**When Estate Planning and Marital Agreements Collide:
Validity, Enforceability and Disclosures**

Wendy S. Goffe
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 386-7565 (direct)
wendy.goffe@stoel.com
www.stoel.com

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Wendy S. Goffe is a partner with the law firm of Stoel Rives LLP, Seattle, Washington with thirty years of experience counseling clients on estate planning issues. She has been named one of “The Best Lawyers in America” for trusts and estates (2007-2022), Super Lawyers for estate planning and probate, nonprofit organizations (2003-2021), top 50 women lawyers (2006–2019, 2021), top 100 lawyers (2008–2014, 2018, 2021), she has been listed in Chambers High Net Worth Guide (Private Wealth Law - Washington) (2016-2021), she is a Fellow of the American College of Trust and Estate Counsel (ACTEC), chair of the ACTEC Family Law Task Force and a member of the ACTEC Digital Property Committee. She is an Accredited Estate Planner® (Distinguished) awarded by the National Association of Estate Planners. Her experience includes advising clients on probate and trust administration, estate and gift taxation, charitable and nonprofit organizations, family-owned business succession and issues concerning unmarried couples. She has also worked extensively with private collectors, artists, artist foundations, museums, and art dealers, who seek legal counsel relating to the creation, destruction, purchase, sale, consignment, auction, ownership, financing, loan, authentication, export/import, display, reproduction, insurance, taxation, storage, charitable and noncharitable gifting, restitution, and recovery of fine art and other creative work.

Wendy is the co-editor of *The Tools & Techniques of Estate Planning for Modern Families, Leimberg Library,* The National Underwriter Company (2019), and the author of the following chapters: “Planning for Unmarried Couples and Cohabitation Agreements,” “Planning for Same-Sex Couples,” “Advising and Planning for Transgender Family Members.” She has been interviewed by and written for many national publications and was previously a contributor to Forbes.com.

She is a Professional Advisor on Estate Planning Law to the American Law Institute Continuing Legal Education (ALI CLE), The Fred Hutchinson Cancer Center Planned Giving Advisory Council, The Seattle Foundation Professional Advisory Council, and the Children’s Legacy Council of the Children’s Hospital Foundation. She is a former Adjunct Instructor at Seattle University Law School, as well as a former member of The Nature Conservancy Planned Giving Committee. She is also a former member of the ABA Taxation Section Community Property Comment Project, the Executive Committee of the Estate Planning Council of Seattle, the Acquisition Committee of the Tacoma Art Museum, the Executive Committee of the WSBA Real Property, Probate and Trust Section, the YWCA Planned Giving Advisory Committee, the Ethics Committee of Valley Medical Center and the Board of Directors and Grants Committee of The Women’s Endowment Foundation, a supporting organization of the Jewish Community Endowment Fund, Seattle, Washington. In her free time Wendy is a volunteer for Girls on the Run and an avid trail runner.

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I. Introduction.

There is much to be gained from cross-discipline collaboration between matrimonial and estate planning attorneys when planning for our clients. Divorce is an aspect of planning for the modern family that cannot be ignored or downplayed. This outline examines how a client's premarital agreement and pre-divorce estate planning instruments, including trusts, may be drafted to account for a possible future divorce. This outline also looks at ways to plan for the possibility of a beneficiary's divorce in a senior generation's estate plan.

Divorce and trust laws are state-specific. Thus, while these materials may discuss some general concepts relevant in most jurisdictions, with some references to particular state laws for illustration, any advice to a particular client should be provided with the assistance of legal counsel who practices in and is familiar with the applicable state law.

II. Tax Consequences of Divorce.

The following is a summary of only a few of the federal tax rules that need to be considered in the dissolution context.[1] Without grounds for special treatment, assets provided to a divorced spouse or for children of a terminating marriage would, like any other irrevocable transfer of assets, potentially be subject to federal gift tax. (Divorcing individuals may not view such transfers as gratuitous, but the intent behind a transfer is irrelevant for gift tax purposes.) There are three overlapping legal grounds supporting the exclusion of transfers pursuant to divorce agreements from an individual's taxable gifts: (1) IRC §2516, (2) a broader statutory argument that arises from IRC §2512(b); and (3) case law.

A. Transfers under IRC §2516.

The primary statutory approach is based on IRC §2516, which provides as follows:

> Where spouses enter into a written agreement relative to their marital and property rights and divorce occurs within the 3-year period beginning on the date 1 year before such agreement is entered into (whether or not such agreement is approved by the divorce decree), any transfers of property or interests in property made pursuant to such agreement—
>
> (1) to either spouse in settlement of his or her marital or property rights, or
>
> (2) to provide a reasonable allowance for the support of issue of the marriage

[1] For a comprehensive examination of taxation as it relates to dissolution, *see* Carlyn S. McCaffrey and John C. McCaffrey, *Tax and Estate Planning for Divorce: Selected Issues* (Oct. 2015), https://www.bocaratonepc.org/assets/Councils/BocaRaton-FL/library/McCaffrey%20Carlyn%20-%20Tax%20and%20Estate%20Planning%20for%20Divorce%20Oct%202015.pdf.

> during minority,
>
> shall be deemed to be transfers made for a full and adequate consideration in money or money's worth.[2]

The agreement must be legally effective for transfers, either outright or in trust, to so qualify, but it need not be approved by (or even presented to) the divorce court, although death of a party prior to entry of the decree would invalidate the agreement (although the marital deduction would generally apply instead). The statue could also apply to transfers pursuant to a prenuptial agreement (so long as divorce followed the agreement within two years). Nor does it apply to cover amounts for the support of minor children in excess of a reasonable allowance.

In addition to the required timeframe, there are further limitations to this statutory protection. First, transfers to or for the benefit of the other spouse must be "in settlement of his or her marital or property rights."[3] This has been interpreted to imply that transfers must be determinable: If a trustee or other party has discretion over the spouse's enjoyment, that discretion will be presumed to be exercised to the minimal extent possible, and amounts over this will be considered taxable gifts.

Transfers within the statutory timeframe under the following provision of a property settlement agreement ("PSA") would avoid gift tax under IRC §2516:

> Each party accepts the provisions herein made for him or her in lieu of and in full and final settlement and satisfaction of any and all claims or rights that either party may now or hereafter have against the other party for support or maintenance or for the distribution of property. However, each party has relied upon the representations of the other party concerning a complete and full disclosure of all marital assets in accepting the property settlement, and it is understood and agreed that this provision shall not constitute a waiver of any marital interest either party may have in any property owned but not fully disclosed by the other party as to existence or fair market value at the time this agreement is executed. Moreover, the failure of either party to disclose property shall constitute a material breach of this agreement, which shall give rise to all remedies at law or in equity available to the other party.

Transfers to or for the benefit of the marital children, by contrast, only qualify for the gift tax exemption under IRC §2516 if they "provide a reasonable allowance for the support of issue of the marriage during minority."[4] Transfers above the level of legally required support, or when the children are above age 18, will thus be considered taxable gifts. In practice, there appears to be no guidance from the Internal Revenue Service (the "Service") on the scope of the former limit, though it presumably is intended to track state law on the support obligations of the parent. The

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[2] IRC §2516. *See also* IRC §2043(a) providing that transfers at death in fulfillment of such obligations are also deemed for full and adequate consideration.

[3] IRC §2516.

[4] *Id.*

latter restriction, however, means that any value provided to marital children, which may be enjoyed after the age of majority, is not exempted by the statute, and may be a taxable gift (unless it meets one of the other exceptions described below). This would apply, for example, to the present value of an interest in trust that continues beyond the age of minority.

Divorce-related transfers based on the settlement agreement are involuntary and generally not treated as a completed gift.

B. Testamentary Transfers Pursuant to Property Settlement Agreements.

A related issue in the dissolution context is the deductibility of transfers upon death required pursuant to a PSA when payable to persons other than the ex-spouse. *Leopold v. United States* addressed the deductibility of a testamentary gift and allowed a deduction for a testamentary gift required by a PSA. [5] The decedent in *Leopold* had three daughters, two from his first marriage and one from his second (which was also dissolved). Although the decedent made a bequest to the third daughter, the amount was uncertain, so the second ex-wife filed a creditor's claim based on the settlement agreement. Reasoning that "[u]nder exceptional circumstances, it may be that a claim by someone who might otherwise inherit from the decedent should be deductible under section 2053," the Court allowed the deduction for the ex-wife's claim.[6] The third daughter was left nothing more than was required by the property-settlement agreement and the second ex-wife appeared to take a smaller settlement in consideration for her ex-husband's promise to leave their daughter a gift in his will. Because the ex-wife bargained for the gift to her daughter, it was held to be for full and adequate consideration and therefore a deductible estate expense.

IRC §2043(b)(2) now provides, effective in the case of estates of decedents dying after July 18, 1984, that for purposes of IRC §2053(a)(3), a transfer of property that satisfies the requirements of IRC §2516(1) shall be considered made for an adequate consideration in money or money's worth.[7] Therefore, the relinquishment (or promised relinquishment) of marital rights in a decedent's property in favor of a third party does not result in a taxable distribution at the decedent's death with respect to that property. Rather, it is deductible as a payment on an executory contract in the decedent's estate.

C. Transfers under IRC §2512(b).

Transfers that do not qualify for the IRC §2516 exemption may still avoid gift tax if such a transfer is made in full consideration for surrendered rights. Donative intent is not required.[8] The release of future support rights can constitute "adequate consideration," and can therefore eliminate taxable gift treatment under IRC §2512(b) (which provides generally that a gift occurs only if

[5] 510 F.2d 617 (9th Cir. 1975).

[6] *Id.* at 623-34 (internal quotation marks and citation omitted).

[7] §2053(c)(1)(A).

[8] Treas. Reg. §25.2511-1(g)(1).

property is transferred for less than adequate consideration).

To constitute adequate consideration, however, the support rights being released must be assigned an economic value. A taxable gift arises to the extent of the excess of the value of transferred property over that of the support obligation.[9] The benefit to this approach is that property can be transferred, which would otherwise be outside the scope of IRC §2516—such as to marital children after the age of majority—as long as it is equal in value to the other rights being released.

For example, in a 1979 Revenue Ruling where the divorce agreement provided for an annuity to the wife with remainder to adult children, the Service concluded that if the husband had established that the wife actively bargained for and relinquished support rights in exchange for the full present value of the annuity, then there would be no gift by the husband.[10]

Since child support rights generally cannot be fully released, and because there is no generally accepted valuation methodology for legal support rights, this is not a widely favored strategy for transferring value to minor children.[11] But it can be a useful planning technique to shift wealth to adult children in the context of divorce.

D. Case Law Treatment of Transfers Pursuant to Property Settlement Agreements.

Finally, under a line of cases that predates IRC §2516, transfers to or for the benefit of a divorcing spouse or marital children—if made pursuant to a divorce decree entered by a court—may not be sufficiently voluntary to be properly subject to gift tax.[12] The language and reasoning in these cases is broader than IRC §2516, since the principle applies even when the technical limitations of that provision would not be satisfied. This rule is referred to as the *Harris* rule, referencing *Harris v. Commr.*, the first of these cases, which was decided in 1950.[13]

Subsequent cases have held that a settlement agreement between the parties can become part of the court decree for purposes of the *Harris* rule simply by reference and incorporation into the decree, as long as the court had the power to review and approve the agreement.[14] Commentators have thus argued that *Harris* effectively exempts transfers from gift tax (including transfers to children above the age of majority) as long as the obligations are determinable and enforceable

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[9] *See* Rev. Rul. 77-314; *see also Sherman v. United States*, 492 F.2d 1045 (5th Cir. 1974).

[10] Rev. Rul. 79-363. Note, however, that had the wife done so, presumably she would have been deemed to have made a taxable gift to the adult child in the amount of her relinquished support received by that child.

[11] Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* ¶¶ 123.6.2, 121.4.3 (1989).

[12] *See Harris v. Comm'r*, 340 U.S. 106 (1950); *Cooley v. Brennan*, 228 P.2d 104 (Cal. App. Dep't Super. Ct. 1951); *Comm'r v. Copley's Estate*, 194 F.2d 364 (7th Cir. 1952).

[13] *Harris v. Comm'r*, *supra* n.11, 340 U.S. at 107.

[14] *See McMurtry v. Comm'r*, 203 F.2d 659, 665 (1st Cir. 1953) (finding no taxable gift where transfers made pursuant to the parties' property settlement agreement were held attributable to the divorce decree that approved the settlement agreement).

under the terms of the divorce decree.[15] This appears to be the common understanding and practice of lawyers in some states, Florida and Illinois among them.

Note, however, that in *Spruance v. Commr.*, the Tax Court warned that "*Harris* did not incorporate a broad rule that all transfers based on a court decree need not be supported by adequate consideration, and that all involuntary transfers are free from gift tax."[16] *Spruance* held that remainder interests given to the marital children in a settlement trust—and receivable by them as adults—were taxable gifts by the grantor. This reasoning, though, has not since been cited by a court or by the Service, so it is unclear whether the case remains good law.

With these federal tax rules in mind, as well as additional rules discussed below, the next sections will discuss planning in contemplation of divorce, during the dissolution process and after the divorce is finalized.

III. <u>Keeping Separate Property Separate: Marital Property Agreements.</u>

A. Premarital Agreements.

Marriages end in two ways—death or divorce. A good premarital agreement will address both. The potential for both death and divorce needs to be considered, openly discussed, and drafted for. A premarital agreement provides the least amount that the parties owe each other. A well-drafted agreement should, if nothing else, define the minimum provisions that must be made for the surviving spouse and specify the parties' intentions to provide for each other upon divorce. The contracting spouses are always free to be more generous than the agreement requires. The collaboration between an estate planner and a matrimonial lawyer produces the strongest agreements.

Most clients who want premarital agreements may be categorized as follows:

- wealthy parents of adult children getting married who stand to inherit wealth or have inherited wealth;
- adult children of a wealthy parent entering into a second marriage; and
- wealthy people marrying either other wealthy people, or people with substantially less wealth.

Premarital agreements are not usually suitable for people without significant wealth.

It has been said that everyone who marries enters into a premarital agreement that is set forth in the family and probate laws of the state they live in. The ideal agreement creates a default separate property regime. Joint property should only be created by an agreement of the parties and not by operation of law. Further, a premarital agreement should waive all intestate rights on death, and

[15] *See* Bittker & Lokken, *supra* n.9, ¶ 123.6.2.

[16] *Spruance v. Comm'r*, 60 T.C. 141, 154 (1973), aff'd 505 F.2d 731 (3d Cir. 1974) (quoting Surrey & Warren, *Federal Estate and Gift Taxation*, 222-23 (1961)).

the waiver of other "marital rights" that include the right to take as a pretermitted heir, a family allowance, a probate homestead, property that would pass from the decedent by testamentary disposition in a will executed before the waiver, the right to elect to take community property or quasi-community property against the decedent's will, the right to take the statutory share of an omitted spouse, the right to be appointed as the personal representative of the decedent's estate, and other rights that might accrue on death.

Any rights created on death should be clear and specific. The agreement should address the issues of who pays the estate taxes, any change in the size of the estate, a change in the type of assets, and changes in the law. An agreement providing for a percentage of the estate is disfavored when the assets consist of real estate and real property. The valuation of these assets could hold up distributions for years, and create unnecessary litigation. The use of life insurance can be an efficient way of providing for the surviving spouse.

Most clients entering into premarital agreements will want a limitation on alimony (aka spousal maintenance or spousal support), which in many states will be reviewed by the Court as to whether it was unconscionable at the time the agreement was entered into or at the time of enforcement, or both.

Agreements designating certain assets as separate property, and the rest as marital or community property, create the risk of commingling assets during the marriage. This leads to litigation, which is what agreements are written to avoid.

Your engagement letter should clarify that you are drafting the agreement for the state the parties are planning to live in. If they plan to move to another state or country soon, you may want to refer an agreement out to counsel in the other jurisdiction. Even if you have a choice of law and a choice of forum provision, if there is no nexus with the state, a court may not enforce that choice of law clause. Further, another court may find that the provision in the agreement relates to a public policy issue, and not enforce that provision. This could occur if the agreement attempts to limit spousal support, or if it has restrictions on personal behavior. Never count on a choice of law clause to protect you in the event the agreement is litigated.

If the parties have homes in several states and countries, it may be difficult to know in what state or residence a divorce might be filed. It is wise to get the input from attorneys in the other jurisdictions. You will have to decide whether the parties need a separate agreement for the other jurisdiction, or if you want to incorporate their recommendations in your agreement. Unfortunately, family law differs so much from state to state that trying to put it all in one agreement may lead to confusion.

Most countries allow people to elect a marital regime, such as separate property, community property, or a combination thereof. If the parties have a residence in a country that has marital regimes, they should seek the counsel of a foreign lawyer. In some cases, a foreign premarital agreement could invalidate the native regime.

In the absence of a premarital agreement, assets acquired as compensation are community or marital property. Assets brought into a marriage or acquired by gift or inheritance during marriage are considered separate property. However, to the extent separate and community or marital property is commingled, the property is presumed to be community or marital in nature.

A typical agreement may waive rights to income or assets of the other spouse. It may also waive the right to maintenance and support, pension and retirement benefits, and the right to serve as personal representative. But an agreement may go much further so long as it is legal and does not violate public policy.

The agreement can determine the treatment of contributions of funds and/or services by one spouse or by the marital community to another spouse's property as a gift or a loan, or whether such contribution creates an equitable interest. The agreement can determine the treatment of life insurance and retirement plans existing prior to marriage and future plans or policies obtained by the parties.

Importantly for this discussion, an agreement can also provide that upon the dissolution of marriage, the parties agree to resign from fiduciary positions held under irrevocable trusts created by the other party.

B. Postmarital Agreements.

Without a premarital agreement, the parties may later consider entering into a postmarital agreement. Realistically, parties to a premarital agreement are more likely to enter into the agreement because they want to get married, but parties that are already married do not have that incentive. It may be more difficult to construct adequate consideration for one spouse to give up rights he or she has already acquired by law as a result of the marriage than to enter into a premarital agreement before any rights have vested. Furthermore, not all jurisdictions uphold postmarital agreements.[17] The Uniform Premarital and Marital Agreement Act ("UPMAA") has been adopted by North Dakota and Colorado. The act makes it easier to set aside premarital agreements on the basis of unconscionability or lack of disclosure.

C. Enforceability of Marital Property Agreements.

When there is a marital agreement already in place, it is common to challenge their enforceability but generally difficult to set them aside. Each jurisdiction has its own standards for finding a marital agreement enforceable.

Marital property agreements usually contain choice of law provisions. Parties can choose which state's law governs their agreement, though under the UPMAA, the chosen state must have a significant relationship either to the agreement or to either party.[18] The Uniform Premarital Agreement Act ("UPAA") simply allows for choice of law.[19] Under general contract law, parties to a contract may choose the state for which the law is to be applied unless the state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for

[17] *See* Linda J. Ravdin, *Postmarital Agreements: Validity and Enforceability*, ABA Family Law Quarterly (Summer 2018).

[18] UPMAA §4(1).

[19] UPAA §3(a)(7).

the choice, or application of the law of the chosen state would be contrary to the public policy of the forum state.[20]

Standards generally turn on a combination of fairness and adequate disclosure of assets. For example, in Washington, the Supreme Court developed a two-pronged analysis of substantive and procedural fairness to determine the validity of premarital agreements.[21] First, the court looks at whether the agreement makes a fair and reasonable provision for the party not seeking to enforce it. If the agreement is fair and reasonable and the challenging party has not shown fraud or overreaching, there is no need to advance to the second prong. Only in the second prong does the court examine whether full disclosure has been made of the property involved, and whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by both parties of their rights.[22]

A detailed analysis of the enforceability of premarital and postmarital agreements is beyond the scope of this outline.[23] Because of the nuanced complexity of what constitutes adequate disclosure, this topic warrants closer examination.

D. Best Practices for Financial Disclosure for Marital Property Agreements.

The most common challenge to the validity of premarital agreements is that there was not adequate disclosure. In the majority of states, financial disclosure is not required for a premarital or postmarital agreement to be found valid. Rather, parties can waive all disclosure. Nevertheless, as discussed below, inadequate disclosure may still successfully be used to void an agreement in many circumstances. Furthermore, different standards will apply if the agreement is to be governed by the UPAA or the UPMAA. [24] See Exhibit A for a selection of cases regarding financial disclosure for premarital and postmarital agreements.

[20] Restatement (Second) of Conflict of Laws §187 (Am. L. Inst. 1971).

[21] *Marriage of Matson*, 730 P.2d 668, 670 (Wash. 1986).

[22] *Id.* Failure under the first prong leads to a more extensive examination under the second. To be found enforceable under the second prong, the court will look at the circumstance surrounding the execution of the agreement (bargaining positions, sophistication of the parties, presence of independent advice, understanding of legal rights and consequences, timing vis-a-vis wedding date, etc.).

[23] For a more detailed discussion, *see* P. Andre Katz & Amanda Clayman, *When Your Elderly Clients Marry: Prenuptial Agreements and Other Considerations*, 16 J. Am. Acad. Matrim. L. 445 (2000). *See also Premarital and Marital Contracts: A Lawyer's Guide to Drafting and Negotiating Enforceable Marital and Cohabitation Agreements* 196 (Edward L. Winer & Lewis Becker eds., 1993).

[24] The UPAA was promulgated by the Uniform Law Commission, National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1983. In 2012, the Uniform Law Commission promulgated the Uniform Premarital and Marital Agreements Act (UPMAA), essentially a revised UPAA, which established procedural and substantive safeguards for marital agreements in an effort to bring them into accord with safeguards for premarital agreements. Uniform Law Commission, National Conference of Commissioners on Uniform State Laws (2012). To date only Colorado and North Dakota have adopted the UPMAA, both in 2013.

1. Agreements under the UPAA and UPMAA.

Twenty-six states and the District of Columbia have adopted the UPAA. The Act provides: "The agreement is enforceable without consideration."[25] And, disclosure can be waived.[26]

For agreements under the UPMAA, which has been adopted by Colorado and North Dakota, the waiver must simply be in a separate record signed by both parties.[27]

Under the UPAA, the parties owe a fiduciary duty to deal openly and fairly with each other in the formulation of marital agreements. Accordingly, a premarital agreement[28] must comply with certain formalities. A premarital agreement must be in writing and signed by both parties.[29] The parties must have general contractual capacity and enter the agreement free from fraud, duress, and undue influence.[30] The UPAA recognizes marriage itself as adequate consideration for a premarital agreement.[31]

The UPAA requires that all premarital agreements meet a procedural fairness test.[32] The party seeking to enforce the agreement has the burden of proof. The agreement will be void if (1) it was not entered into voluntarily; or (2) it was unconscionable before and at the time of execution of the agreement *and* (a) there was a lack of fair and reasonable disclosure of the property or financial obligations, (b) there was no voluntary waiver of any right to disclosure, and (c) the party challenging the validity of the agreement did not have or reasonably could not have had adequate knowledge of the property or financial obligations of the other party.[33]

Under the UPAA, it is possible for the parties to voluntarily and knowingly waive the disclosure requirement.[34] The waiver must be in a separate signed writing; and, it must be signed *before* the agreement itself is signed.[35] Although the UPAA does not specifically require the presence of independent legal counsel as a condition to enforceability of a premarital agreement, the absence of independent counsel may be a factor in determining whether the fairness tests have been met.

[25] UPAA §2 (1983).

[26] *Id.* §6(a)(2).

[27] UPMAA §9(d)(2).

[28] The UPAA uses the term "premarital agreement" instead of "prenuptial agreement" and defines such contract as an "agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." *Id.* §1.

[29] *See id.* §2.

[30] *Id.* §§2, 6.

[31] *Id.* §2.

[32] *Id.*

[33] *Id.* §6.

[34] *Id.* §6(a)(2)(ii); *Fick v. Fick*, 851 P.2d 445 (Nev. 1993).

[35] An agreement need only have been executed voluntarily and with fair financial disclosure (actual or constructive) or an express waiver. UPAA §6(a)(2).

Furthermore, the UPAA does not say how long before the agreement itself is signed the waiver must be signed; presumably immediately before signing the agreement is sufficient.

2. Best Practices Regardless of Controlling Law.

It is always in the best interests of the wealthier party to make an adequate financial disclosure (and not rely on a waiver). Some states' laws are more demanding as to financial disclosures. In our mobile society, it is important to contemplate that a couple may move during their marriage, possibly to a jurisdiction with more stringent laws applicable to divorcing couples.

State law may require legal advice for an effective waiver of financial disclosure. State law may not permit waiver at all. A combination of no financial disclosure, lack of counsel, and a short time between presentation and wedding makes validity vulnerable even when waiver is generally permissible. In some jurisdictions, the lack of independent counsel or even inadequate counsel has been held to be a sufficient circumstance to cause an agreement to be invalid.[36] Independent legal counsel is highly indicative of voluntariness. In California there are specific rules that must be followed if one or both parties are not represented by counsel.[37]

States allowing waiver of disclosure may require that it was made knowingly and voluntarily. Even when waiver is permissible, it is best to comply with the most demanding validity standards.

- For an agreement under which parties will retain exclusive rights to nonmarital assets but share the fruits of their labor it is best for the parties to identify all premarital assets so as to be able to reclaim them.

- Fair and adequate financial disclosure greatly enhances validity, and is often the key to a finding of validity even when other aspects of the process or the substance are somewhat deficient. Courts routinely reject claims of duress and coercion, even when the agreement is presented close to the wedding, if the proponent provided a fair and adequate financial disclosure. Courts also examine other critical factors, including the bargaining positions and sophistication of the parties, the parties' understanding of the legal consequences of the agreement, and the parties' knowledge of their rights.

- When representing the economically disadvantaged party, the lawyer should insist upon financial disclosure before giving advice to the client about the adequacy of the terms, and before formulating proposed terms to enhance the financial security of the client. The lawyer should also inquire into the client's expectations as to future inheritance or other resources, especially when he/she is young and has living parents/grandparents.

[36] In *Allen v. Allen*, the court invalidated a prenuptial agreement based on inadequate counsel. No. 15-P-722, 2016 WL 4238770 (Mass. App. Ct. Aug. 11, 2016) (unpublished). Wife was from Brazil and spoke limited English. Husband's attorney drafted the agreement. Wife visited a Portuguese-speaking attorney who translated the agreement and read it to her out loud; however, that attorney gave wife no legal advice. The appeals court agreed with the trial judge and thus found that the wife did not have adequate opportunity to consult with counsel.

[37] Cal. Fam. Code §1615.

- Mechanics of financial disclosure:

    - Best practices: The gold standard is a written statement appended to the agreement of amounts and sources of income, and the identity and value of all significant assets and liabilities.[38] For some parties, a statement of net worth without detail may be adequate; for example, if both parties are wealthy, if the parties have a general understanding of the assets of the other, or if they work and own a business together. Tax returns, financial records and other raw data (any combination of a written statement, as described above; financial records and other raw data; and with respect to a closely held business, more (see below)).

    - Avoid informal oral disclosure: Courts have upheld oral disclosure, if adequately proven, but this is risky for the proponent.[39] A party's pre-existing knowledge of the other party's financial affairs has been held to be adequate, but is also risky for the proponent. A recital in the agreement that the parties made an informal financial disclosure or that they were each familiar with the other's financial affairs, has been held adequate, but is also risky for the proponent. Courts have upheld a list of major assets without values, but this too is risky for the proponent.

- Disclosure of the value of assets whose value is not readily apparent: No requirement for formal appraisal exists; rather, a good-faith statement of value is generally sufficient. Any statement of value of such assets should be appropriately qualified. For example:

    > It is understood that the estimates of fair market value are not based upon appraisal and therefore may be erroneous; however, the estimates furnished are the best opinion of the person making the estimate. The estimate is based upon [describe]. [Other party] has had the time and opportunity to request documents, inquire, and appraise the property but has chosen not to do so. It is also understood that the listing of liabilities may be inaccurate to some extent because each of the parties has accounts in progress for which billings or monthly statements have not been received, or because the precise amount of the indebtedness is unknown; however, the estimate is the best opinion of the person making the estimate.

- Disclosure of the value of a closely held business: Disclosure of an interest in a closely held business presents a special challenge. The value of the business may not be readily ascertainable, and there is no requirement for a formal appraisal. However, an owner who fails to provide meaningful disclosure of known data does so at his or her own peril. He or she could provide the gross revenues of the business, the number of employees, his or her percentage interest, salary, or other compensation received from the business, and the like. It is a mistake for the owner to assume that the other party's knowledge of the existence of the business is tantamount to an understanding of its value. The owner's statement as to

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[38] *Cannon v. Cannon*, 865 A.2d 563, 584 (Md. Ct. App. 2005).

[39] *DewBerry v. George*, 62 P.3d 525, 531 (Wash. Ct. App. 2003). In *DewBerry*, the Court upheld an oral agreement because it was procedurally and substantively fair, and it had been followed by both parties throughout their marriage.

value should be appropriately qualified. When the value is stated at book value it is especially important that the disclosure include an acknowledgment that actual value may be higher.

- The lawyer for the owner should inquire as to: Whether there have been any recent appraisals of the business (e.g., in connection with another owner's divorce) or of a major asset (e.g., a commercial building). Has the owner received any offers to buy the business or a major asset? Are there plans for an initial public offering? Has the owner made any statements of value, such as in a loan application, application for key-person insurance, or in connection with a divorce?

- The owner's financial advisor or certified public accountant ("CPA") will often be helpful in formulating a disclosure statement that will balance the need for disclosure to ensure validity and the interest of the business owner in the confidentiality of the business' records and business information.

- Options for disclosure:

    - The owner's good-faith statement of value, coupled with explanation of the basis for the statement (e.g., "$____, which is five times book value"), coupled with qualifying statements (e.g., "fair market value may be much higher").

    - The owner's accurate statement as to key data from which the other party's lawyer can judge whether the information is sufficient to make a decision about signing or asking for more information, including, e.g., type of entity, years in business, type of goods or services sold, percentage ownership, number of owners, gross and net revenues, owner's compensation for last three years, etc.

    - Provision of documents, e.g., business tax returns, profit and loss statements, etc., for last three years.

    - A combination of the above and a statement such as the following:

        > It is agreed that this agreement is not based upon the estimations being wholly accurate; rather, the parties are attempting to provide a good-faith disclosure of their respective estimated financial positions. It is further agreed that each party knows that this agreement need not be executed by that party should there be any question about the accuracy or sufficiency of the disclosure. Any inaccuracy in estimation, or omission, shall not be a ground to revoke this agreement and each of the parties waives any such inaccuracy on estimation, or any omission.

- The most likely challenge will be that the owner has undervalued the company. This claim may be made because an asset is difficult to value or has a wildly fluctuating value. However, full disclosure in some jurisdictions is not to say that the other party must know the exact financial status of the owner's resources, but enough information so that the less wealthy party will not be prejudiced by the lack of information, and can intelligently determine whether he or she desires to enter the prenuptial contract.[40] The following type of statement could be used to document this understanding:

> Wife acknowledges and agrees that value of the Company set forth on Schedule A is based primarily on the fact that the value of Husband's business is related to his ability to provide personal services. An estimated fair market value of the business has been suggested on Schedule A; however, no formal appraisal of the Company has been prepared in connection with this Agreement. Wife acknowledges that she has been offered and/or has received all information that she has sought with respect to the Company, and agrees to the terms of this Agreement without regard to the value of the Company, including the possibility that the fair market value of Husband's interest therein is (or may become) significantly higher than as represented on Schedule A.

- Disclosure of irrevocable trust interests:
  - In some states, beneficial interests in certain irrevocable trusts are property for divorce purposes. Moreover, the definition of "property" for the purpose of divorce is broader than for nearly any other purpose, and is subject to expansion through the common law. Since the attorney drafting a premarital agreement does not know where a divorce will take place, it is best to assume that beneficial interests in irrevocable trusts are property, and therefore to disclose those interests to the extent possible.
  - In general, a party will need to disclose vested rights, such as an interest as a beneficiary in an irrevocable trust or a revocable trust of which the party is the settlor. The kinds of information the party as beneficiary or settlor should disclose (and the other party should request) include:
    - The name of the trust;
    - Whether the trust is revocable or irrevocable;
    - The identity of the trustee and settlor;
    - The nature and value of trust assets;
    - The number and identity of trust beneficiaries (e.g., is the party to the

[40] *See Matson*, *supra* n.19, 730 P.2d at 671.

premarital agreement the sole beneficiary or only one of many?);

    - The current rights of the party, if any, to income and principal;

    - Whether the trustee can distribute income or principal to the party, the standard for the exercise of this power, and whether the trustee has discretion to withhold distributions from the party;

    - The history of income and principal distributions, if any, to the party;

    - What future rights the party has and when these rights come into being, such as upon a parent's death or upon reaching a certain age;

    - Whether the party has a power of appointment and whether it permits the party to exercise it in favor of a spouse; and

    - Whether trust assets will be includible in the gross estate of the party (or anyone else) for federal estate tax purposes.

- Client retention of documents and other materials:

  - In states where there is no bar to discovery related to premarital agreements, the less-wealthy spouse will often challenge the accuracy of disclosures for leverage. If a marriage had a duration of any meaningful length, it can be extremely difficult for the party defending the accuracy of disclosures to find documents supporting the information on disclosures because third parties do not keep them, and memories are not very reliable.

  - The drafting attorney should provide the client with an entire file of the disclosures and copies of supporting documents. This can be done via a DropBox or Sharefile file, a thumb drive, or hard copies.

  - The drafting attorney should include a letter clearly stating that it is the client's responsibility to retain the materials.

- Disclosure of expectancies (e.g., future inheritance) or other possible changes:

  - There is no general requirement to disclose the value of a parent's estate. Consider whether you can and should do so to support the overall enforceability of the marital agreement

  - The beneficiary of a trust may or may not have access to the level of detailed information about assets held in trust necessary to provide full disclosure in the context of negotiating a premarital agreement. The trustees and other family members may have strong objections to disclosing the trust assets. The beneficiary may not even know of the existence of the trust or of its assets in jurisdictions that allow silent trusts.

- To a certain extent the other party could acquire some knowledge of the future in-laws' wealth by visiting their homes and observing their standard of living.

- Where there is a big disparity between what your client has now and what they expect to inherit outside of trust, a general statement in the agreement acknowledging an understanding that the future spouse may inherit substantial assets may be sufficient (or may be all you can deliver). Include a statement such as: "The parties have known one another for some time and are generally familiar with the assets and liabilities of each."

- Although the beneficiary may have certain rights as a beneficiary to an accounting of trust assets, that is far different than having the right to current and immediate disclosure of trust assets.

- It is difficult to predict how a court will view nondisclosure due to lack of availability. It is prudent to err on the side of providing whatever is available and noting that is the case.

• Other kinds of reasonably anticipated changes that are also of a large magnitude, e.g., a bonus, a promotion, a salary increase, a grant of stock options, etc.

  - How speculative? How imminent? Is the client subject to a confidentiality agreement with the employer that would restrict his/her ability to disclose? For example, the benefits will come as a result of the employer's sale of its business or a result of the employer taking the company public. What variables does it depend on and to what extent does your client have a say?

• Disclosure of hard-to-value tangible assets, such as art, antiques, collectibles, jewelry: This should include the value for homeowner's insurance, the amount paid, and the date of acquisition. For works of art, is the artist's work held by any museums? Are the antiques or collectibles important; is there a market for them? Was any of the jewelry ever worn by a member of a royal family or anyone important that would affect the value? How much effort should the client put into tracking down current values, assuming such data are available? Are these items in the aggregate worth a substantial amount? Are they worth a substantial amount relative to the value of the real estate, cash, securities, retirement accounts, and business interests? An appraiser may be necessary to answer these questions.

E. Addressing Privacy Concerns.

- Many parties prefer that their financial data be kept confidential. There may be particular matters, such as business information that is especially sensitive. A party may have concerns about the disclosure of financial information to a new spouse's adult children or other family members, or in a court proceeding between a new spouse and his or her former spouse. The agreement can include a confidentiality provision that prohibits each party from disclosing the other's financial information to a third party, with an exception for his or her lawyer or other professional advisors, or in response to a court order. It can also provide for the right to seek a court order, in the event of future litigation, to protect this information.

- A pre-execution confidentiality agreement protects the client in the event the marriage plans fall through.

- Consider whether it is in the client's interest to have the agreement require that the premarital agreement be submitted to the Court at divorce; another option would be for the parties to enter into a settlement that affirms the premarital agreement and to have only the marital settlement agreement go into the court record.

- The agreement could describe accurately what disclosure was provided and identify the specific documents provided for review, but not attach them to the agreement itself.

- Combine a list of personal assets and liabilities with another form of disclosure for a closely held business.

- Include a confidentiality clause in the agreement.[41]

- Include a dispute resolution clause that provides for arbitration of divorce (if permitted by law) or a private reference judge in certain states.[42]

- If a spouse has beneficial interests in third-party settled trusts, consider having the non-moneyed spouse enter into an agreement directly with the senior generation that created the trust interest or the trustee of the trust. The agreement could include both a confidentiality agreement regarding the trust interests and assets, and an agreement to not pursue any additional disclosure regarding the trust, including assets, values, and other beneficiaries. Consider having the trustee provide small consideration for this agreement.

- Rather than borrowing boilerplate that, on its surface, looks serviceable, consider the following drafting tips for confidentiality clauses in the marital agreement context:

  - Clearly Identify What Information Is Protected. Avoid a laundry list of concepts. Courts may view overly broad definitions as unreasonable, jeopardizing enforcement of the agreement. A realistic assessment of what is intended to be protected is necessary. If it is broad you should be able to justify its breadth.

[41] See *In re Marriage of Burkle* 37 Cal. Rptr. 3d 805 (Cal. Dist. Ct. App. 2006). Parties were persons of "high public interest." Husband filed motion to seal or redact certain pleadings and parties' postmarital agreement. The trial court ordered certain information redacted, but refused to redact information on account balances and postnuptial agreement. The press intervened, arguing the public had presumptive right of access to dissolution proceedings and pleadings and the statute was unconstitutional on its face. Trial court agreed and Court of Appeal affirmed.

[42] *DeLorean v. DeLorean*, 511 A.2d 1257 (N.J. Super. Ct. 1986).

- Clarify Circumstances for Disclosure. The point of a non-disclosure agreement is to avoid *inappropriate* disclosure of confidential information, not *all* disclosure. Again, describe the circumstances under which disclosure is or is not appropriate, including how, when, and to whom disclosure may be made and avoid the laundry list. The agreement should also specify exceptions where disclosure may be legally required.

- Specify the Ongoing Nature of the Obligation. If disclosure after a term of years or the death of a party is to be permitted, this should be specifically stated. To ensure that the confidentiality obligation endures beyond the end of marriage, you should explicitly state that the spouse's non-disclosure obligation survives the end of employment.

- Provide Adequate Consideration. For a non-disclosure agreement to be enforceable, it has to be supported by adequate consideration. In the marital agreement context, the agreement to marry is sufficient context. If, however, the non-disclosure agreement is being entered into after the marital relationship has begun, depending on the state, additional consideration may be needed to support the agreement.

- Comply with Applicable State and Federal Laws. The enforceability of confidentiality agreements may be limited by state and federal laws.

o The following is a broad form of confidentiality and nondisparagement clause that could be adapted to a marital agreement to allay concerns regarding disclosed assets:

> Confidentiality. Each party must preserve the confidentiality of this Agreement. It shall not be disclosed except as required by law or if necessary to enforce its terms. If filed with the Court for enforcement purposes, the parties shall use best efforts to file it under seal. Each party must refrain from publicly disclosing this Agreement or the contents thereof. Neither party shall give a copy of this Agreement to any person other than legal, accounting, financial, or professional advisors of a party and only to the extent necessary to implement or enforce its terms. Whenever possible, only an excerpt of this Agreement should be provided to the professional. The professional must be advised that the document or excerpt is confidential and that it must be used only in connection with providing professional services and not publicly disclosed. Before disclosing the terms of this Agreement or any written portion of this Agreement to any such professional, the party must take reasonable precautions, as determined in their sole discretion, to require the professional to maintain the confidentiality of this Agreement.
>
> Unless with the prior written consent of the other party, the parties

> agree that at no point before, during, or after their marriage (including in the event their marriage is dissolved) shall either party share or otherwise disseminate in any form, including without limitation any type of social media (such as Facebook, LinkedIn, YouTube, Flickr, Twitter, Snapchat, blogs, etc.) the following information: (i) any information, including without limitation photography or videos, featuring or including the other party that may have an adverse material impact on that party's career, character, or reputation; (ii) any information, including general summaries, related to the existence of, terms of, or financial information contained in, this Agreement; or (iii) any information related to the financial arrangements between the parties or the financial situation or net worth of the other party.
>
> Notwithstanding the foregoing, each Party may discuss the terms of the Agreement with (but not provide a copy of the Agreement to) close family members or friends with whom he or she feels significant trust and is reasonably satisfied will not further disclose the information.
>
> The parties understand and agree this paragraph is a material provision and that any breach of this paragraph shall be a material breach of this Agreement, and that each party would be irreparably harmed by violation of this provision.

F. Fraud in the Inducement.

Fraudulent disclosure alone is not always sufficient to negate a marital agreement. To succeed on such a claim it is necessary to show that a party was fraudulently induced to enter into the agreement that the other party is seeking to enforce, based on a knowing misrepresentation of material facts or failure to disclose material facts by the enforcing party.

To succeed on a claim of fraudulent inducement with respect to a marital agreement, the party challenging the agreement must allege and establish the basic elements of a fraud claim. To support a claim for fraud, a plaintiff must show proof of all nine essential elements of the claim: (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of the falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage.[43] Each element must be proven by clear, cogent, and convincing evidence.

A claim of fraud fails in the absence of any one of the nine elements.[44] Moreover, reliance on a fraudulent misrepresentation must be reasonable under the circumstances, which is a question of

[43] *Elcon Constr., Inc. v. E. Wash. Univ*., 273 P.3d 965, 970 (Wash. 2012).

[44] *Frontier Bank v. Bingo lnvs., LLC*, 361 P.3d 230, 238 (Wash. Ct. App. 2015).

fact.[45] "When the agreement is executed as a result of marital discord, incident to reconciliation, or to resolve a financial disagreement, a court will generally find that each party acted independently, or was obligated to protect his or her own interests, or was not entitled to rely on a special confidence placed in the other."[46]

In *Northington v. Northington*,[47] the Alabama Court of Appeals upheld the trial court's decision to enforce a postnuptial agreement that had been entered into following the husband's discovery of his wife's infidelity and in consideration of the husband's agreement not to file for divorce. The wife contended that she had been fraudulently induced to sign the postnuptial agreement due in part to the fact that the husband had not disclosed the value of the real estate listed in the agreement but had merely identified the real estate, cost basis, and debt. The Court rejected that contention in part because the wife had been married to her husband for over 20 years at the time of the postnuptial agreement and had the time, resources, and advice of counsel needed to obtain the information necessary to make an educated decision to enter into the agreement.

The fact of a lie cannot be used to establish materiality when the underlying misrepresentation is itself not material; to reach that conclusion, the fact of the lie bootstraps materiality and subverts the intent of the required elements. Hence, the fact of a party's misrepresentation itself is irrelevant to the validity of the agreement.

IV. <u>Pre-Divorce Planning.</u>

When estate planning counsel represents both spouses, ethical obligations typically preclude unilateral assistance to one of the parties with regard to pre-divorce planning. However, an individual considering divorce is entitled to seek independent estate planning counsel to organize his or her estate.

A. General Considerations

Once it becomes clear that an individual is heading toward divorce, he or she should have his or her estate plan, asset titling, and beneficiary designations reviewed. It may be appropriate to remove the spouse as fiduciary and/or modify other provisions in an existing plan that grant the spouse the ability to remove and appoint fiduciaries or exercise powers of appointment.

In addition, for an irrevocable trust instrument that provides the spouses to be deemed automatically deceased upon the filing of a divorce action or separation, the options and desired outcomes for whether that should be changed in some way (e.g., via the exercise of powers of appointment or decanting) should be considered before filing the action.

A party should proceed with caution in taking unilateral steps before a divorce action is filed. A spouse should avoid an obvious prohibition such as a fraudulent conveyance. While married, in

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[45] *Williams v. Joslin*, 399 P.2d 308, 309 (Wash. 1965).

[46] Linda J. Ravdin, *Postmarital Agreements: Validity and Enforceability*, 52 Fam. L. Q. 245 (Summer 2018).

[47] 257 So. 3d 326 (Ala. Civ. App. 2017).

many states, each spouse is considered a fiduciary to the other and as such would be subject to fiduciary duties.

Some states have automatic temporary restraining orders that are imposed on filing a divorce action and serving a divorce action.[48] The restrictions may restrain "both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties and their child or children for whom support may be ordered; both parties from creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of the court."[49]

In California, a party to a divorce can do the following: (1) Creation, modification, or revocation of a will; (2) revocation of a nonprobate transfer, including a revocable trust, pursuant to the instrument, provided that notice of the change is filed and served on the other party before the change takes effect; (3) elimination of a right of survivorship to property, provided that notice of the change is filed and served on the other party before the change takes effect; (4) creation of an unfunded revocable or irrevocable trust; and (5) execution and filing of a disclaimer pursuant to Part 8 (commencing with Section 260) of Division 2 of the Probate Code. These sections are important for estate planners. The client can create a trust, but cannot fund it. They can only revoke a trust with notice. They can draft a new will, but it will likely be temporary. Perhaps they can draft a pour over will to fund the new trust. Other states allow for, or do not prohibit, many kinds of planning during a divorce. Additionally, planners should keep in mind that there is a difference between planning that may alter a spouse's statutory property interests, and planning that does not modify rights on death, or that designates a spouse as a presumptive fiduciary, such as medical powers of attorney.

It is also critical to understand whether the relevant state has a revocation upon divorce statute and how it is applied. There are approximately two dozen states that have revocation of probate and nonprobate assets upon divorce statutes. A majority of the statutes are based on §2-804 of the Uniform Probate Code ("UPC"). The most notable section of the revocation statutes based on UPC §2-804 is that if the revocation statute is pre-empted by federal law, the former spouse who remains named as the beneficiary or survivor "is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted."[50]

B. Trusts.

Challenging legal issues arise when spouses are involved in a divorce and one is also the beneficiary of an irrevocable trust. As a preliminary matter, the rules concerning the treatment of

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[48] E.g., Cal. Fam. Code §2040.

[49] *Id.* §2040(a)(3)-(4).

[50] UPC §2-804(h)(2).

trusts when dividing up marital property are substantially different than those that apply in the division for support purposes. The resolution of property division and support claims are largely based on state law, public policy, and the terms of the trust. All trusts should be reviewed to determine what powers exist, by whom they are held, and whether changes are possible and appropriate, not only as to fiduciary designations but also as to dispositive provisions. There is generally no revocation on divorce of an ex-spouse's interest in an irrevocable trust. Does the trust dictate what occurs if the parties divorce or legally separate? What powers does a spouse have as a fiduciary? Are the dispositive provisions in favor of the spouse mandatory or discretionary? How do the trusts benefit the children? How might the trusts be considered in any future support obligations? Are there any letters written by the trustee, giving insight as to the trustee's intent with respect to future distributions? While spendthrift trusts are generally beyond the claims of creditors, courts often recognize the expenses of supporting a beneficiary to include the legal obligation to support a spouse and children.

If changes may be made, what changes might be recommended: removal and replacement of trustees, exercise of a power of appointment, conversion to a unitrust, modification, decanting, or severing into multiple trusts?

A divorcing spouse's enforceable right to the assets in the trust makes it much more likely that the assets will be part of the marital estate. If an interest in an asset is determined to be a mere expectancy, on the other hand, those assets are much less likely to be included in the marital estate of the divorcing parties. Fully discretionary trusts offer the greatest level of protection to a beneficiary; the beneficiary typically has no present, enforceable interest in the trust property, cannot compel distributions, and must rely on the trustee's exercise of discretion. Community property states will not treat property in trusts as community property if they were inherited or gifted, although some community property states treat the interest and dividends as community property.

An irrevocable trust is not always set in stone. Many of these trusts (even domestic asset protective trusts ("DAPTs)) are drafted to be flexible. If sufficiently flexible, or if it can be modified, the trust may become a useful vehicle for carrying out the terms of the premarital agreement. Any trust should be reviewed for the following flexible provisions:

- Anyone holds a power—either under the trust instrument or pursuant to applicable state law—to "decant" the trust (i.e., distribute its assets into another trust with different terms);
- the trust can be modified under state law by consent of certain parties or upon petition to an appropriate court;
- the trust's situs can be moved to a jurisdiction that permits decanting or modification by consent;
- anyone has the power to add beneficiaries;
- anyone has a power of appointment;
- anyone has the power to remove and replace an uncooperative trustee;

- anyone has the power to substitute trust assets for assets of equivalent value (a "swap" power); and
- a trust-owned life insurance policy can be sold from the existing trust to a new life insurance trust with different terms.

1. Trusts Established During the Marriage by the Married Couple.

(a) Insurance Trusts.

Insurance trusts are commonly established by married couples. Since dissolution settlements commonly include insurance requirements, existing trusts and coverage should be reviewed to determine if still feasible to use, or adapt, for this purpose, and whether modification of the insurance coverage may result in reduced premiums. If the flexibility is inadequate, new insurance, and perhaps new trusts, may have to be considered.

Survivorship insurance will often become unnecessary post-divorce as a result of the division of the estate. If the trust provides for sufficient flexibility, the divorcing couple may wish to keep a policy in force to benefit the children or other designated heirs. If this is done, then the PSA should address payment of future premiums. Even if the policy is converted into a paid-up policy, the possibility of additional premium payments should be addressed (e.g., if the policy underperforms the projections).

(b) Qualified Personal Residence Trust.

A qualified personal residence trust ("QPRT") is often used to leverage a gift of a valuable primary residence or vacation home to the next generation. Divorce is rarely considered when drafting these trusts. In the event of divorce several issues arise that will have to be addressed; the threshold issue will be whether it is economically feasible to retain the home.

Because the QPRT is an irrevocable trust, it cannot easily be changed. Court approval might be available in a matrimonial context, especially if the home is the primary asset and settlement and financial protection of minor children is not possible without unwinding the trust. If an independent buyer is not feasible or desired (because one spouse will retain the house), then it can perhaps be sold to the ex-spouse for a note. The note might then be distributed out of the QPRT as part of the PSA. This approach, while not intended or perhaps recommended, may not be a red flag to the IRS because the taxpayers will have used the applicable exclusion on funding without any benefit if the QPRT is terminated. The ex-spouses may prefer the loss of the applicable exclusion given their new financial situation resulting from the divorce, the desire to conclude a property settlement, the reduction in their taxable estates as a result of the divorce, and the currently high exclusion. The only potential claimant in the early termination of a QPRT would be the children. If adults, they may be persuaded to consent to the termination, or if minors, a court might confirm their parents consenting for them. While the IRS might argue that the children made a gift of their remainder interest in the QPRT to the parents, this may be a cost worth incurring, if necessary, to complete the property settlement.

If it is necessary to sell the residence as part of the dissolution settlement, it can be sold by the QPRT. Since a QPRT is structured for federal income tax purposes as a grantor trust, the $250,000 per person ($500,000 for a couple filing a joint return) home sale gain exclusion may be available.[51]

Another option for a house held by two QPRTs, one for each ex-spouse, would be for them to jointly sell the home pursuant to terms set forth in the PSA, exclude gain to the extent feasible, and then use the proceeds in their respective QPRTs towards the purchase of new separate residences.

If the net proceeds to each QPRT are insufficient to purchase a new home, each spouse could own part of his or her respective new residence as a tenant in common with his or her QPRT. Another alternative would be for an ex-spouse to contribute additional funds to his or her QPRT, which would be treated as an additional gift to the trust. The QPRT would then use the combination of the new funds and the sale proceeds to purchase a new home.

If the sale proceeds exceed the amount reinvested, or the ex-spouse chooses not to reinvest the proceeds in a new residence, those proceeds would be paid as a periodic annuity to the ex-spouse beneficiary for the remainder of the QPRT term under the qualified annuity trust provisions of the QPRT document. When both ex-spouses are equal beneficiaries of their respective trusts, each having previously owned a one-half interest in the marital residence, then each ex-spouse would receive an annuity payment for the remaining term of the trust, which should be factored into the calculations of maintenance and support.

(c) Trusts for Children.

Families frequently establish trusts to benefit children and grandchildren. These trusts typically are intended (whether expressly stated or not) to provide for educational benefits for the children. In the event of a later divorce, these trusts can be used to meet education and perhaps other financial needs of the children (depending on the trust agreement, the terms of the settlement agreement, and the financial needs of the post-divorce family). When negotiating the terms of such arrangements the provisions of the trust will have to be analyzed: Are distributions mandatory or discretionary? By whom and to what extent? Who are the beneficiaries—solely the children of the marriage or a "pot" trust including other beneficiaries as well? These terms may be argued by either ex-spouse as supporting or detracting from the right to count these funds in the settlement or to mandate their use. The courts are likely to consider these funds as available to meet the needs of a minor child.

(d) Inter-Vivos Qualified Terminable Interest Property ("QTIP") Trusts.

When one spouse has substantially greater assets, an inter-vivos QTIP trust may be established to ensure that if the "poorer" spouse predeceases the wealthier spouse, sufficient assets will be available to make use of that spouse's applicable exclusion amount. In the event of a later divorce, a number of options may be considered. If feasible under the QTIP agreement some or all of the corpus may be distributed to the spouse/beneficiary as part of a PSA. More likely, the QTIP trust will be continued and treated as cash flow to the ex-spouse/beneficiary factored into the property settlement. One party may seek modification of the trust instrument (resignation of an unfavorable

[51] IRC §121.

trustee, conversion into a total return trust, etc.) in an attempt to preserve the corpus for the remainder beneficiaries.

A court may consider the anticipated mandatory income distributions from a QTIP as income available to the spouse/beneficiary for purposes of meeting living expenses and maintenance. The investment flexibility, asset composition, and other provisions of the QTIP trust should be evaluated by counsel for the ex-spouse beneficiary to identify discretion that could be used to adversely impact distributions. For example, if income has historically been distributed monthly, but the QTIP trust agreement permits annual or more frequent distributions, can the trustee's discretion be controlled to prevent the trustee from delaying distributions post-divorce as a punitive measure?

2. Self-Funded Trusts Established During the Marriage by One or Both Spouses.

It is not uncommon for one spouse to establish a trust for himself or herself during the marriage. This might be done for a host of reasons by one or even both spouses. The following is a discussion concerning the most common self-settled trusts.

(a) Revocable Trusts.

Revocable trusts are frequently established by both spouses (in some jurisdictions as a single trust) to facilitate probate avoidance, management of assets in the event of disability, and other objectives. Since the grantor spouse has an unfettered right to revoke or modify the trust, there should be no particular impact of a revocable trust on a future divorce. However, if a spouse has inherited assets or received gifts of assets that are separate property, a common technique is to isolate these assets in a revocable living trust for identification purposes, to avoid commingling and preserve the separate property character.

(b) Spousal Lifetime Access Trust ("SLAT").

A SLAT is an inter vivos irrevocable trust created for the benefit of a grantor's spouse. The trust is not intended to qualify for the gift or estate tax marital deduction (which would result in inclusion of the trust assets in the spouse's estate); rather, the SLAT is designed to remove the trust assets from both the grantor and grantor spouse's estate.

At the drafting stage, spousal trust rights in the event of a divorce should be but are not often addressed. Existing SLATs should be reviewed to understand the impact of divorce set forth in the document, and taking into consideration spousal rights in pre- and postnuptial agreements.

Because a spouse is a beneficiary, a SLAT is taxed as a grantor trust;[52] the grantor must recognize and pay income tax on the trust's income as part of his or her personal income. In addition, the so-called "spousal unity rule" provides that the grantor is considered to hold any power or interest held by any individual receiving trust distributions who *was* the grantor's spouse at the time of the

[52] *Id.* §677(a)(1).

creation of the power or interest, even if later divorced.[53] As a result, even after divorce, distributions to a former spouse will continue to trigger grantor trust status as to the grantor.

The SLAT agreement may directly address divorce by including a provision that terminates any spousal trust rights upon legal separation or divorce. It could define the spouse as the individual then married to the grantor rather than naming a specific spouse, to allow for distributions to subsequent spouses. It could also require that, in the event of divorce, an adverse trustee must consent to distributions to the former spouse, eliminating grantor trust status under IRC §677 (but care still needs to be taken that the trust is not a grantor trust under other sections of the Code).Not all SLATs contain these provisions. In such cases, the former spouse may retain spousal trust rights post-divorce, unless addressed in a subsequent agreement or PSA.

To allow the grantor to avoid paying income tax, the trust could be distributed to the beneficiary with a corresponding distribution to the grantor spouse, eliminating later income tax consequences to the grantor. Or the PSA could require the beneficiary of the SLAT to reimburse the grantor for income tax paid. For additional drafting suggestions see George Karibanjian, Richard Franklin & Lester Law, *Alimony, Prenuptial Agreements, and Trusts Under the 2017 Tax Act*, Bloomberg Estates, Gifts and Trusts J., Number 3 (May 10, 2018); Justin Miller, *Reform Could Make Divorce a Lot More Taxing*, ABA Family Law Quarterly (Summer 2018).

(c) The Self-Funded Domestic Asset Protection Trust ("DAPT").

The use of a self-funded DAPT is becoming increasingly common for those concerned about asset protection. Often in the case of an impending divorce, a parent or spouse may attempt to protect assets by conveying them to a DAPT. Either by statute or case law, however, the general rule is that a DAPT established by the named beneficiary remains subject to the claims for support and alimony. If a transfer is made of marital assets to a DAPT, consideration of how a court would view the transfer during a later divorce is critical. If both spouses are beneficiaries, then whether and how the trust can be modified or operated in the future will have to be addressed. If the DAPT is structured with an institutional trustee or distribution committee, perhaps the PSA can include an instruction letter to the trustee or distribution committee concerning future distributions. While unlikely to be binding on an independent trustee governed by a previously established irrevocable trust agreement, the trustee may be willing to give considerable weight to such a directive in making any future distribution decisions. If only one spouse is a beneficiary, perhaps such a distribution instruction could be given addressing distributions to children of the marriage. However, an irrevocable transfer to a DAPT, occurring before any divorce proceeding, may be beyond the reach of a court, especially one located in another jurisdiction from that in which the trust is established. In this situation, the non-beneficiary ex-spouse may persuade the Court to deem the beneficiary ex-spouse to receive certain distributions from the trust in determining a property settlement.

Traditionally, states have not allowed individuals to fund spendthrift trusts to benefit themselves. That is, the grantor of a trust was not allowed to set up a trust against which his creditors (including a divorcing spouse) could not make claim. As a result, many clients have created domestic, and

[53] *Id.* §672€(1)(A).

even overseas, asset protection trusts to restrict the claims of future creditors. A number of states, including Alaska, Delaware, Nevada, South Dakota and Wyoming have changed their spendthrift trust rules to allow limited protection for a self-funded irrevocable trust.

While a comparison of the state and foreign trust rules is beyond the scope of this outline, such trusts may be created in lieu of or as part of a premarital agreement. Each year, attorney Steven J. Oshins revises his "Domestic Asset Protection Trust State Rankings Chart," available at http://www.leimbergservices.com.[54]

C. Modification or Unwinding of Prior Trust Planning.

Most trusts used in estate planning are irrevocable, so change is limited. The general rule is that a trust, once established, ordinarily cannot be altered, amended, revoked, or terminated in mid-course except pursuant to its own provisions.[55] Nevertheless, a trust may be rescinded or reformed if there was fraud, duress, undue influence, or mistake when the trust was set up. For example, if one spouse transferred a house to an irrevocable trust, making a gift of jointly owned property, without the other spouse's knowledge, perhaps it can be argued that the trust was fraudulently formed and therefore void. Under both the Uniform Voidable Transactions Act[56] and its predecessor the Unform Fraudulent Transfer Act,[57] a transfer can be voided if it was made with actual intent to hinder, delay, or defraud any creditor of the transferor. A spouse can be a creditor.

Trusts may be drafted to already include provisions allowing for modification, which should be considered when negotiating a divorce settlement.

When modifying or unwinding prior trusts, the trustee must keep in mind his or her fiduciary duties to the other trust beneficiaries. While trustees and estate planning counsel are very familiar with working within the confines of this broader focus, divorce attorneys, have only one person's interest in mind – their client's. The court in a divorce case only has two people in front of him or her, and therefore a trustee's fiduciary duty to other beneficiaries can get "lost" in the proceeding unless kept in the forefront by the trustee.

1. Ex-Spouse Removal Clauses.

If the trust agreement contains specific terms relating to a spouse, such as a requirement that the spouse and the grantor be married (or married to each other at the time of the grantor's death) for the spouse to benefit, divorce may be grounds for termination of the agreement.

An ex-spouse removal clause might turn out to be disadvantageous in the event of divorce. For example, if a spouse is removed as a beneficiary of an insurance trust, and the PSA requires insurance to be maintained for his or her benefit, the removal clause could require the purchase of

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[54] *See* Leimberg Information Services, Inc., *11th Annual Domestic Asset Protection State Rankings Chart*, Asset Protection Newsletter No. 402 (Apr. 13, 2020).

[55] William F. Fratcher, 4 *Scott on Trusts* §330 (1986).

[56] Uniform Voidable Transactions Act, §4(a)(1).

[57] Uniform Fraudulent Transfer Act, §4(a)(1).

additional insurance.

2. Use Modification Provisions in Existing Trusts to Meet Divorce Requirements.

It is increasingly common to incorporate provisions to allow drafting flexibility to address changed circumstances in the trust agreement. If a trust provides for discretion by the trustee (or other fiduciary) to modify provisions of a trust, this power may be used to modify the trust to accommodate the post-divorce family needs, to meet provisions of a PSA, and to minimize post-divorce friction. For example, individual trustees could be replaced or succeeded by other individuals or an institutional trustee.

The trust agreement may contain a provision allowing the trustee to terminate the arrangement under certain circumstances, which may include divorce. If termination is not feasible, it may be possible to negotiate a release of certain rights under the trust, such as the right to serve as trustee.

Termination might be accomplished if a trust protector has the authority to terminate without restriction, or only in specified circumstances (such as the purpose of the trust having been satisfied).

If a trustee has been given the power to make unlimited principal distributions, that power may be exercised to effectively terminate the trust. Alternatively there may be the ability to take advantage of an express power to terminate in the event that the trust is uneconomical to operate. These provisions may be a double-edged sword, however. In the event of a divorce, a spouse may use these provisions to encourage a court to order the termination of the trust, or to treat trust assets as fully reachable by the beneficiary/ex-spouse payee.

It may also be possible under the applicable state's principal and income act to convert an income-only trust into a total return trust that makes an annuity payment based on a specified percentage of principal. This approach might provide greater certainty to the ex-spouse payee and eliminate discretion that the trustees might have over investments, which could be used to reduce distributions to the ex-spouse payee/beneficiary.

3. Trust Decanting.

Decanting allows the trustee of an otherwise irrevocable trust with broad discretionary powers to transfer the trust assets into a new trust with different terms. Decanting can be used to deal with changed circumstances, to fix drafting errors, to optimize tax treatment, or facilitate trust administration. But it can also be used to move trust property presumed to be subject to distribution in a divorce beyond the reach of the divorce court's jurisdiction.

Uses of decanting include limiting or eliminating a beneficiary's rights; removing and replacing a trustee; and changing investment or distribution policies.

Ferri v. Powell-Ferri is a recent example of the power of decanting in the divorce context. This case involved a Connecticut divorce and a trust governed by Massachusetts law, where decanting was used to successfully move assets out of reach of a divorcing wife.[58] However, the Connecticut Supreme Court considered the trust assets to be subject to its equitable powers for the purpose of setting maintenance.[59]

Note that about half the states provide statutory authority to decant.[60] Most states require that notice be given to beneficiaries. In *Ferri*, the decanting occurred without the husband's permission, knowledge, or consent, which would not be permitted in many of the states that otherwise permit decanting.

Rather than rely on state law default decanting provisions, it is preferable to include decanting provisions in a trust instrument to maximize a trustee's flexibility. If drafting a new trust, a broad decanting power might provide, in part, as follows, depending on the laws of the jurisdiction, the limits of public policy in which the trust is created, and the intent of the grantor:

> **Trustee's Power to Decant**. Grantor specifically authorizes and empowers the Independent Trustee, in his or her sole discretion, to distribute any or all of the principal and accumulated but undistributed income of any trust created under this Agreement, at any time and without the knowledge or consent of the beneficiary, in further trust for the benefit of the beneficiary and in the beneficiary's best interest, as may be permitted under the laws of the jurisdiction governing the administration of this trust at such time, and regardless of whether such laws existed at the time of execution of this trust.
>
> In exercising the powers to distribute principal hereunder, the Independent Trustee may distribute outright to, or to an existing or new trust for the benefit of, any one or more of the class among which the Independent Trustee may distribute outright. If the Independent Trustee creates a new trust, the Independent Trustee may, subject to the provisions of Paragraphs *[insert reference to provisions limiting who may serve as trustee, such as prohibitions against naming the settlor as trustee]*, select as the trustee or trustees of that trust any person or persons (including a trustee of the trust from which the property is distributed); the Independent Trustee may create new powers of appointment in the trustee or trustees or in any member of the class for whose benefit the trust may be created, provided that the exercise of such powers, if granted to a trustee or trustees, will benefit only a member or members of such class, and such powers, if granted to a distributee, may benefit any person specified in the grant thereof; the Independent Trustee may impose lawful spendthrift provisions; the Independent Trustee may create life interests or other limited interests in a distributee with future interests, vested or contingent, in favor of other distributees whether or not in being when the power is exercised; and,

[58] 72 N.E.3d 541 (Mass. 2017). For a detailed analysis of decanting in the context of divorce and the *Ferri* cases, see Jonathan Haskell & Marc A. Chorney, *Decanting in Connection with Divorce*, Colo. Lawyer (Oct. 1, 2019), https://ssrn.com/abstract=3490793.

[59] *Ferri v. Powell-Ferri*, 165 A.3d 1137 (Conn. 2017).

[60] *See* Susan T. Bart, *Summaries of State Decanting Statutes* (updated Jan. 1, 2020), https://www.actec.org/assets/1/6/Bart-State-Decanting-Statutes.pdf .

> generally, in the case of each power, the Independent Trustee may distribute in any manner the Independent Trustee shall determine for the benefit of any person or persons within the class for whose benefit the Independent Trustee is authorized by this instrument to distribute property. It is Grantor's desire, but not direction, that in exercising any power, such person be mindful of any contribution to the invaded trust qualified for the annual exclusion under IRC §2503(b), the marital deduction under IRC §2056(a) or §2523(a), or the charitable deduction under IRC §170(a), §642(c), §2055(a) or §2522(a), as a direct skip whether or not a nontaxable gift under IRC §2642(c), or qualified for any other specific tax benefit that would be lost by the existence of the authorized Trustee's authority under this paragraph for income, gift, estate, or generation-skipping tax purposes under the Code.

The authority to decant should make clear the extent of any permissible changes, such as which beneficiaries can be affected by decanting and whether powers of appointment can be granted or withdrawn. It should also describe prohibited changes, such as any change that would cause loss of the marital deduction or affect the exempt status of a GST trust. Procedures for exercising the power to decant, along with who actually has the power to decant, should also be established. For example, do only independent fiduciaries have the power to decant?

It is important to keep in mind the GST consequences of decanting. A trust created before September 26, 1985 is "grandfathered" at the time of its execution, and is thus exempt from GST tax. This generally remains true even if a beneficiary holds and exercises a *special* power of appointment or a power to decant, so long as the applicable perpetuities period was not extended and the original trust contained the power to decant.[61]

4. Other Ways to Modify Trust Distributions: Power to Adjust, and Unitrust Regimes.

A trustee must invest assets pursuant to the so-called prudent person rule.[62] Under that rule, a trustee is required to invest for "total return." That is, a trustee must invest in a way that benefits both income and principal beneficiaries. However, when beneficial interests clash, as they typically do in a divorce scenario, the source of return becomes critical, and the tension between investing for income and investing for growth can become more pronounced. More specifically, how does a trustee invest without considering whether return is produced from income or from capital appreciation when the income beneficiary (perhaps a second spouse) is pressuring the trustee for more income and the remainder persons (perhaps children from a prior marriage) are pressuring the trustee to withhold income from the spouse? Fortunately, there are two regimes that provide trustees with the means to implement the mandate of total return investing—the power to

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[61] Treas. Reg. §26.2601-1(b)(4)(i)(A) provides that a distribution of trust principal from a trust that was irrevocable on September 25, 1985 to a new trust will not cause loss of exempt status if the terms of the governing instrument or applicable state law at the time the trust became irrevocable authorizes the decanting to the new trust without the consent or approval of any beneficiary or court, and the terms of the governing instrument of the new trust will not extend the time for vesting beyond the original perpetuities period.

[62] Restatement (Third) of Trusts §227 (Am. L. Inst. 1992).

adjust, and unitrust regimes.

Under a power to adjust regime, the trustee is permitted to adjust between income and principal to be fair and reasonable to all beneficiaries.[63] In other words, even if a principal distribution is not permitted under a trust document or is permissible pursuant only to a limited standard (like health or education), the trustee can redefine a portion of the principal as income and pay that to the income beneficiary.

Under the unitrust regime, the trustee can convert an income beneficiary's interest into a unitrust payout of a fixed percentage of the trust's principal. Most states allow a trustee to determine the appropriate unitrust payout within a band of three to five percent. In New York, the unitrust payment is fixed at four percent. Washington's statute, RCW 11.104A.040, provides for a similar payout.

These two distribution methods are intended to ease the tension between competing income and remainder beneficiaries and align interests, so that all beneficiaries benefit from the trust's growth, whether from principal or income.

5. Special Considerations for SLATs.

One popular planning tool for an environment where a steep reduction in the lifetime gift tax exemption amount is expected is the creation and funding of SLATs. Some practitioners may even prepare and fund two such trusts, one with each spouse as a beneficiary, and have such SLATs essentially be used as division of interests in property if there is a divorce. Practitioners involved in such planning should take care to: a) prepare a marital agreement in conjunction with this planning in order to clearly delineate how the interests in the SLATs should be taken into consideration if there is a divorce; b) fund each SLAT only with interests that are reasonably in a SLAT with an adverse party (e.g., interests in an LLC that one spouse actively operates should not be an asset of her ex-husband's trust); c) fully address the fact that the grantor of a grantor trust SLAT must pay that SLAT's income tax even if the parties are divorced, and perhaps set forth work-arounds in the event of a divorce.[64]

V. <u>Planning for Divorcing Heirs.</u>

Parents and other relatives may want to modify their estate planning documents and create flexibility in light of a pending divorce, following a dissolution, or simply to protect the family's assets from a divorcing spouse in general.

In planning for a descendant's divorce, it is best to maintain flexibility. For example, a client who finds her son at fault for divorcing a beloved daughter-in-law raising the client's grandchildren likely would not want that divorced spouse treated as "deceased" for all purposes under the

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[63] *See, e.g.*, RCW §11.104A.020.

[64] 26 U.S.C. §§672 and 677; see also, Kanyuk, Roots and Wings – Structuring Trusts to Give Beneficiaries a Chance at Success, Despite Inheriting Money – Taxation of Grantor Trusts after Divorce (May 11, 2021), https://www.cftexas.org/cft/files/e8/e8e9d79d-0aa2-4e9a-9a23-a1bdf3cd154b.pdf.

instrument. It is also best to include clear provisions regarding the settlor's intent regarding distributions to a married beneficiary and/or his or her spouse. One of the hallmarks of the common law of trusts and the Uniform Trust Code is that the settlor's intent is paramount. If a settlor's intent includes that a spouse receive no direct or indirect benefit from the trust, then the settlor should clearly specify as such. Trial courts can then understand trustee actions that are taken in relation to a divorce as a trustee acting at the direction of the settlor rather than at the direction of the beneficiary spouse. In courts of equity, such clear language can make an enormous difference in how trustee actions are understood.

Often times, the senior generation planning for divorcing heirs will ask the estate planner to draft a prenuptial or postnuptial agreement for the heir. Estate planners should keep certain ethics rules in mind and should act and advise accordingly. The attorney should consider whether there would be any conflict of interest in representing the heir and the seniors (ABA Model Rule 1.7), whether either party will request that you keep information confidential from the other party (ABA Model Rule 1.6), and whether you will be able to freely communicate with each party enough to ensure he or she can make informed decisions (ABA Model Rule 1.4). An engagement agreement with an heir should clearly specify what the heir should expect as to client confidences, and under what conditions the attorney would have to terminate representation. For instance, if an attorney represents the parents of a son who is about to get married, and the attorney has been asked to draft a premarital agreement for the son, the son may disclose that once the prenuptial agreement is signed and the parties are married, he and his spouse plan to "rip up" the prenuptial agreement. On the other hand, the parents may tell the attorney not to reveal to the son their estate planning or the magnitude of their wealth. The attorney must be vigilant in ensuring that he or she meets ethical duties to all clients and is able to communicate with all clients sufficiently to ensure all clients are able to act with informed consent.

The following are a few concepts to consider:

A. Limit Control.

Generally, it is a good planning strategy to make sure that the descendant has the flexibility not to be the sole trustee of the trust during the time of divorce. Having a corporate or other independent as trustee (or at least as co-trustee) can bolster the descendant/beneficiary's arguments during divorce that he or she cannot merely use the trust assets. There also may be other beneficiaries, such as more remote descendants, whose interests need to be taken into account before distributions can be made.

Parents should consider how much control a non-family spouse may have over family assets. For example, organizational documents for a family business should contemplate the possibility of divorce and provide a mechanism to allow other family members or the business to buy out a non-family member spouse. The terms should be reasonable and include the ability to spread out payments to minimize the impact on the business's cash flow. Parents may also consider giving interests in a family business in trust rather than outright.

B. Add Beneficiaries.

Additional discretionary beneficiaries, such as descendants, could also be added to the trust. If a trust has discretionary beneficiaries other than the ex-spouse, the trustee would be able to make distributions to those beneficiaries to the exclusion of the ex-spouse. The trust would continue to be taxed as a grantor trust, even if no distributions are made to the ex-spouse.

C. Spendthrift Trusts.

A spendthrift trust is a trust in which the beneficiary has no right to demand distributions or the ability to assign or transfer his or her interest in the trust. Instead, one or more trustees are given broad discretionary powers to make or withhold distributions. Many different types of trusts can be drafted to include spendthrift provisions. The broad discretion given to the trustee(s) causes a beneficiary to have no vested rights to be claimed by a spouse or other creditor. As a result, spouses and other creditors of a beneficiary are unable to demand payment of income or principal to satisfy the obligations of the beneficiary.

Several states restrict or prohibit spendthrift trusts. Where allowed, the permissible terms vary widely from state to state. While a spendthrift trust may prohibit claims made by a divorcing spouse against trust assets, it is likely that a divorcing spouse may be able to reach trust assets by attachment of present or future distributions made to the beneficiary-spouse.

In most states, keeping property for descendants in lifetime spendthrift trusts can be an effective way to protect those assets from future creditors, including divorcing spouses.[65] The Massachusetts Supreme Court in the recent *Pfannenstiehl* case reinforced the validity of such protections by holding that a spendthrift trust is not included as a marital asset in a divorce.[66]

Notwithstanding its apparent limitations, the general rule in many states that have adopted the Restatement (Third) of Trusts is that a spendthrift trust does not provide protection against several types of claims, including child support.[67] Similarly, the Uniform Trust Code provides that a spendthrift clause does not protect against certain exception creditors, including a spouse, children, or a former spouse who has a judgment against the trust beneficiary for support or maintenance.[68] Similarly, a number of states treat spouses as exception creditors who can receive alimony even from spendthrift trusts.

D. Requiring a Premarital Agreement.

Depending on state law, certain interests in third-party created trusts can be deemed marital

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[65] *See generally* George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees*, §222 (2d ed. 1980).

[66] *Pfannenstiehl v. Pfannenstiehl*, 55 N.E.3d 933(Mass. 2016) (Supreme Judicial Court of Massachusetts overturned lower court decision that assets in a discretionary spendthrift trust created by a third party were reachable as marital assets).

[67] Restatement (Third) of Trusts §59.

[68] Uniform Trust Code §503(b).

property or otherwise subject to division upon divorce.[69] Accordingly, it can be useful to include provisions that incentivize trust beneficiaries to have a premarital agreement to expressly protect all such trusts and their growth as separate property. The following is a form of trust provisions expressing this requirement:

<u>Premarital/Postmarital Requirements</u>.

> Notwithstanding anything to the contrary contained herein, Trustee shall not make any income or principal distribution to a Primary Beneficiary who is legally married or engaged to be married, unless that beneficiary has a valid, binding marital agreement, specifically segregating all inheritances from this Trust as sole and separate property of that beneficiary.
>
> (a) The marital agreement must provide that the Primary Beneficiary's spouse disclaim any interest in any distributions, and that the distributions, appreciation in value, and profits relating thereto shall remain the separate property of the beneficiary.
>
> (b) The Primary Beneficiary's spouse must agree to execute and deliver any additional documents necessary to carry out the intent of this provision.
>
> (c) The Trustee is authorized to obtain an opinion of counsel regarding the legality of the Premarital/Postmarital Agreement. Trustee is relieved of liability for a distribution in error of this Section if such an opinion of counsel is received.
>
> (d) If a Primary Beneficiary's spouse fails to execute the marital agreement or other additional documents required herein, the Trustee shall retain the income and principal that would have otherwise been distributed to the beneficiary as a separate share or Trust for the beneficiary, and distributions shall be made in accordance with the following until the required documents are executed:
>
> (1) The Trustee shall apply for the benefit of that Primary Beneficiary such amounts of income and principal of this share or Trust as the Trustee shall from time to time deem appropriate for the beneficiary's support, health care, education, and maintenance; and
>
> (2) Any power of appointment or right of withdrawal held by the Primary Beneficiary may not be exercised during the Primary Beneficiary's lifetime.

As an incentive to comply, a trust can provide a cash distribution of a fixed amount (such as $10,000 or $20,000) once the protective premarital agreement is in place. For example:

> <u>Distribution Upon Execution of Premarital Agreement</u>. When a beneficiary and the beneficiary's intended spouse execute a premarital agreement that the trustee is advised by legal counsel is valid, then on or after the date of such beneficiary's marriage, such

[69] E.g., Texas, Connecticut, Michigan, or Massachusetts. *See also In re Marriage of Bentson*, 656 P.2d 395 (Ore. 1983) (Wife gained interest in any distribution from corpus of testamentary trust of which husband was a beneficiary).

> beneficiary may by written instrument, delivered to the trustee, withdraw from the principal of the trust an amount equal to five percent (5%) of the trust's accumulated net income and principal, as it is then constituted. In addition, upon the request of the beneficiary, the trustee shall reimburse the beneficiary for any and all documented expenses and legal fees incurred by either party in securing such agreement.

Even where certain distributions are mandatory, a trust could be drafted so that distributions may be distributed "to or for the benefit of" a beneficiary. This might allow a trustee to make a distribution for the benefit of the beneficiary without making a distribution directly to a beneficiary and thereby avoid the reach of creditors.

While well-meaning, a requirement that a child or grandchild enter into a premarital agreement may impact an adult-child relationship with their significant other. Premarital agreements deal with what happens at divorce and death. These issues are ice water on romance for a couple in love. The generous parent or grandparent may choose to leave this issue alone and let the child deal with these issues on their own. If they want to have influence, perhaps be specific in what assets should be kept separate. Note that inherited and gifted property is separate or non-marital property in many states, even without a premarital agreement. And in some, the rent, issues, and profits are separate property.

On the other hand, the heir could be grateful that the parents are dictating the premarital agreement because it takes this difficult decision out of their hands. They can always say, "my father made me do it."

E. Powers of Appointment.

A power of appointment ("POA") is a powerful tool to provide flexibility, especially where a trust is expected to continue for multiple generations. A limited POA could also be drafted so that a beneficiary may direct distributions toward a spouse or away from a spouse and for the benefit of other trust beneficiaries in the event of divorce.

Some parents may want to entirely exclude the ability to exercise a POA in favor of a spouse. Another option to protect descendants is to limit a descendant's special POA so that lifetime exercises can be made only to descendants and charities, but that testamentary gifts can include a surviving spouse (i.e., one who was married to the descendant and did not have a divorce action currently pending at the time of the descendant's death).[70]

It should be noted that certain POAs may be deemed a property interest under dissolution of marriage laws in some states.[71]

F. Trust Protectors.

[70] *See* Bogert & Bogert, *supra* n.63, §264.20.

[71] Gerard Deffenbaugh & David Kirch, *How Powers of Appointment Affect Irrevocable Trust Remainder Interests in Dissolution of Marriage Proceedings*, The Colo. Law. (Dec. 2019).

A trust protector can add flexibility to a trust. A trust protector is an individual who is granted powers under the trust agreement to see that the grantor's wishes and intent are carried out. Trust protector powers can be quite broad. In general, some common powers include the power to terminate the trustee, appoint successor protectors, direct or veto trust distributions, and add or remove beneficiaries. A trust protector can protect assets that might otherwise be subject to the claims of a divorcing spouse.

G. No-Contest/In Terrorum Provision.

In jurisdictions where permitted, a no-contest or *in terrorum* provision can be a useful deterrent to an heir seeking to change the terms of an irrevocable trust or will. Except in the case of a marital trust, a spendthrift provision may provide that the attempted assignment by a beneficiary of his or her trust benefits would automatically terminate those benefits.

VI. Anticipate the Consequences to the Beneficiaries.

An adult irrevocable trust beneficiary going through a divorce may have to address the issues presented by the trust's income. This income will show up on the parties' income tax returns. It may be that the distributions were used to improve their marital standard of living. These distributions will likely increase their obligation to pay child and spousal support. A court has the discretion to include recurring gifts as income for child support.[72] One-time gifts or inheritances are not income for support purposes but income that they can generate is.[73]

Gifts from a supported spouse's parents are also factors in setting spousal support. On the other hand, a subsidy the supported spouse receives from a parent does not relieve paying a spouse's spousal support obligation.[74] The income definition for child support purposes is very broad. Even debt cancellation can be considered as income available for support.[75] Receipt of an inheritance is not necessarily required; the imminent receipt of an inheritance may be considered in setting child support.[76]

A case involving a wealthy man born to wealth and social prominence who was living without any visible means of support is illustrative. His family home was a 16,000 sq. ft. luxurious Hillsborough mansion built by his grandfather in 1918. His residence was surrounded by 47 acres of land with hiking trails, streams, wildlife, and gardens. It contained valuable art, jewelry, furnishings, and other items collected by his parents and grandparents. He and his wife met in the early eighties, with the husband not working since 1972, relying instead on income from securities and family trusts. The appellate court held that the trial court did not abuse its discretion in setting

[72] *In re Marriage of Alter*, 89 Cal. Rptr. 3d 849 (Cal. Dist. Ct. App. 2009).

[73] *In re Marriage of Scheppers*, 103 Cal. Rptr. 2d 529 (Cal. Dist. Ct. App. 2001).

[74] *In re Marriage of McQuoid*, 12 Cal. Rptr. 2d 737 (Cal. Dist. Ct. App. 1991).

[75] *In re Marriage of Kirk*, 266 Cal. Rptr. 76 (Cal. Dist. Ct. App. 1990).

[76] *Straub v. Straub*, 29 Cal. Rptr. 183 (Cal. Dist. Ct. App. 1963).

child and spousal support that exceeded the husband's monthly income where his extensive property holdings and exceptional circumstances allowed deviation from guidelines.[77]

In *In re Schwartzkopf*, the Court noted that California law is well-settled that "a trust created for the purpose of defrauding creditors or other persons is illegal and may be disregarded."[78] This rule was extended to apply to the creation of trusts where the grantor's intention was to prevent his wife from reaching the property.[79]

In *In re Marriage of Dick*, a large alimony order was affirmed despite the husband having no assets or income.[80] The parties lived a very lavish lifestyle that included residences in the U.S. and abroad, servants, continuous first-class travel, the use of expensive automobiles and unlimited funds for clothing and entertainment, among other luxuries. One of the wife's experts testified from a reconstruction of expenses that the couple spent $74,521 per month during the last 17 months of their marriage. In this case, the court held that "[t]he rule regarding fraudulent corporations is equally well settled: 'When a corporation is used by an individual or individuals, or by another corporation, to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the acts as if they were done by the individuals themselves.'"[81]

Generous parents no doubt mean well, and their gifts can significantly impact child support and alimony. In some states, well-meaning gifts can cause the division of property to be skewed. A court will determine whether income will be imputed to a party based on the past history of giving or on the party's standard of living with greater wealth.

VII. <u>What Estate Planners and Matrimonial Lawyers Can Learn From Each Other.</u>

It is not uncommon for a matrimonial lawyer to draft provisions in premarital agreement addressing what will occur at the death of their client without consulting an estate planning lawyer. Here are a few of the things they would be well-advised to do, only with the advice and assistance of an estate planning lawyer:

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[77] *In re Marriage of de Guigne*, 119 Cal. Rptr. 2d 430 (Cal. Dist. Ct. App. 2002).

[78] *In re Schwarzkopf*, 626 F.3d 1032, 1037 (9th Cir. 2010) (internal quotation marks and citation omitted).

[79] *Id.*

[80] *In re Marriage of Dick*, 18 Cal. Rptr. 2d 743 (Cal. Dist. Ct. App. 1993).

[81] *Id.* at 752 (citation omitted).

1. Drafting provisions that apply at death of a party in premarital, postmarital and cohabitation agreements without making sure that there is a will or trust in place.

2. Not taking into account taxes on death.

3. Not clarifying whether the payment at death is before or after taxes

4. Agreeing to pay a percentage of the estate without taking into account the nature of the assets, their liquidity, and the cost of valuation.

5. Agreeing to pay a lump sum without taking into account liquidity.

6. Entering into an agreement that may take time and expense to implement.

7. Not addressing portability issues.

8. Entering into a contract to make a will without knowing the consequences.

9. Creating a binding estate plan that does not take into account changes in fortune and wishes.

10. Not considering using life insurance as an alternative to a percentage of the estate or a lump sum.

11. Providing for the use of life insurance without being clear as to who the policy owner is, when it will expire, or the increasing costs of carrying a policy.

12. Not considering the parties children from a prior marriage and thereby opening the door to future litigation.

13. Not considering court-imposed obligations to secure previous child and spousal support.

14. Assuming that the client will review the agreement from time to time.

15. Assuming the client will keep the agreement in a safe place so that it can be enforced.

Of course, estate planners can also miss issues that family law lawyers would not. These issues include:

1. They may see a premarital agreement primarily as an estate planning tool and not a divorce planning tool.

2. From a family lawyer's point of view, representing both parties in a transmutation of assets as part of an estate plan is problematic in some, but not all,

jurisdictions. In those jurisdictions where separate counsel is advisable, a lawyer may represent both parties without a conflict or confidentiality waiver.

3. Often parties will be advised to change separate property to community property to obtain a step-up in the basis of the property, without warning the parties that if they divorce, the transferor may be giving up their interest in that property.

4. And they may not tell the transferee that the transferor may not have waived their right of reimbursement.

5. An estate planner may not be aware of nuances in drafting limitations on alimony/maintenance or realize how these limitations have become a primary reason a premarital agreement is drafted.

6. They may not be aware of the difference between premarital and postmarital agreements.

7. Drafting documents providing for transfers at death that are not conditioned on marital status.

8. Violating Automatic Temporary Restraining Orders in place in the dissolution matter.

9. Transferring property to family trust without language in trust stating that property maintains its character.

10. Transferring separating property to community property without considering parties may divorce.

VIII. Conclusion.

Estate and matrimonial counsel can work together to recognize the many implications and opportunities in light of a divorce. It is important that estate planning practitioners understand the potential consequences of their planning in the event of a divorce. Similarly, matrimonial counsel would serve their clients well by involving a skilled trust and estate attorney to analyze any trust benefiting parties to a divorce and assist in structuring their planning, separately or together, to facilitate the conclusion of the divorce. Estate planning counsel can also coordinate planning going forward, including planning with marital agreements. This outline provides a high-level survey of complex issues, all of which can vary considerably depending on state law. Awareness of the issues will encourage better planning.

EXHIBIT A

A SELECTION OF CASES REGARDING FINANCIAL DISCLOSURE FOR PREMARITAL AND POSTMARITAL AGREEMENTS

<u>Premarital Agreement Cases</u>	**Case Facts about Disclosure**	**Enforcement Sought/Challenge Made**	**Comments**
Branch v. Branch, 508 S.W.3d 911 (Ark. Ct. App. 2016)	PMA upheld where H made accurate statement of net worth without detail; obligation to provide fair and reasonable disclosure does not require full and complete detail.	At dissolution	
Knapp v. Ginsberg, 282 Cal. Rptr. 3d 403 (Cal. Ct. App. 2021)	Malpractice case arising from a PMA entered into by Knapp with Grant Tinker (produced the *Mary Tyler Moore Show*); apparently Tinker made no formal financial disclosure; Knapp understood Tinker was very wealthy, but all she wanted was the marital home (valued at $10M as of Tinker's death) and a paid-off mortgage (balance of $4M at his death); Tinker's estate was insufficient to pay off the mortgage.	After death	Example of a case where weaker party needed financial disclosure to assess whether the husband could fulfill the promises he made in the agreement; apparently, he was not as rich as he seemed.

Premarital Agreement Cases	**Case Facts about Disclosure**	**Enforcement Sought/Challenge Made**	**Comments**
King v. King, No. 2020-CA-1624-MR, 2021 WL 5856347 (Ky. Ct. App. Dec. 10, 2021)	Premarital agreement invalid where recited financial disclosures were attached, but they were not W's preexisting knowledge, and recital of same, not good enough to save agreement.	After death	Messy process in other respects
Waton v. Waton, 887 So. 2d 419 (Fla. Dist. Ct. App. 2004)	H's disclosure regarding value of business (he said "value unknown") was adequate for PMA where he stated ownership percentage and gross revenues.	At dissolution	
Gordon v. Gordon, 25 So. 3d 615 (Fla. Dist. Ct. App. 2009)	H's disclosure of existence of pension without specifying value of it adequate for PMA "[w]hen considering the value of husband's employer pension in light of the other substantial assets that husband fully disclosed"	At dissolution	
Kwon v. Kwon, 775 S.E.2d 611 (Ga. Ct. App. 2015)	Recitation that parties made full and fair disclosure coupled with waiver language did not save PMA where evidence showed H omitted two LLCs; party cannot use waiver to avoid duty to disclose; other party has no duty to inquire; rather, burden on each to disclose.	After death	

Premarital Agreement Cases	**Case Facts about Disclosure**	**Enforcement Sought/Challenge Made**	**Comments**
In re Marriage of Wanger, No. 14-3357, 2016 WL 900432 (Ill. App. Ct. Mar. 8, 2016)	Waiver did not save agreement where H made written disclosure of substantial assets but withheld information about trusts and other assets. Rejected H's argument no obligation to disclose irrevocable trusts because settlor (his father) still alive.	At dissolution	Applying CA law; Burden on attacking party.
In re Marriage of Solano, 124 N.E.3d 1097 (Ill. App. Ct. 2019)	Challenging party not entitled to discovery as to assets that may not have been disclosed when PMA included a waiver of any disclosure beyond that already provided.	At dissolution	
Blige v. Blige, 656 S.E.2d 822 (Ga. 2008)	PMA failed for lack of disclosure where H was truck driver and failed to disclose (actually he hid) substantial cash.	At dissolution	One day before wedding, H took W to lawyer he hired for her, lawyer handed agreement to her, read it with her and asked her to sign it. Burden of proof on party seeking enforcement.
Levy v. Sherman, 43 A.2d 25 (Md. Ct. App. 1945)	Premarital agreement recited that disclosure was made but there was no written disclosure. Evidence inadequate to show full disclosure.	After death	

Premarital Agreement Cases	**Case Facts about Disclosure**	**Enforcement Sought/Challenge Made**	**Comments**
Ortel v. Gettig, 116 A.2d 145 (Md. Ct. App. 1955)	H made no financial disclosure for PMA and W waived all rights at death. PMA invalid.	After death	H's gifts during marriage and provisions in his will did not save otherwise invalid PMA
Hartz v. Hartz, 234 A.2d 865 (Md. Ct. App. 1967)	PMA upheld after death of H where parties made no formal disclosure, each had general knowledge, both parties had substantial estates of approx. equal value, agreement was substantively fair to both.	At dissolution	Note that W initiated the PMA to protect her children from prior marriage; but, after death, H's estate relied on the PMA, therefore bore the burden of proof.
Head v. Head, 477 A.2d 282 (Md. Ct. Spec. App. 1984), *cert. den.*, 483 A.2d 754 (Md. Ct. App. 1984)	MSA settling W's challenge to validity of PMA was valid where H disclosed value of his company (Head skis; Prince tennis rackets) at \$2.5M based on carrying value; W, a lawyer, knew carrying value different from real value; H's sale of company 6 mo. later for \$45M was not fraud.	At dissolution	Agreement was the product of negotiations; both parties had lawyers.
Harbom v. Harbom, 760 A.2d 272 (Md. Ct. Spec. App. 2000)	List of H's family business interests, without values, coupled with W's general knowledge was sufficient for validity of PMA; key is whether there was overreaching, not absence of disclosure.	At dissolution	That the PMA was the product of a negotiation was significant to the decision.
Cannon v. Cannon, 865 A.2d 563 (Md. Ct. App. 2005)	No formal financial disclosure for PMA; parties had some discussion about H's assets before marriage when H applied for a	At dissolution	Trial judge believed H's testimony; what if credibility determination had gone the other way. Court of Appeals retained long-standing precedent

Premarital Agreement Cases	**Case Facts about Disclosure**	**Enforcement Sought/Challenge Made**	**Comments**
	mortgage to purchase home for parties and his financial affairs were uncomplicated; PMA valid.		holding that parties to a premarital agreement are in a confidential relationship as a matter of law.
Stewart v. Stewart, 76 A.3d 1221 (Md. Ct. Spec. App. 2013)	Rejecting W's claim financial disclosure for PMA was inadequate because it did not include accountant's statement or information from which she could calculate H's future earnings.	At dissolution	
Michniewicz v. Michniewicz, No. 0266, 2018 WL 1747897 (Md. Ct. Spec. App. Apr. 11, 2018)	PMA failed where W unaware of H's "$40,000 of unlisted cash stored in the basement ceiling of his home"	At dissolution	
Schechter v. Schechter, 37 N.E.3d 632 (Mass. App. Ct. 2015)	Prenuptial agreement invalid due to lack of full disclosure where H "made inconsistent statements about who owned [his primary asset] and the true nature of his actual income."	At dissolution	
In re Marriage of Bliss, 367 P.3d 395 (Mont. 2016)	PMA valid although W failed to include her two businesses (cat breeding and pet grooming) in written disclosure where parties lived together before marriage, W operated one from home, H occasionally worked in the other.	At dissolution	Why omit the businesses? Wouldn't it have been easy to include them?

Premarital Agreement Cases	**Case Facts about Disclosure**	**Enforcement Sought/ Challenge Made**	**Comments**
In re Est. of Shinn, 925 A.2d 88 (N.J. Super. Ct. 2007)	Written disclosure listing various assets valued at $850,000 inadequate where H listed other assets without statement of values and where his life insurance application stated $6M net worth. PMA invalid.	After death	Sounds like fraud though the court did not call it that.
Dobre v. Dobre, No. A-1315-15T2, 2018 WL 1882968 (N.J. Super. Ct. Apr. 20, 2018)	PMA invalid where W's disclosure schedule referenced attached property appraisals, account statements and tax returns, none of which were attached.	At dissolution	
Carter v. Fairchild-Carter, 133 N.Y.S.3d 316 (N.Y. App. Div. 2020)	PMA void in its entirety where key benefit for W (50% of appreciation of marital home) premised on H's fraudulent statement of then-current value.	At dissolution	H engaged in other sleazy conduct on leadup to signing.
Parrett v. Wright, No. 2017-CA-59, 2017 WL 6398840 (Ohio Ct. App. Dec. 15, 2017)	PMA invalid because deceased W did not fully disclose assets and agreement did not include statement waiving full disclosure of assets.	After death	Neither party made financial disclosure. One page agreement. No lawyers. H's nondisclosure and concealment of an asset did not constitute waiver. In dicta, court speculated whether waiver is permissible. Decedent's estate had burden of proof.

Premarital Agreement Cases	**Case Facts about Disclosure**	**Enforcement Sought/ Challenge Made**	**Comments**
Walker v. Walker, No. M2018-01140-COA-R9-CV, 2020 WL 507645 (Tenn. Ct. App. Jan. 31, 2020)	H failed to disclose he owned condominium with former girlfriend, purchased during hiatus in premarital relationship with W; PMA invalid.	At dissolution	No info in opinion about value relative to other assets; so was it material? Court seemed heavily influenced by H's deliberate omission of this info. H's lawyer told parties to bring asset lists to his office but did not ask questions.
McKoy v. McKoy, No. CL16-6180, 2017 WL 11380084 (Va. Cir. Ct. Jan. 6, 2017)	Statement in PMA, repeated three times, that parties made disclosures, and referred to attached schedules, did not save the agreement when statements were false and therefore fraudulent, no schedules were attached.	At dissolution	Terms of PMA were also unconscionable. What if terms were not unconscionable? Would H have gotten away with the fraud?

Postmarital Agreement Cases	**Case Facts about Disclosure**	**Enforcement Sought/Challenge Made**	**Comments**
Northington v. Northington, 257 So. 3d 326 (Ala. Civ. App. 2017)	Postmarital agreement executed after W caught in extramarital affair, as condition for reconciliation. W was aware of 14 parcels of real estate H owned as well as H's business. H gave W amount of debt on real estate and purchase price, showing net equity of $324K. H refused to give W FMVs, though H had given this info to banks, showed net equity of $1.6M, instead advised W about other methods she could use to get valuations. Postmarital agreement was valid.	At dissolution	Trial court rejected W's claim of fraud in the inducement due to refusal to provide values.

In re Marriage of Burkle, 43 Cal. Rptr. 3d 181 (Cal. Ct. App. 2006)	H not required to furnish W all details in writing when W offered access to all information: W argued that H had a fiduciary duty to furnish her, in writing, and without demand, sufficient information concerning the merger transaction so as to afford her the opportunity to properly exercise her rights and duties as a partner in the assets. Court of Appeal disagreed, relying on *Boeseke v. Boeseke*, 519 P.2d 161 (Cal. 1974): "The pertinent rule is that a spouse who foregoes investigation and accepts a proposed settlement 'may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts.'"	At dissolution	
Smith v. Smith, 11 MFLM Supp. 93 (Ct. Spec. App. 2010) (N.J. unpublished)	Postmarital Agreement valid. Financial disclosure is not a prerequisite to validity.	At dissolution	
Petracca v. Petracca, 956 N.Y.S.2d 77 (N.Y. App. Div. 2012)	Disclosure of assets valued at $22 million was inadequate where understated by $11 million; postmarital agreement invalid.	At dissolution	Terms of agreement were manifestly unfair, and process marked by over-reaching.
Keith v. Keith, 156 N.W. 910 (S.D. 1916)	Postmarital agreement void where W agreed to pool assets with H based on his fraudulent concealment of his insolvency.	At dissolution	

Postmarital Agreement Cases	**Case Facts about Disclosure**	**Enforcement Sought/ Challenge Made**	**Comments**
Daniel v. Daniel, 779 S.W.2d 110 (Tex. App. 1989)	H, a lawyer and CPA, could have discovered marital estate earned $1M in trust controlled by W by examining joint tax returns; postmarital agreement upheld.	At dissolution	
Morris v. Morris, No. 13-0742, 2014 WL 1272517 (W. Va. Ct. App. Mar. 28, 2014)	Postmarital agreement invalid where H's financial disclosure was fraught with glaring omissions [$14.3M of retained earnings in his business] and gross inaccuracies [gross understatement of income].	At dissolution	Good example of outright fraud. Did H actually think he was going to get away with this?
In re Marriage of Van Ert, 54 N.E.3d 928 (Ill. App. Ct. 2016)	H failed to disclose offer to purchase business for $16 million, consummated two hours after divorce; W's petition alleging fraud entitled to hearing.	At dissolution	
Amburgey v. Amburgey, No. 2017-CA-000235-MR, 2018 WL 3702492 (Ky. Ct. App. Aug. 3, 2018)	Neither party disclosed income or net worth and postmarital agreement did not identify parties' assets. Postmarital agreement unenforceable.	At dissolution	

Postmarital Agreement Cases	**Case Facts about Disclosure**	**Enforcement Sought/Challenge Made**	**Comments**
In re Marriage of Bernard, 137 Wash. App. 827, 835-36, 155 P.3d 171 (2007).	The Washington S. Ct. found prenuptial agreement was substantively unfair because, among other reason, (i) it severely restricted the creation of community property, especially if death or dissolution occurred within ten years of marriage, (ii) community property rights were completely eliminated in the short term, yet the husband was allowed to enrich his own separate property at the expense of the community, and (iii) because it made inadequate provisions for the wife relative to the husband's means. The court found the agreement procedurally unfair because the wife was presented with a draft agreement days before the wedding, and concerned that the husband would call off the wedding. W signed a side letter agreeing to renegotiate the agreement after the wedding, but the points that the side-letter left open for renegotiation were too narrow to cure the defects in the original agreement. The Court found the amended agreement was also substantively unfair. It should also be noted that the Court of Appeals based its procedural unfairness conclusion, in part, on the fact that W's attorney did not accurately advise her of her rights.	At dissolution	This analysis only applies to agreements where the parties have waived the right to a just and equitable distribution of their jointly held property. In the absence of a waiver, the court has full discretion to equitably distribute the property, so an analysis of the fairness of the agreement is unnecessary.
In re Marriage of Sanchez, 33 Wn. App. 215, 654 P.2d 702 (1982), *In re Marriage of Fox*, 58 Wn. App. 935, 795 P.2d 1170 (1990).	Agreement upheld because it was based on a full disclosure of relevant facts, it was fair in its execution, and the parties strictly observed the agreement in good faith.		