place later in life, after each party has had the opportunity to accumulate substantial separate assets.
- L. One or both parties will have had experience with divorce and the attendant division of marital property. Ideally, such a client will thus be aware of the turmoil a nuptial agreement can avoid, and he or she will need little persuasion to enter into one. In many cases, a nuptial agreement may be mandatory upon the client's remarriage, in accordance with the terms of a separation agreement in connection with the client's prior marriage.
- M. If there are children from previous relationships, each client will want to make certain that their children are provided for regardless of which spouse dies first, and that the subsequent remarriage of a surviving spouse won't allow any diversion of family wealth. The well-publicized existence of a nuptial agreement may also lessen any perception on the part of adult children that a new spouse has entered into the marriage solely to usurp their inheritance.

N. Types of Nuptial Agreements

1. **Prenuptial Agreements.** Prenuptial agreements (also known as premarital agreements or antenuptial agreements) are agreements entered into by parties contemplating marriage. These agreements set forth the rights and obligations of each party in the event of death or divorce, as well as during the marriage.
2. **Postnuptial Agreements.** Postnuptial agreements (also known as postmarital agreements) are agreements entered into by the parties after marriage, which likewise set forth the rights and obligations of each party in the event of death or divorce, as well as during the marriage. Postnuptial agreements can be used when no divorce is contemplated or when divorce is not imminent. When divorce is imminent, postnuptial agreements are referred to as separation agreements.

II. NUPTIAL AGREEMENT REQUIREMENTS

The Uniform Premarital Agreement Act (the "UPAA"), which has been adopted by twenty-six states and the District of Columbia, sets forth the typical requirements for a valid prenuptial agreement.⁹

⁹The Uniform Premarital Agreement Act, as adopted by the National Conference of Commissioners on Uniform States Laws (1983) (the "NCCUSL"). As of June 2015, the NCCUSL website reports that the UPAA has been adopted by the District of Columbia and the following states: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, and Virginia.

Each adopting state may have additional statutes or case law that expand upon these requirements. In addition, different requirements may exist in regard to postnuptial agreements. However, the UPAA requirements provide a useful overview of the considerations that must be taken into account when drafting a nuptial agreement that will hold up to judicial scrutiny. The UPAA addresses only prenuptial agreements. State law addressing postnuptial agreements has been far less settled and consistent. Some states have neither case law nor legislation, while the remaining states have created a wide range of approaches.¹⁰ In 2012, the NCCUSL adopted the Uniform Premarital and Marital Agreements Act (the “UPMAA”) to treat prenuptial agreements and postnuptial agreements under the same set of principles and requirements.¹¹

A. Complete Financial Disclosure

Under § 6(a) of the UPAA, a prenuptial agreement is not enforceable in an action or proceeding if the party against whom enforcement is sought proves that the agreement was unconscionable when it was executed and that, before execution of the agreement, he or she (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, (ii) did not voluntarily and expressly waive, in writing, any right to financial disclosure of the other party beyond the disclosure provided, and (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.¹²

1. In some states, individuals who contemplate marriage are considered to be in a confidential relationship with each other. This relationship may give rise to a common-law duty to make a full and fair disclosure of the nature, extent and value of the assets that each party holds so the other party may make an informed decision as to what will be relinquished as a result of entering into the nuptial agreement.¹³
2. Note that a state’s disclosure requirements may make a distinction between prenuptial and postnuptial agreements. For instance, Florida Statutes §732.702(2) provides that where an

¹⁰ Wisconsin’s statute adopts similar requirements to the UPAA, whereas marital agreements in Michigan are governed by ordinary contract law in addition to the duty to disclose. *Wisc. Stat. Ann. § 766.58*; *Rinvell v. Rinvell*, 475 N.W.2d 478, 481 (Mich. Ct. App. 1991); *but see Cheff v. Cheff*, 2012 WL 1415150 (Mich. Ct. App. Apr. 24, 2012) (failing to extend *Rinvell* to postnuptial agreements).

¹¹ As of June 2015, the NCCUSL website reports that the UPMAA has been adopted only by Colorado and North Dakota. It has also been introduced previously in the District of Columbia and Nevada, and more recently in Mississippi.

¹² UPAA § 6(a)(2).

¹³ *See, e.g., Doig v. Doig*, 787 So. 2d 100 (Fla. Dist. Ct. App. 2001). Note that some states do not recognize a fiduciary relationship between individuals contemplating marriage. In such jurisdictions, each spouse has “a duty to make some inquiry to ascertain the full nature and extent of the financial resources of the other.” *Mallen v. Mallen*, 622 S.E.2d 812, 816 (Ga. 2005) (reasoning that the lack of a confidential relationship gives rise to both a duty to disclose and a duty to “exercise ordinary diligence in making independent verification of contractual terms and representations”); *see also Beesley v. Harris*, 883 P.2d 1343 (Utah 1994) (holding that disclosure is an affirmative duty, the failure to do so is nondisclosure, and the burden is not on the other party to inquire); *DeLorean v. DeLorean*, 511 A.2d 1257, 1261 (N.J. Super. Ct. Ch. Div. 1986) (finding that the burden is “not on either party to inquire, but on each to inform” as to the nature and extent of his or her finances).

agreement waives certain spousal rights (such as a right to an elective share), a fair disclosure of each party's assets is required only if the agreement is executed after marriage.

3. Full disclosure would include details of an individual's net worth (including all assets and liabilities), as well as income. The nuptial agreement should indicate what the value reflects (fair market value, book value, cash value, etc.). Information regarding these values, such as appraisals, brokerage statements and income tax returns for the previous three years, should be provided to the other party and his or her attorney for review.

Complete disclosure is recommended even if the other party already has adequate knowledge of the client's property or financial obligations. This avoids any possibility that a court will conclude that the other party's knowledge was not as complete as originally believed.

B. Disclosure of Lifetime Taxable Gifts

1. On December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "2010 Act"). Among the significant changes set forth in the 2010 Act is the concept of "portability" of the "deceased spousal unused exclusion amount" (the "DSUEA"). The provisions of the 2010 Act relating to portability were scheduled to expire at the end of 2012. However, on January 2, 2013, the American Taxpayer Relief Act of 2012 (the "2012 Act") was enacted that "permanently" extended much of the estate and gift tax structure, including the portability provisions, from the 2010 Act.
2. Under § 2010(c)(5)(a) of the Internal Revenue Code¹⁴ (the "Code" or "IRC"), as amended by § 303(a) of the 2010 Act, the executor of a deceased spouse may make an election on a timely filed estate tax return to make a deceased spouse's unused gift tax and estate tax exemption amounts (collectively, the DSUEA) available to the surviving spouse. Thus, if the election is made and the deceased spouse made no lifetime taxable gifts, the deceased spouse's unused \$5,450,000¹⁵ exclusion amount can be passed on to the surviving spouse, who will then effectively have a \$10,860,000 exclusion amount available for use (assuming that the current 2015 exclusion amount is in effect at each death). The surviving spouse can use that \$10,860,000 exclusion amount to either shelter lifetime taxable gifts¹⁶ or to shield assets from federal estate taxation at his or her death.

¹⁴ 26 U.S.C. §2010(c)(5)(A).

¹⁵ \$5,450,000 is the basic exclusion amount for 2016. The basic exclusion amount is indexed for inflation and will increase over time.

¹⁶ The IRS has issued Temporary and Proposed Regulations that provide that lifetime taxable gifts by the surviving spouse are applied against any DSEUA available from a deceased spouse before being applied against the surviving spouse's own exclusion amount.

3. In light of the enactment of portability, it may be advisable for the parties to execute a nuptial agreement to (i) disclose any lifetime taxable gifts they may have made and (ii) to allow the other party's attorney the opportunity to review their gift tax returns, to make sure any taxable gifts were properly reported.
4. This disclosure will be of particular importance if one of the parties is a widow or widower. Under § 2010(c)(4)(B)(i) of the Code (as amended by the 2010 Act), a surviving spouse who remarries may only use the DSUEA of his or her *most recently* deceased spouse. So, a surviving spouse's remarriage comes at the risk of losing the DSUEA of his or her deceased first spouse, if the second spouse likewise predeceases him or her. For this reason, it will be of extreme importance to a wealthy widow or widower contemplating marriage to determine how much of the other party's exclusion amount has already been exhausted by lifetime taxable gifts (or will be exhausted by the other party's use of exclusion at death).

C. Consideration

Pursuant to § 2 of the UPAA, a prenuptial agreement is enforceable without consideration.

1. However, the agreement must reflect a degree of mutuality of benefits to support its enforceability, and a ceremonial marriage is a prerequisite to the effectiveness of the prenuptial agreement.¹⁷ Pursuant to § 5 of the UPAA, a prenuptial agreement that is amended after marriage (or the mutually agreed revocation of the agreement) is also enforceable without consideration.

2. In some states, a nuptial agreement must recite the consideration that each party has received. In others, the marriage itself is sufficient consideration for a prenuptial agreement. In the case of a postnuptial agreement, mutual promises encompassing various rights of the parties, in addition to disposing of property owned by them, may be considered sufficient consideration.

D. Formalities of Execution

Pursuant to § 2 of the UPAA, a prenuptial agreement must be in writing and signed by both parties. If a nuptial agreement contains testamentary provisions, state law may require that it be executed in conformity with the more stringent requirements for a Last Will and Testament (for example, execution in the presence of two witnesses). In New York, which has not adopted the UPAA, any agreement made by the parties before or during marriage must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded (i.e., acknowledged in the presence of a notary public).¹⁸

¹⁷ UPAA § 2, cmt.

¹⁸ N.Y. Dom Rel. Law § 236(B)(3).

E. Separate Counsel

Furthermore, case law in some states suggests that each party should obtain separate representation with regard to the nuptial agreement or that an unrepresented party should expressly acknowledge his or her decision to enter into the agreement without the advice of counsel. Even under the UPAA, the presence of independent counsel for each party can be a factor in determining whether the agreement was executed voluntarily and whether the agreement is unconscionable.¹⁹ In any case, separate representation is highly recommended.

F. Timing

In the case of a prenuptial agreement, any meetings with attorneys (as well as the negotiation and execution of the agreement) should occur well in advance of the wedding, making it more difficult for a challenging spouse to assert duress or undue influence. Good practice is to insist that a prenuptial agreement be signed before the wedding invitations are sent.²⁰

III. PRENUPTIAL AGREEMENT CONSIDERATIONS

- A. As referenced earlier, prenuptial agreements have become increasingly popular in the last twenty years as a method to address the financial risks.
- B. States which have adopted the UPAA define a prenuptial agreement as “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.”²¹
- C. Although prenuptial agreements are useful in any situation where the cost of preparation is appropriate in relation to the assets at risk, prenuptial agreements will be especially helpful in certain situations, including for 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,

¹⁹ UPAA § 6, cmt.

²⁰ *Mamot v. Mamot*, 813 N.W.2d 440, 452 (Neb. 2012) (holding a trial court erred in enforcing prenuptial agreement, finding the wife was coerced into signed the agreement after the wedding invitations had been sent out, money was spent on the wedding, and there was inequality in assets and bargaining power).

²¹ See e.g., UPAA § 1(1); 750 Ill. Comp. Stat. 10/2(1); and Fla. Stat. § 61.079(2)(a).

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.

D. Enforceability

1. Prenuptial agreements executed before January 1, 1990 are governed by common law in Illinois, whereas in Indiana the common law governs for agreements executed before July 1, 1995. Under common law, a valid prenuptial agreement must:
 - a. be in writing; and
 - b. disclose net worth.
2. Illinois prenuptial agreements executed after January 1, 1990 are governed by the Illinois Uniform Premarital Agreement Act, Wis. Stat. Ann. § 766.58. Indiana prenuptial agreements executed after July 1, 1995 are governed by the Uniform Premarital Agreement Act.
 - a. Under the UPAA, prenuptial agreements:
 - i. must be in writing;
 - ii. need not be for consideration; and
 - iii. can be amended or revoked after marriage if both spouses agree in writing (also valid without consideration).²²
 - b. Prospective spouses may contract as to:
 - i. the rights and obligations of one or both spouses relating to property;
 - ii. the right to manage and control property;
 - iii. the method or means of property distribution at separation, divorce, or death;

²² 750 Ill. Comp. Stat. 10/3; and Ind. Code § 31-11-3-4; 750 Ill. Comp. Stat. 10/6; and Ind. Code § 31-11-3-7.

- iv. the modification or elimination of spousal support;
 - v. the creation of estate planning documents to carry out the prenuptial agreement;
 - vi. interests in life insurance policies;
 - vii. choice of law; and
 - viii. any other matter not barred by public policy or a criminal statute.²³
3. A prenuptial agreement is unenforceable under the UPAA when:
- a. the agreement was not voluntarily executed; or
 - b. the agreement is unconscionable and, before its execution, one spouse:
 - i. did not receive a fair and reasonable disclosure of the property or financial obligations of the opposing spouse;
 - ii. did not voluntarily and expressly waive the right to disclosure of the property or financial obligations beyond the disclosure actually provided; and
 - iii. did not otherwise have adequate knowledge of the property or financial obligations of the opposing spouse.²⁴
4. Prenuptial agreements cannot adversely affect a child's right to support.²⁵
5. As described previously, about half the states have adopted the Uniform Premarital Agreement Act (UPAA) in its entirety or with minor modifications.²⁶
- a. Under the UPAA, a prenuptial agreement is presumed valid and enforceable.
 - i. A party seeking to void the agreement has the burden of proving the agreement was unconscionable and there was nondisclosure of property or financial obligations by one of the parties.²⁷

²³ 750 Ill. Comp. Stat. 10/4; and Ind. Code § 31-11-3-5(a).

²⁴ UPAA § 6(a).

²⁵ UPAA § 3(b); 750 Ill. Comp. Stat. 10/4(b); Ind. Code § 31-11-3-5(b).

²⁶ The UPAA applies to marital agreements "executed on or after" the effective date of the Act, not at the time of enforcement. UPAA § 12; *see also Rogers v. Gordon*, 961 A.2d 11, 15 (N.J. App. Div. 2008).

²⁷ *Burtoff v. Burtoff*, 418 A.2d 1085, 1089-90 (D.C. 1980) (enforcing a prenuptial agreement when the wife failed to meet the burden on the basis of her ability to negotiate some terms of the agreement, access to independent counsel, and ample time to arrive at an agreement after full disclosure of husband's assets).

- ii. Even without consideration, a prenuptial agreement is enforceable under the UPAA if it is signed by both parties.
 - b. Generally, the inquiry under the UPAA requires less disclosure for a valid prenuptial agreement than does the common law.
6. The requirements for a valid prenuptial agreement may vary across jurisdictions, however, three common criteria generally are applicable.
 - a. First, the agreement must not be a product of fraud, duress, mistake, misrepresentation, or nondisclosure of material fact.
 - b. Second, the agreement must not be unconscionable when executed.
 - c. Third, changed circumstances must not make enforcement of the prenuptial agreement unfair and unreasonable.²⁸

E. Content Addressed by Contract

1. Generally, provisions that regulate day-to-day marriage issues, such as frequency of sexual relations or visits by the in-laws, are unenforceable.
2. Unenforceable provisions have also included (i) safekeeping of a treasured snowball collection in the freezer, (ii) walking the dog, or (iii) authorizing a husband to sue for divorce if his wife gains more than 15 pounds.²⁹
3. 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.³⁰

²⁸ See Roy, *supra*, note 4, at 2[a] (evaluating the fairness of executing a prenuptial agreement based on various factors, such as the extent of and disparity in assets and the opposing parties' traits such as sophistication and experience).

²⁹ See Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 *Stan. L. Rev.* 887, 900 (1997) and Dennis I. Belcher, Dennis I., and Laura O. Pomeroy, *A Practitioner's Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 *Real Prob. Prob. & Tr. J.* 1, 19 (2002).

³⁰ *Id.*

4. Nonetheless, even if not legally enforceable, the couple may wish to take advantage of the contract to document certain promises they wish to make to each other (such as not smoking, wearing a helmet on a motorcycle, or wearing a seat belt).³¹
5. The following are suggested topics for consideration:
 - a. Division of property upon termination of the relationship;
 - b. Separate versus commingled property and sharing of expenses and bill payment;
 - c. Signature authority, record keeping, investment strategy, asset disclosure and values, asset contributions, and voting control over certain assets;
 - d. Domestic services (and compensation, if any, for the services);
 - e. Health and disability insurance;
 - f. Dispute resolution;
 - g. Remedies for default on obligations;
 - h. Estate planning;
 - i. Support (both during and after the term of the relationship);
 - j. Life insurance; and
 - k. Occupancy of primary residence.

F. Drafting Considerations

1. Drafting a prenuptial agreement is challenging because it is virtually impossible to envision all the possible directions the couple may take in the future (children, careers, inheritances, etc.), and contemplate revisions of the law.
2. It is similarly difficult to foreclose every avenue for challenge of a prenuptial agreement, and drafting in a manner that sets forth a separate provision for every possible contingency creates inflexibility and ignores the unimaginable event.

³¹ For clients following a Jewish tradition, they may be signing a “ketubah” which is a type of nuptial agreement in which they can specify promises and vows of this nature. But for clients who are not signing a ketubah and may wish to include these types of presumably unenforceable provisions in their prenuptial agreement, that is certainly an opportunity to do so as long as counsel advises that such provisions are unenforceable and there is a savings clause in the contract.

3. Minimizing Challenges

- a. 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.
- b. Ensure full and complete financial disclosure and attach a net worth statement to the agreement itself as evidence of the disclosure.
 - i. Have the opposing party and their counsel acknowledge receipt of the financial disclosure in some way.
 - ii. 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 prenuptial agreement and only under protective order.
- c. Address clearly the treatment of property owned before the marriage.
 - i. Protect against inadvertent commingling with marital property or conversion to community property.
 - ii. Address whether appreciation and income from separate assets will be treated as marital property or as separate property.
 - iii. Attach to the prenuptial agreement a separate schedule of each party's separate property, which at least provides a starting point if tracing does become necessary.
- d. If the agreement provides for spousal support, consider a "disaster clause" that relieves the payor of the obligation in the event of a reversal of fortune.
- e. Alimony trusts. In lieu of making a stream of alimony payments, the nuptial agreement should consider mandating an alimony trust.
 - i. Once fully funded, the trust relieves the payor spouse of future tax obligations when trust income is paid to the payee spouse.
 - (a) The payee is taxed on distributed income.
 - (b) The trust is taxed on undistributed income.

- ii. To be effective, the trust should be irrevocable.
 - (a) The grantor can provide that upon termination of his support obligation under the divorce decree the trust principal will revert to the grantor.
 - (b) While this reversion interest might normally cause the trust to be a grantor trust for income tax purposes, a special rule treats an alimony trust like a non-grantor trust. As a result, the beneficiary spouse is taxed on the income distributed and the trust pays taxes on any excess income that is not distributed. IRC § 682.
- iii. The alimony trust has several advantages usually associated with estate planning.
 - (a) The trust provides for a consistent income stream, assuring steady payments to the payee regardless of problems the obligor may encounter during the payment period.
 - (b) The trust serves to lessen concerns regarding the payee spouse's potential creditors and the payee spouse's ability to manage and administer the funds.
 - (c) Limits contact between the parties.

4. Plan for the Estate Plan

- a. Not surprisingly, prenuptial agreements often are prepared with such a focus on divorce that the estate planning effects are all but ignored.
- b. Defining separate or prenuptial property without including a waiver, however, will not affect the application of a surviving spouse's statutory forced share rights under state law.
- c. Define what assets will be included in the estate.
- d. Consider requiring that the parties be living together (as well as married) at the time of death in order for the survivor to receive any share of the estate.
- e. Particularly where there are children by a prior marriage, consider a living arrangement for the surviving spouse and who will be responsible for the payment of mortgages, taxes, and upkeep.

- i. It may also be necessary to provide for use of home furnishings.
 - ii. Consider treatment of heirlooms.
 - f. To avoid unintentional modification of the prenuptial agreement and to foreclose the argument that the prenuptial agreement was nullified by a party's actions in preparation of the party's estate plan, the prenuptial 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.
5. For purposes of prenuptial agreements, potential spouses should be treated as future creditors.
 - a. Closely held stock. If closely held stock is involved, a buy/sell agreement is strongly recommended.
 - i. The stock-owning spouse and his or her fellow shareholders, partners, or members should enter the buy/sell agreement.
 - ii. The agreement should address the transfer of the stock incident to divorce or death.
 - b. Waiving rights to qualified retirement plans. While prospective spouses cannot effectively waive rights to ERISA plans, the two parties can agree to do so in a prenuptial agreement before marriage, and sign a subsequent, valid waiver during marriage.
6. A common oversight by attorneys not conversant in estate tax reduction techniques results in a prenuptial agreement that penalizes the wealthier party upon divorce if assets are transferred between spouses for tax planning purposes.

V. POSTNUPTIAL AGREEMENT CONSIDERATIONS

- A. Postnuptial agreements are written contracts between spouses signed after a marriage. There are a variety of different reasons that a married couple would consider a postnuptial agreement but the two most likely uses of postnuptial agreements are that they are a way to save a marriage or that they are a way to plan for divorce. Postnuptial agreements are distinguished from separation agreements or marital settlement agreements in that they do not contemplate an imminent divorce. Conflict and enforceability issues may arise when the parties are entering into the postnuptial agreement for reasons different from one another. Postnuptial agreements are more likely to be challenged than prenuptial agreements and therefore present more risk for the drafter.

- B. Postnuptial agreements have historically been less enforceable than prenuptial agreements because public policy disfavors postnuptial agreements on the grounds that they may promote the dissolution of marriage. Courts tend to be more wary of duress or coercion and there is generally less latitude in making restrictive provisions with a postnuptial agreement. There is less presumption of a negotiation at “arm’s length” post marriage.³²
1. Generally, courts should honor agreements that simply define the marital or non-marital status of certain assets without discussing the division of assets in the event of a divorce. However, in many jurisdictions there is now case law upholding postnuptial agreements that also allocate assets or set spousal support in the event of a divorce.
 2. Courts enforcing postnuptial agreements typically conclude that the waiver of statutory rights created by marriage constitutes consideration for the agreement.
 - a. No jurisdiction will support a postnuptial agreement where a spouse agrees only to do what they are already obligated to do by law as consideration.
 - b. Courts are frequently citing “equity” and may hold postnuptial agreements to the same standards as marital settlement agreement in determining the conscionability or fairness of the agreement.
 - c. The trend in the law, however, is toward upholding these contracts when there is adequate consideration.
- C. Postnuptial agreements may be appropriate in the following situations:
1. If, during the course of estate planning discussions, clients reveal that they have commingled separate property unintentionally and both spouses desire to remedy the situation;
 2. Following a reconciliation of estranged spouses (particularly as an inducement to reconcile);
 3. Where there is family wealth transfer or business succession planning that could create unintended marital property interests that can be avoided with a postnuptial agreement;
 4. When a couple later decides to have a child together and one or both of the spouses have children from a prior marriage;
 5. Where there are assisted reproductive technology issues that must be addressed;³³

³² See generally Sean Hannon Williams, *Postnuptial Agreements*, 2007 Wis. L. Rev. 827 (providing additional background and arguing that postnuptial agreements should be *less* problematic since both parties have more knowledge and less time pressure before arriving at an agreement).

³³The Centers for Disease Control and Prevention define assisted reproductive technologies (“ART”) as any fertility treatment in

6. Where the parties had a verbal agreement prior to marriage but failed to finalize a prenuptial agreement prior to marriage; and
7. Where the parties intend to modify or renegotiate the terms of a prenuptial agreement.

D. Enforceability

1. In jurisdictions that enforce postnuptial agreements, the criteria generally are the same as the criteria for enforcing prenuptial agreements.
2. Full financial disclosure is the most important factor in determining fairness and waiver of financial disclosure is essentially not an option with postnuptial agreements unless specifically prescribed by statute. Generally, there is a higher standard of disclosure post-marriage. Note that a state's disclosure requirements may make a distinction between prenuptial and postnuptial agreements. For instance, Florida Statutes §732.702(2) provides that where an agreement waives certain spousal rights (such as a right to an elective share), a fair disclosure of each party's assets is required only if the agreement is executed after marriage.
3. Once again, a court will review an agreement for procedural and substantive fairness.
4. Demonstration of meaningful negotiation is even more key in postnuptial agreements than in prenuptial agreements.
5. The typical attacks on postnuptial agreements are the same as those with respect to prenuptial agreements, with the added challenge to postnuptial agreements based on lack of consideration or were really just "divorce planning" and therefore fraudulently induced.

E. As with prenuptial agreements, attorney representation during the signing of a postnuptial agreement protects the interests of a client with interests directly and openly adverse to those of the other spouse and is vital to enforceability.

1. Rule 1.7 of the Model Code prohibits representing both spouses.
2. 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. The ongoing risks of the conflict are even more intense with postnuptial agreements due to the higher threshold for court enforcement.

- F. Postnuptial agreements generally are perceived as stemming from conflict, and therefore, are thought of as more difficult to prepare. Negotiations between a couple on the precipice of divorce are always going to be more complicated than negotiations between a happy couple contemplating marriage.
1. Often, however, postnuptial 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.
 2. Also, it may be easier to narrow future contingencies that need to be addressed in the agreement.
- G. Spouses should consider other asset-protection structures, such as partnerships, buy-sell agreements, QPRTs, GRATs, or CRATs, when a postnuptial agreement will not serve as an appropriate or effective solution.

VI. WAIVERS OF SPECIFIC PROPERTY RIGHTS

- A. Waiver of Alimony and Spousal Support. Pursuant to § 3(a)(4) of the UPAA, the parties to a nuptial agreement may contract with respect to the modification or elimination of spousal support.
1. However, under § 6(b) of the UPAA, if a waiver of support leaves a spouse financially unable to support himself or herself, a court may trump the agreement and require support in order to avoid the state having to provide public assistance.
 2. If an agreement is intended to waive alimony, the waiver provision should include all types of alimony, such as rehabilitative, permanent, periodic, bridge-the-gap and lump sum alimony. Note, however, that in some UPAA states (such as Florida) temporary alimony (i.e., alimony paid during the divorce proceeding) cannot be waived.³⁴
- B. No Waiver of Child Support, Custody and Visitation. Pursuant to § 3(b) of the UPAA, rights regarding child support cannot be waived in a nuptial agreement and, therefore, should not be included in such agreement. Generally, any attempt to waive child support, custody or visitation in any nuptial agreement will violate public policy, even in non-UPAA states.
- C. Waiver of Equitable Distribution of Property. Pursuant to § 3(a)(1) of the UPAA, parties have the power to contract with respect to their rights and obligations in any property they own, either separately or jointly.

³⁴ *Belcher v. Belcher*, 271 So. 2d 7, 9 (Fla. 1972) (holding that a marital agreement cannot contract away future obligations to pay alimony, including temporary support).

1. This includes the right to contract with respect to the disposition of property upon separation or death.³⁵ However, if the parties wish their nuptial agreement to entirely supplant a state's equitable distribution rules, they should expressly state this intent.
2. Likewise, if the parties intend to keep certain property as separate property, such as income earned during the marriage, such intent should be clearly stated in the nuptial agreement. Otherwise, income and earnings, and the assets acquired with such income and earnings, may be considered marital property subject to equitable distribution.

D. **Waiver of Interest in Homestead Property.** Some states may have statutes limiting a spouse's ability to waive his or her rights in homestead property. For instance, in Florida, a provision waiving a party's constitutional right to homestead property is valid only if the waiver is made knowingly and intelligently.³⁶

1. Accordingly, if each party intends to waive his or her rights in homestead property, the nuptial agreement should explain the nature of the right being waived by setting forth (i) the definition of homestead property, (ii) the homestead rights that each spouse would enjoy in the absence of the nuptial agreement, and (3) that each party knowingly and intelligently waives such homestead rights.
2. If an individual changes domicile to a state with a homestead statute only after he or she has entered into a nuptial agreement, it is recommended that the nuptial agreement be amended to make reference to his or her rights under the homestead laws of the new domicile, and to affirm that these rights are being waived.

E. **Waiver of Interests in Retirement Plans.** The most significant assets of many clients are their retirement plans. Accordingly, nuptial agreements should be drafted such that any waiver of retirement benefits complies with federal law. The following are federal laws of which the preparer should be aware in connection with the waiver of rights under retirement plans:

1. The Employee Retirement Income Security Act of 1974 ("ERISA") and The Retirement Equity Act of 1984 ("REA"). ERISA, which overrides state law, was enacted to protect employee retirement benefits. REA then amended ERISA to provide protection to the spouses and descendants of employees. Under REA, a surviving spouse must receive certain benefits from a qualified plan of a spouse who was a plan participant, even if the participant dies prior to retirement age. It is important to note that Individual Retirement Account ("IRA") benefits are *not* subject to REA.

³⁵ UPAA § 3(a)(3).

³⁶ *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007); *Hartwell v. Blasingame*, 564 So. 2d 543 (Fla. Dist. Ct. App. 1990) (reaffirming the requirement that a waiver be made in the context of a mortgage to assure the homestead waiver is made knowingly, intelligently, and voluntarily), *approved*, 584 So. 2d 6 (Fla. 1991); *Rutherford v. Gascon*, 679 So. 2d 329 (Fla. Dist Ct. App. 1996).

2. Internal Revenue Code of 1986, as Amended (the “Code”). Section 401(a)(11)(A) of the Code requires that a surviving spouse receive a qualified pre-retirement survivor annuity benefit (if the participant spouse died before the annuity starting date) or a qualified joint and survivor annuity benefit (if the participant died after the annuity starting date). Section 417(a)(2) of the Code provides that a spouse may waive a right to a qualified plan benefit if the waiver meets the following requirements:
 - a. The waiver is in writing;
 - b. The election must designate a beneficiary that may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse);
 - c. The spouse’s consent must acknowledge the election’s effect; and
 - d. The spouse’s signature must be witnessed by a plan representative or a notary public.
3. In the case of second marriages, clients often desire to waive their rights to each other’s retirement benefits, so that these benefits can pass directly to their respective children. However, the Treasury Regulations to the Code provide that an agreement entered into prior to marriage does not satisfy the applicable consent requirements of § 401(a)(11) and § 417 of the Code.³⁷
 - a. Accordingly, the nuptial agreement should provide that the parties agree to sign the applicable qualified benefit plan waivers after the parties are married. Of course, the participant spouse (and the estate planner) must be sure to obtain the applicable waivers from his or her spouse after marriage.
 - b. The nuptial agreement should also provide that the nonparticipant spouse releases all claims to the retirement plan benefits. To the extent that the participant spouse fails to obtain the required waivers from the nonparticipant spouse, and the nonparticipant spouse fails to release his or her claims to the retirement plan benefits, the heirs of the participant spouse may then have a cause of action against the nonparticipant spouse.
 - c. With regard to a plan not required to provide the qualified joint and survivor annuity to a married participant, a participant can withdraw his or her interest in the plan and roll it over to an IRA. By doing so, the participant could defeat the requirement that the nonparticipant spouse waive his or her right to the death benefits of the retirement plan.

³⁷ Treas. Reg. § 1.401(a)-20 Q-28 and A-28.

- d. Notwithstanding the foregoing, although federal law does not require that a non-participant spouse waive his or her rights in an IRA, some financial institutions impose this requirement.
- F. **Waiver of Interest Under Will.** Most nuptial agreements provide that the agreement is not intended to limit either party's discretion to make *voluntary* transfers (whether during lifetime or at death) to the other in amounts exceeding what is required under the agreement. So, if a decedent wishes to leave her entire estate to her husband, such a provision confirms her power to do so even if the agreement only requires her to bequeath half of her estate.
1. When crafting such a provision, practitioners should be careful to determine whether either party has *preexisting* estate planning documents that would provide a benefit to a surviving spouse in excess of that required by the nuptial agreement. If so, the practitioner must inquire whether the client's intent is to have the nuptial agreement or the preexisting documents control.
 2. This investigation is crucial, since applicable state law may, by default, construe a waiver in a nuptial agreement of "all rights" to the property of the other spouse to include a waiver of any rights or benefits under preexisting estate planning documents.
 3. In a recent Florida case, *Steffens v. Evans*, the Court was asked to determine the effect of a provision in a post-nuptial agreement that allowed voluntary transfers and stated that "any gifts given by one party to the other hereafter shall constitute the receiving party's separate property."³⁸
 4. Decedent, during his second marriage, executed a Will in which he named his current wife as a substantial beneficiary. Five years later, the couple entered into the post-nuptial agreement quoted above, in which each of them waived "all right" to the separate property and estate of the other, including by way of inheritance.³⁹
 5. Upon decedent's death, decedent's first wife, on behalf of her minor children with decedent, petitioned the court to have the bequests to the second wife set aside, on the grounds that the second wife's rights under the Will had been waived by the post-nuptial agreement.
 6. The Court noted that Florida law explicitly provides that a waiver, unless otherwise limited by its terms, of "all rights" to the property or estate of a spouse includes a waiver "of all benefits that would otherwise pass to the waiving party . . . by the provisions of any will executed before the written contract, agreement or waiver."⁴⁰ The Court then noted that the

³⁸ 70 So.3d 758, 761 (Fla. Dist Ct. App. 2011). See also *Hulsh v. Hulsh*, 431 So.2d 658 (Fla. Dist. Ct. App. 1983).

³⁹ *Steffens*, supra, 70 So.3d at 759.

⁴⁰ Fla. Stat. § 732.702(1).

voluntary transfer provision of the nuptial agreement at issue, by its terms, only applied to transfers made “hereafter.” As such, the Court concluded that, by signing the post-nuptial agreement, the surviving spouse had waived all right to take under the Will of the decedent.

- G. Waiver of Other Rights Upon Death. If intended, the nuptial agreement should provide that each party waives the following rights upon the death of the other party:
1. Rights to elect against the Will or any other testamentary instrument of the other party (i.e., elective share rights);
 2. Rights as intestate successor;
 3. Rights as a pretermitted spouse;
 4. Exempt property rights;
 5. Family allowance rights;
 6. Homestead rights (discussed above);
 7. Right to qualify and serve as personal representative of the other party’s estate or trustee of any trust created by the other party.

VII. TAX CONSIDERATIONS RELATING TO NUPTIAL AGREEMENTS

A. Income Tax Issues

1. Property settlement. For income tax purposes, transfers between spouses (either by gift or sale, and in any amount) are tax-free regardless of any gain or loss.⁴¹ Property transfers between former spouses incident to divorce also qualify for this gift tax marital deduction.⁴²
 - a. A transfer is incident to divorce if it occurs within:
 - i. one year after the cessation of marriage; or
 - ii. six years after the cessation of marriage, when the transfer is made pursuant to the terms of a divorce decree or separation agreement.⁴³

⁴¹ IRC § 1041(a).

⁴² IRC § 1041.

⁴³ IRC § 1041(c); Treas. Reg. § 1.1041-1T(A-7).

- b. The transfer is treated as a “gift” for income tax purposes.⁴⁴
 - i. Consequently, the transferee spouse takes a carryover basis from the transferor spouse and the period during which the transferor held the property is included in the transferee’s holding period.⁴⁵
 - ii. Legal fees directly related to a property settlement can be added to the basis of the property.
 - iii. Transfers subject to § 1041(a) are tax-free even when both spouses bargain at arms-length and for full and adequate consideration. The tax treatment is mandatory; therefore, a transfer between spouses will not allow one spouse to elect to recognize a loss even if the transfer is for full and adequate consideration.
 - iv. In addition, accrued and unpaid interest (or any existing right to income) generally cannot be assigned to the transferee spouse.⁴⁶
 - v. Rather, the transferor spouse must recognize such income and the transferee spouse’s basis is increased by the income recognized.
 - c. The divorcing couple must specifically identify the assets to be transferred in the divorce agreement to qualify for IRC § 1041(c).⁴⁷
2. Income Tax Effect of Payments of Alimony. Cash payments of alimony are generally taxable to the recipient spouse and deductible by the payor spouse.
- a. Specifically, § 71(b) of the Code provides that a stream of cash payments to or on behalf of a spouse or former spouse pursuant to a divorce or separation instrument, whether for support or as part of a property payout, is taxable to the payee and deductible to the payor if the liability for payment ceases upon death of the payee, is not fixed as child support, and so long as the divorce or separation instrument does not designate such payment as a payment which is not includible in the gross income under § 71 of the Code and not allowable as a deduction under § 215 of the Code.

⁴⁴ IRC § 1041(b)(1); IRC § 2523(a).

⁴⁵ IRC § 1041(b)(2); IRC § 1223.

⁴⁶ Rev. Rul. 87-112, 1987-2 C.B.207.

⁴⁷ Treas. Reg. § 1.1041-1T (Q-7 and A-7).

- b. Both parties must be aware of the recapture rules applicable to excess spousal support payments, and care must be taken to avoid the imposition of such rules in the nuptial agreement. Section 71(f) of the Code provides that if during the first three post-separation years there is impermissible front loading of a cash payment determined under the Code to be alimony, phantom taxable income could be attributable to the payor—and a deduction could be created for the payee—in the third post-separation year. This rule is intended to prevent spouses from characterizing non-deductible property settlement payments as deductible alimony payments.
3. Federal Income Tax Returns. The nuptial agreement may mandate that the parties file joint or separate federal income tax returns. Alternatively, the nuptial agreement may mandate that the parties file joint or separate income tax returns if either party makes such a request of the other party. The latter option is generally preferred, as it provides for maximum flexibility each year. The parties should be aware that the filing of a joint tax return imposes joint and several liability on both spouses.⁴⁸

B. Gift Tax Issues

1. Transfers Incident to a Divorce. Transfers incident to a divorce may be considered gifts for purposes of the federal gift tax. Section 2512(b) of the Code provides that any transfer for less than “adequate and full consideration in money or money’s worth” is a gift. The following are exceptions to the treatment of a transfer incident to a divorce as a gift:
 - a. Section 2516 Payments. Section 2516 of the Code provides that the transferor spouse will be deemed to have received full and adequate consideration if the payment is made from one spouse to the other pursuant to a written agreement and the agreement is effective within two years before or one year after the date of divorce. The agreement must be signed within the prescribed period of time, but the transfer may occur at any time.

⁴⁸ I.R.C. § 6013(d)(3).

- b. “Harris Rule” Payments. Under the Harris rule, payments made pursuant to an agreement incorporated into a court decree or under a court order for divorce or support do not have to be made for full and adequate consideration.⁴⁹
 - c. Payments Made in Satisfaction of Legal Obligation to Support. Payments made in satisfaction of a legal obligation to support a spouse and minor children are not gifts because the release of such legal obligation is deemed to be adequate consideration.⁵⁰
 - d. Annual Exclusion Payments and Qualified Transfers. Annual exclusion payments made pursuant to § 2503(b) of the Code and qualified transfers made for certain educational and medical expenses under § 2503(e) of the Code are not treated as gifts.
 - e. Waivers of Pension Rights. Waivers of pension rights under § 2503(f) of the Code are not treated as gifts.
2. Gift Splitting. If the practitioner represents the wealthier spouse, he or she may suggest that the wealthier spouse include language in the nuptial agreement that provides that the other spouse must consent to split gifts under § 2513 of the Code upon the request of the wealthier spouse. By requiring such a consent, the wealthier spouse could double the amount of annual exclusion gifts he or she makes during the year. The gift tax annual exclusion amount is the amount an individual can gift per year per donee without using a portion of his or her federal gift tax exemption or incurring gift tax.⁵¹ Such amount is currently \$14,000 annually per donee, or \$28,000 annually per married couple per donee. Including such a provision in the nuptial agreement would also enable the wealthier spouse to gift up to \$10,860,000 during the marriage, which is two times the lifetime gift tax exemption amount (\$5,450,000 per person).⁵²
- C. Estate Tax Issues. As discussed above, the 2010 Act introduced and the 2012 Act continued the concept of “portability,” whereby a surviving spouse is allowed to take advantage of the deceased spouse’s unused exclusion amount (a/k/a the “DSUEA”). However, the DSUEA is available to a surviving spouse only if his or her executors make an affirmative election on a timely filed estate tax return.

⁴⁹ *Harris v. Comm’r*, 340 U.S. 106 (1950).

⁵⁰ Rev. Rul. 68-379, 1968-2 C.B. 414.

⁵¹ I.R.C. § 2503(b).

⁵² I.R.C. § 2505.

1. Absent a requirement in a nuptial agreement, the executors of a deceased spouse may have no obligation to (a) file an estate tax return (which is not required if the value of the decedent's assets is under the estate tax exemption amount) or (b) make a DSUEA election in favor of the surviving spouse.
2. This state of affairs will likely be unacceptable to a wealthy client contemplating marriage, who will want to ensure that he or she can obtain the benefit of the DSUEA of the poorer spouse in the event that the poorer spouse dies first. Indeed, the allure of a \$5,450,000 DSUEA may be a part of what attracted the client to his or her fiancée or fiancé in the first place!
3. As discussed above, utilization of the other spouse's DSUEA will be of particular importance to clients who have a predeceased spouse from a prior marriage. Since a surviving spouse may only use the DSUEA of his or her *most recently* deceased spouse, he or she runs the risk that the DSUEA of his or her first spouse will be lost forever, if the surviving spouse's second spouse likewise predeceases him or her.⁵³
4. As discussed later in this outline, it will likely be advantageous to use an inter vivos trust to utilize a poorer spouse's estate tax exemption amount, rather than relying on portability. However, as a backup until the couple can pursue more advanced estate planning, the parties may wish to mandate in their prenuptial agreement that one or both of them will, by Will, direct their executors to make a DSUEA election in favor of the surviving spouse. In order to ensure that there will be DSUEA remaining for a surviving spouse, the prenuptial agreement may also require (i) that any future use by one spouse of his or her lifetime gift tax exclusion amount requires the consent of the other and (ii) that the executors of the first spouse must set aside a prescribed minimum amount of unused exclusion amount for the surviving spouse.

⁵³ This risk could be eliminated by using the DUSEA of the first deceased spouse on lifetime gifts prior to the new marriage or at any time prior to the new spouse's death. The Temporary and Proposed Regulations provide that a surviving spouse is able to retain the benefit of any DUSEA from a deceased spouse used on lifetime taxable gifts regardless of whether the surviving spouse has an DUSEA available at death (for example, because the surviving spouse remarries and survives the new spouse who fully utilized the new spouse's own exclusion amount). The Temporary and Proposed Regulations do create the possibility of a

VIII. ALTERNATIVES TO A NUPTIAL AGREEMENT⁵⁴

Although a nuptial agreement may be appropriate in many cases, it may not always be, especially if a marriage is a first one for both parties. Accordingly, there are some other methods that provide some of the protections one might otherwise achieve with a nuptial agreement.

A. Identification of Property/Revocable Trusts

1. Under the law of most states, property brought into a marriage is separate property, which is not subject to division upon divorce, if such assets are not commingled with marital property. Further, appreciation and increases of these assets also do not become marital property unless the increase or appreciation is due to the efforts of either party during the marriage. In the case of an individual whose separate property is passive, such as investment assets, if such individual understands that these assets must be kept separate and not commingled with marital property, keeping these assets separate should protect them from a claim in a divorce proceeding. Explaining the law to a prospective spouse and encouraging him or her to keep his or her property separate may be sufficient.
2. With regard to keeping separate property separate, a bank custody account could assist in a prospective spouse keeping his or her property separate. Clear identification and documentation of the fact that a given custody account consists of assets having a specific origin, which the spouse wants to identify and maintain separate, would be means of arranging for effective separation.
3. Another means by which to ensure that such an individual will keep separate assets separate, is for him or her to establish a revocable living trust and reregister separate assets (other than retirement accounts) in the name of the living trust, being sure that the prospective spouse is not a trustee of the trust nor has any other power with regard to the trust under any type of power of attorney. In this manner, a specific lot of property is identified as separate property, while keeping the entire lot traced and identified as it is invested and reinvested.
4. Also, a couple moving from a community property state to a common-law state might want a clear identification of the community property assets. A revocable living trust can serve this purpose as well. All community assets can be titled jointly (including in a joint trust) while all separate assets remain in their separate declarations of trust.

B. Irrevocable Trusts. Likewise, if a family is concerned about making a gift or an inheritance

planning strategy for extraordinarily wealthy people to marry terminally ill poor people to obtain DSUEA from the poor person and then immediately use that DSUEA on lifetime taxable gifts (and then repeat).

⁵⁴ This material is derived from materials originally created by Stephanie Casteel of Wallace Morrison & Casteel, *Planning and Defining Premarital Agreements* (2005).

to an individual who may be married, the family can transfer property to such individual in a trust. Although a distribution made from the trust, if then commingled with marital property by the beneficiary, would become marital property, the property retained by the trust, and so separate, should not be subject to the claims of a surviving spouse in most states. Also, the parents can condition any trust distribution on being subject either to the discretion of an independent trustee. When an individual is the beneficiary of a trust established by another for his or her benefit, however, he or she should also make sure that trust distributions do not follow a pattern that could give rise to an expectation of entitlement with respect to either income or principal distributions.⁵⁵

- C. Family LLC or Partnership/Buy-Sell Agreement. Also, with regard to families who are weary of their assets passing to their children who may, intentionally or not, subject the assets to the claims of a divorcing spouse, the family could form a family limited partnership or limited liability company to hold these assets. Typically, these entities restrict transfers of interests of these entities and/or require a divorcing partner/member to offer his or her interests to the entity for purchase by the entity and/or the other partners/members at a discounted price.
1. These provisions typically apply not only for a divorcing partner/member, but also to a partner/member at death. As for a prospective spouse who feels that the family does not trust him or her, or in the case of a prospective spouse who is already actively involved in a family business, the family could explain that, although it may not be concerned if interests were to pass to the prospective spouse in the event of the death of the family's heir, the family is nonetheless concerned about the event of the prospective spouse's remarriage and the inadvertent transfer of the family's interests outside the immediate family to his or her future spouse, whom is currently unknown by the family.⁵⁶
 2. Another option for the family of a prospective spouse who will inherit family business interests is to implement a buy-sell agreement among the parties. Although this type of agreement may force the family to purchase interests that would otherwise be transferred to an unfriendly party, the agreement prevents unrelated third party involvement without the family's consent, avoids possible litigation in an attempt to retain intra-family control, and provides certainty as to purchase price and terms.⁵⁷
- D. Life Insurance. Although it may be possible to protect the future inheritance of one spouse without a nuptial agreement, what about protection for the other spouse upon the death of the "wealthy" spouse? Even without an agreement, state spousal rights would give little comfort to the other spouse if most of the deceased spouse's assets are tied up in family trusts or family entities. In this case, the "wealthy" spouse could purchase a life insurance policy on his or her life as a means as providing protection to the other spouse.

⁵⁵ Richard M. Horwood and Lauren J. Wolven, *Pre-Divorce Estate Planning: Bed Bash & Beyond*, 30 Tax Mgmt. Est., Gifts and Tr. J. 111 (Mar.-Apr. 2005).

⁵⁶ Erika L. Haupt, *For Better, For Worse, For Richer, For Poorer: Premarital Agreement Case Studies*, 37 Real Prop. Prob. & Tr. J. 29 (2002).

⁵⁷ *Id.* at fn. 45.

- E. **Avoid Commingling of Non-Marital Property.** Take steps to protect non-marital property from commingling. A spouse can advance this objective by (i) registering the assets in the name of a segregated revocable trust (as discussed above), (ii) not naming one's spouse as agent under a power of attorney, and (iii) removing any other indices that may cause a third party to believe that the spouse has an ownership interest in the property.
- F. **Asset registration.** The couple should consider clearly designating any spousal transfers that are exclusively for asset protection purposes.
1. Many states, including Illinois, recognize that transfers of marital property between spouses, incident to tax planning, generally are not completed with the intent of making a gift.⁵⁸
 2. For example, Illinois law provides, in part:

(b)(1) For purposes of distribution of property pursuant to this Section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.
 3. To this end, it is important to document any transfers that are made solely for tax planning (such as to balance assets) or creditor protection reasons. Attorneys can include such information on the transfer documentation or otherwise make appropriate notes of it in their records.

IX. CONCLUSION

Estate planners can do great service to their clients by advising them regarding prenuptial agreements and postnuptial agreements. Practitioners must be fully versed in both the estate planning as well as the divorce implication of nuptial agreements to insure enforceability and so that the agreement yields all of the intended consequences. Nuptial agreements have become both more enforceable and more complex and all practitioners need a thorough understanding of the agreements before venturing into nuptial agreement drafting.

Editor's Note: The version of this outline that the authors updated for their ALI CLE Audio Webcast, "Nuptial Agreements for Estate Planners," November 2, 2015, contains several helpful Forms. For information about this downloadable program and its accompanying materials, go to www.ali-cle.org/tsxb11 or contact the Editor at jdipietro@ali-cle.org.

⁵⁸ See, e.g., 750 Ill. Comp. Stat. 5/503(b).