

Nuptial Agreement Forms and Lists for Estate Planners

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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, having assisted in the researching and drafting of the book *Problems in Family Law*. She also co-authors a chapter for the Illinois Institute for Continuing Legal Education titled *Unique Employee Benefits: Stock Options, ESOPs, etc.* and 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; repre-

senting 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 where she chairs the New Fellows Steering Committee. Professional awards and recognitions include Illinois Attorney Under 40 To Watch by the Law Bulletin Publishing Company (2008), The Best Lawyers in America® in the practice areas of both Trusts and Estates, and Litigation - Trusts & Estates, U.S. News and World Report (2012-present), Illinois Rising Star in Illinois Super Lawyers (2009, 2011), Super Lawyer in Illinois Super Lawyers (2012-present), Leading Lawyer in Trust, Will & Estate Planning Law with the Illinois Leading Lawyer Network (2010-2014), and “AV Rated” by Martindale-Hubbell. .

*Editor’s note: These Forms were part of the author’s outline, *Nuptial Agreements for Estate Planners*, which appeared in the April 2016 issue of *The Estate Planning Course Materials Journal*. This outline is an updated version of the outline that the authors presented for the ALI CLE Audio Webcast, *Nuptial Agreements for Estate Planners*, November 2, 2015. An earlier version was presented at the ALI CLE *Course of Study*, *Estate Planning in Depth*, June 21-26, 2015.*

I. SAMPLE LISTS

- A. Sample List of Prenuptial Agreement Questions
- B. Financial Disclosure Form
- C. Sample Issues List for Parties to Discuss Before Drafting Begins
- D. Sample Issues List for Drafting of a Postnuptial Agreement
- E. Sample Estate Planning Provisions for Nuptial Agreements

A. Sample Prenuptial Agreement Questions

1. Please state names, addresses and contact information of each party.
2. Please state name, address and contact information of each party's attorney.
3. However significant or insignificant, there must be full disclosure of all assets, income and liabilities of both parties. This includes all trusts of which a party is a beneficiary. Please complete the attached financial disclosure form in full. Also please attach copies of your last 3 years of income tax returns.
4. Have either of you been married previously? If so, to whom? When were you married? How was the marriage terminated (e.g., death or divorce)? If by divorce, please provide court, case number and copy of decree and any agreements.
5. Does either party have any children? If so, please provide names and dates of birth.
6. What are your primary goals for drafting the prenuptial agreement?
7. Do you want to keep all property prior to the marriage separate? Do you wish to retitle any assets in joint tenancy (e.g., residential real property)?
8. How do you want to hold property acquired during marriage (e.g., separately or jointly)? Note: A good option for keeping property separate is for it to be held in separate trusts.
9. How do you wish property to be allocated in the event of death?
10. How do you wish assets and debts to be divided in the event of a divorce?
11. Do you wish to provide for spousal maintenance or alimony to each other (e.g., temporary alimony, long-term alimony, or lump-sum settlement)?
12. Any special considerations depending on whether you have children together or whether one of you becomes disabled?
13. 13. Do you have any non-financial agreements you wish to make concerning lifestyle issues (e.g., observing particular religion, practices such as smoking or wearing a seatbelt, etc.)?

B. Financial Disclosure Form

All property on this Exhibit is _____'s Individual Property as defined in **Paragraph** _____ of this Agreement, unless designated as Marital Property.

ASSETS:

Cash and Equivalents:

Cash	\$0.00	
Checking/Savings	\$0.00	
Other	<u>\$0.00</u>	
Total Cash and Equivalents		\$0.00

Investments:

CDs	\$0.00	
Stocks and Bonds	\$0.00	
Mutual Funds	\$0.00	
Other	<u>\$0.00</u>	
Total Investments		\$0.00

Retirement Accounts:

IRA	\$0.00	
Pension Fund	\$0.00	
Other	<u>\$0.00</u>	
Total Retirement Accounts		\$0.00

Other \$0.00

TOTAL ASSETS: \$0.00

LIABILITIES:

Student Loans	\$0.00	
Credit Cards	\$0.00	
Other		<u>\$0.00</u>
Total Debt	\$0.00	

TOTAL LIABILITIES: \$0.00

TOTAL NET WORTH: \$0.00

C. Sample Issues List for Parties to Discuss Before Drafting Begins

In order to facilitate in the process of drafting the prenuptial agreement, you should consider your goals and financial situation prior to our meeting next week. As we discussed, we advise that you communicate openly with Jane regarding the prenuptial agreement to the extent that you are comfortable doing so, as the resolution of issues between the two of you will greatly improve the efficiency and amicability of the process.

You requested that we set forth for you specific items you should address before we meet for our pre-drafting session next week. The following issues are major items that will need to be addressed in the prenuptial agreement process.

1. **Lifestyle.** What is the amount of money you and Jane will spend each month to maintain your lifestyle, and to what extent do you wish to finance Jane in maintaining such a lifestyle in the event of divorce? What about in the event of your death?

2. **Maintenance.** Will either of you be required to make monthly maintenance payments in addition to a property settlement? If so, will those payments cease upon remarriage?

3. **Property Settlement.** Will you list assets that you wish to keep separate and then divide only assets acquired after your marriage based on a percentage division (e.g. 50/50 split)? If so, will the percentage vary based on the number of years you are married? If you wish to base the property settlement on the number of years married and ignore the separate/marital property distinction, at what point do you increase the settlement amount (e.g. \$100,000 for every year up to 10 years, and then \$200,000 for every year thereafter; or \$100,000 for every year and \$2,000,000 flat once you reach 10 years)?

4. **Residence.** Will Jane retain the residence in the event of death or divorce? If so, who will be responsible for the remaining mortgage, if any? Will Jane be required to sell the home and give you your share of the proceeds or buy you out of your share after a certain period of time?

5. **Special Assets.** Are there any particular assets you would like to maintain as your own separate assets even after you are married? For example, will you have any rights in the other's retirement accounts?

6. **Release.** Are you willing to release your rights in assets that Jane wishes to maintain as her separate property following your marriage?

7. **Joint Assets.** If you acquire any assets in joint ownership, how will those assets be divided?

8. **Fiduciary Designations.** Do you wish to agree to resign as Trustee of any trust created by the other person in the event of divorce? For example, if we establish an insurance trust for you as part of your estate plan and you name Jane as Trustee, will she resign that position?

9. **Life Insurance.** Will either of you be required to maintain life insurance payable to the other? This is a common method of securing/funding payments owed to a divorcing or surviving spouse.

10. **Expenses.** Will each of you pay your own legal expenses if it becomes necessary to uphold the agreement in court?

11. **Contributions to Separate Assets.** If either of you has an asset that you decide to keep separate, will contributions to that asset by the other party be deemed a gift? For example, if Jane owns a vacation home and you pay \$15,000 for a new roof on that home, will you acquire any rights in the home or are you merely making a gift to Jane of that \$15,000?

D. Sample Issues List for Drafting of a Postnuptial Agreement

1. What property is held jointly and/or individually? How are all of the assets of the parties presently “classified” under the law (marital, non-marital, community, separate)? Are there legal, emotional or other reasons why changes should be made?

2. Who is responsible for paying off debt? Is debt in joint name? How can debt be repaid and what are the priorities in repayment of debt?

3. How are earnings during the marriage allocated? Is there an inequity in how the parties spend or save earnings? Should there be an agreed upon percentage of earnings that each person is able to spend/save? Are both contributing to the family’s income to the best of his or her ability?

4. What is the role of the spouse, if any, in a business now or in the future?

5. How should a business be disposed of in the event of divorce, disability or death?

6. What are your marital priorities for the future; are you goals to pay for a child’s private school college education or to purchase a boat or to save for retirement? How are you going to implement these ideas?

7. How are monies divided in a blended family? How much support should be given to children from previous marriages? What are the ages and needs of the children? What monies should be used to pay for these needs? Are there children with “special needs?”

8. What happens if one spouse falls ill or becomes disabled? Have you considered purchasing long term health care insurance, disability insurance, have you executed a health care proxy or power of attorney?

9. What protection do you have in the event of one another’s death? Do you have life insurance for the other; updated wills; considered estate planning?

E. Sample List of Estate Planning Provisions for Nuptial Agreements

- **Life Insurance.** John agrees to obtain a minimum of Two Million Dollars (\$2,000,000) of 20-year term life insurance within six months after the marriage of the parties. John shall pay for the policy and maintain the policy in good standing during the full 20-year term of the policy or until death or divorce, if earlier. Jane shall be named as the beneficiary of the life insurance policy or the policy may be placed into an irrevocable life insurance trust of which Jane is the trustee and which provides for her primary benefit during her lifetime and for the benefit of any children of John and Jane. Jane must consent in writing to the terms of any such life insurance trust.
- **Revocable Trusts.** For purposes of this Agreement, property owned by a party through his or her revocable trust (living trust) shall maintain its character as Non-Marital, Marital, Co-Owned, or Community Property. The character of property owned through a revocable trust shall not be affected by such ownership unless the parties expressly so agree in writing.
- **Marital Trust.** Upon John's death, the Trustee shall distribute the sum of \$3,000,000 to the Marital Trust, of which Jane shall be the sole beneficiary, and which shall be subject to the following terms:
 - (i) Commencing upon John's death, the trustee shall pay annually to Jane during her lifetime, in convenient installments, at least quarterly, the greater of the following: (a) all of the income of the Marital Trust (as provided under the applicable principal and income act or laws for the Marital Trust); or (b) four percent (4%) of the fair market value of the Marital Trust (such value to be determined in each taxable year for the Marital Trust based on the fair market value of the Marital Trust on the first day of such taxable year, with the amount prorated for any partial year). The distributions to Jane under this paragraph shall not be reduced by any charges (including, but not limited to, expenses, costs, fees, compensation, taxes, interests and penalties) that would otherwise be permitted as charges against income under the applicable principal and income act or laws for the Marital Trust. The trustee shall distribute to Jane such amounts of principal of the Marital Trust as the trustee deems advisable for Jane's support in reasonable comfort and health. The trustee may consider other income and resources available to Jane, but the trustee will give priority to Jane's support in reasonable comfort and health over conservation of principal.
 - (ii) The Marital Trust will either be a trust that can qualify as "qualified terminable interest property trust" under Section 2056(b)(7) of the Code or a trust under Section 2056(b)(5) of the Code, presuming that there is a federal estate tax in effect at the time of Margaret's death.
 - (iii) During Jane's lifetime, the trustee of the Marital Trust shall be a corporate trustee authorized under the laws of the United States or any State thereof. John shall select the initial corporate trustee, and such trustee may be removed by Jane and replaced with another corporate trustee.
 - (iv) John shall have the right to choose the beneficiaries of the principal and income remaining at Jane's death.