

**FOR BETTER, FOR WORSE,  
FOR RICHER, FOR POORER:  
PREMARITAL AGREEMENT CASE STUDIES**

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*Editors' Synopsis: With sections that include advice regarding first and second marriages, older and younger couples, and inheritances and family businesses, the author demonstrates, through clear examples, how premarital agreements may be appropriate for nearly every couple planning to marry and own property.*

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**I. INTRODUCTION**

A premarital agreement is not reserved exclusively for the wealthy and famous. Although much publicity surrounds premarital agreements of high-profile couples such as Mr. and Mrs. Donald Trump (first and second), Mr. and Mrs. Barry Bonds, and Mr. and Mrs. Tom Cruise, a premarital agreement is appropriate for anyone with property, debt, a degree, a certificate or license, an established career, a business or professional practice, a creative product, expectations of inheritance or

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other receipt of assets, past matrimonial experience, or children.

A premarital agreement may protect a family business, protect assets from future claims, provide support for a financially disadvantaged spouse, and provide a framework to discuss and to clarify the economics of the marriage. The agreement may also protect children from a previous marriage, educate prospective spouses as to their rights on death and divorce, and encourage a couple in love to address the realities of their relationship before saying "I do."

This Article presents seven different hypothetical situations, each of which may apply in some respect to anyone preparing to walk down the aisle. Although the possible fact patterns are numerous, one common theme is apparent: regardless of the age or financial status of the prospective spouses, a premarital agreement is something to consider for every marriage.

## II. FIRST MARRIAGES AND YOUNGER COUPLES

### A. The Professional Couple<sup>1</sup>

David and Rebecca are both in their mid-30s and have never been married. David is a successful Wall Street stockbroker, and Rebecca just became a partner at a large New York law firm. They are dedicated to their careers and do not plan to have children.

The parties are very practical and believe a premarital agreement is necessary to protect the substantial wealth each has already accumulated.<sup>2</sup> Through their independent research, they understand the importance of adequately disclosing their assets.<sup>3</sup> With complete financial statements and

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<sup>1</sup> "Today, many women and men are waiting to marry until their late twenties or early thirties, at which time they have already established their careers; these young professionals seek to secure their present and future earnings through premarital agreements." Cory Adams, *Premarital Agreements*, 11 J. CONTEMP. LEGAL ISSUES 121, 122 (2000) (citation omitted).

<sup>2</sup> "The attributes of professionalism as expressed through marriage make two-career couples particularly amenable to contractual agreement." *Id.*

<sup>3</sup> Section 6 of the Uniform Premarital Agreement Act specifically requires fair and reasonable disclosure of each prospective spouse's property and financial obligations. *See* UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2)(i), 9C U.L.A. 48 (1983). What constitutes fair and reasonable disclosure varies. For example, disclosure has been held adequate although the parties did not disclose the value of the assets. *See* Sarah Ann Smith, *The Unique Agreements: Premarital and Marital Agreements, Their Impact Upon Estate Planning, and Proposed Solutions to Problems Arising at Death*, 28 IDAHO L. REV. 833,

income tax returns for the three prior years in hand, they each visit attorneys for the first time six months before the wedding date.<sup>4</sup>

Neither party anticipates that the emphasis the parties have placed on achieving success in their careers will diminish after their marriage, and they both plan to continue working hard. They agree to split all marital property equally in the event of divorce, and to divide the value of their primary residence in the same proportion as each spouse's contribution to the residence bears to its total value. If the marriage terminates by death, the surviving spouse will be entitled to an outright distribution of all marital property, including the deceased spouse's interest in the residence. The parties mutually agree to waive all other rights state law affords surviving spouses.

Should they divorce, neither party wishes to be responsible to the other for spousal support. At least one court has held that the parties must unambiguously express a spouse's right to future support in the premarital agreement.<sup>5</sup> Therefore, in their premarital agreement, the parties clearly state that their waiver of all rights and claims upon divorce includes the waiver of alimony or spousal support.

Although they address the issue of spousal support in their agreement, the parties understand that, under New York law, "provision for the amount and duration of maintenance [shall be valid and enforceable] . . . provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final

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851 (1992) (citing *Tegeler v. Tegeler*, 688 S.W.2d 794, 801 (Mo. Ct. App. 1985)). However, another agreement was deemed void for inadequate disclosure when one prospective spouse did not list the identity or value of his assets and his fiancée could not learn them. *See id.* (citing *In re Estate of McKiddy*, 737 P.2d 317, 320 (Wash. Ct. App. 1987)). Full disclosure is the safest way to an enforceable agreement because courts most likely will view a lack of disclosure as evidence of unfairness. *See id.* (citing *Sineone v. Sineone*, 551 A.2d 219, 222 (Pa. Super. Ct. 1985)).

<sup>4</sup> "An important step to take in drafting the premarital agreement is to ensure the meetings with the lawyers, the negotiations, and the execution of the final document occur as far in advance of the wedding date as possible." Dennis I. Belcher, *How to Tie a Tight Knot with a Marital Agreement*, in 35 PHILIP E. HECKERLING INSTITUTE ON ESTATE PLANNING, ¶ 412.3, at 4-36 (2001).

<sup>5</sup> *See White v. White*, 617 So. 2d 732, 734 (Fla. Dist. Ct. App. 1993); *cf. Howell v. Landry*, 386 S.E.2d 610, 615 (N.C. St. App. 1989) (applying contract principles of construction to premarital agreements); *In re Estate of Wiseman*, 889 S.W.2d 215, 217 (Tenn. Ct. App. 1994) (interpreting and enforcing premarital agreements in the same manner as any other contract).

judgment. . . .”<sup>6</sup>

#### B. Supporting the Student

Robert is employed and plans to support Susan in the pursuit of her medical degree. Susan is currently enrolled in medical school, but she will not obtain her degree and will not complete her training until after they marry.

Robert is concerned about the effect of Susan’s medical career on their marriage. He believes that because he is making a sacrifice to allow Susan to reach her career goals, he is entitled to compensation for his sacrifice if they divorce. Although Susan appreciates Robert’s willingness to support her both financially and emotionally during medical school and training for her chosen specialty, she recognizes that the valuation of any professional degree or practice is inexact and may involve a considerable amount of time and money. Addressing the issue in a premarital agreement and determining alternative methods to compensate a spouse when a profession is involved eliminates the need for expensive discovery to determine the monetary value of a degree or professional practice or both.<sup>7</sup>

If the marriage terminates during their lives, the couple agree that Susan will pay to Robert a lump sum based on a percentage of her annual income for the three calendar years prior to the termination of their marriage. In exchange, Robert waives all claims for his contribution to Susan’s medical degree and practice.

To provide a financial incentive not to contest the validity of the agreement, Susan insists on a provision requiring that a spouse who unsuccessfully challenges any aspect of the agreement will pay all litigation expenses.<sup>8</sup>

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<sup>6</sup> N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 1999). *See also* Gross v. Gross, 464 N.E.2d 500, 509 (Ohio 1984) (finding that even though a premarital agreement meets each good faith test, provisions relating to maintenance or sustenance may lose validity by reason of changed circumstances that render the provisions unconscionable at the time of divorce). *But see* Baker v. Baker, 622 So. 2d 541, 544 (Fla. Dist. Ct. App. 1993) (holding that although a premarital agreement may be unfair and inequitable to a spouse with regard to alimony, it is valid and enforceable if the spouse freely and voluntarily executed it with the benefit of full and fair disclosure of the other spouse’s assets).

<sup>7</sup> *See* ARLENE G. DUBIN, PRENUPS FOR LOVERS 48 (2001) (describing the discovery process as “an onerous and intrusive process that requires considerable disclosure of financial information”).

<sup>8</sup> *See* Belcher, *supra* note 4, at 3-40.

### C. Protection Against Debts<sup>9</sup>

Jonathan recently graduated from college and owes \$75,000 in student loans. He also has credit card debt of \$15,000. He plans to accept an entry-level position with a computer consulting firm and will require two to three years of training before he is eligible for a promotion. Janet also has a college education but has no debts and requires little training to advance in her field. She already has begun saving for retirement with a 401(k) qualified retirement plan and is concerned about her potential responsibility for Jonathan's debts after they are married.

The Uniform Premarital Agreement Act contains no specific provision dealing with the effect of a premarital agreement on creditors.<sup>10</sup> Under the Uniform Marital Property Act, a marital property agreement may not adversely affect the "interest of a creditor unless the creditor had actual knowledge of [the] provision [in the agreement] when the obligation . . . was incurred."<sup>11</sup> However, prospective spouses may agree through a premarital agreement as between themselves with respect to the existing creditors of one spouse.<sup>12</sup> The agreement may also define what property will be used to satisfy the premarital debts of a spouse.

The prospective spouses agree in a premarital agreement that all debts a spouse incurs prior to and during the marriage will be paid from the separate property of that spouse. They also agree that their respective income and earnings after the date they marry will be considered separate property not subject to division on divorce. The agreement provides Janet with the security that she will not lose her savings to Jonathan's creditors. It also allows Jonathan and Janet to focus on Jonathan's indebtedness and plan for reasonable repayment.

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<sup>9</sup> See generally Adams, *supra* note 1, at 124 (suggesting that couples itemize and discuss existing debts before entering into a premarital agreement).

<sup>10</sup> See generally UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 39 (1983).

<sup>11</sup> UNIF. MARITAL PROPERTY ACT § 8(e), 9A U.L.A. 127.

<sup>12</sup> See Clare H. Springs & Jackson M. Bruce, Jr., *Marital Agreements: Uses, Techniques, and Tax Ramifications in the Estate Planning Context*, in 21 PHILIP E. HECKERLING INSTITUTE ON ESTATE PLANNING 7-1, 7-1 to 7-70 (1987); see also Smith, *supra* note 3, at 894-900.

### III. SECOND MARRIAGES AND THE OLDER COUPLE

#### A. Remarried with Children<sup>13</sup>

Henry is a widowed multimillionaire with two adult sons. Martha is a widowed millionaire with three adult children. Henry would like to set aside a portion of his assets to be administered for Martha's benefit if she survives him, but he requires assurance that the bulk of his estate ultimately will pass to his sons. The couple agree that if they divorce, neither should be entitled to the assets of the other or be required to pay spousal support.

If the couple do not execute a premarital agreement under which each waives rights to the other's estate on death, the surviving spouse may receive part of the deceased spouse's estate by electing to take the surviving spouse's statutory share. For example, the Uniform Probate Code provides the surviving spouse with the right to take an elective share of the deceased spouse's estate "equal to the value of the elective-share percentage of the augmented estate" determined by the length of the marriage and in accordance with a set schedule.<sup>14</sup> The augmented estate for purposes of the Uniform Probate Code generally includes the following: (1) the decedent's probate estate,<sup>15</sup> (2) property over which the decedent held a general power of appointment,<sup>16</sup> (3) fractional interests in property held in joint tenancy with the right of survivorship,<sup>17</sup> (4) the decedent's interests in payable-on-death and transfer-on-death accounts,<sup>18</sup> (5) proceeds of insurance on the decedent's life if the decedent owned the policy or had a general power of appointment over the policy,<sup>19</sup> (6) property the decedent transferred during the marriage in which the decedent retained the right to enjoyment or income,<sup>20</sup> (7) property the decedent transferred during the marriage in which the decedent created a power over the income or principal exercisable by the decedent alone or in conjunction with a nonad-

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<sup>13</sup> "The serial spouse (one who marries more than once), usually enters the second or third relationship with a substantial financial reserve as well as children from previous marriages for whom provisions are made in premarital contracts." Adams, *supra* note 1, at 122 (citations omitted).

<sup>14</sup> See UNIF. PROBATE CODE § 2-202(a) (amended 1993), 8 U.L.A. 171 (Supp. 1995).

<sup>15</sup> See *id.* § 2-204.

<sup>16</sup> See *id.* § 2-205(1)(i).

<sup>17</sup> See *id.* § 2-205(1)(ii).

<sup>18</sup> See *id.* § 2-205(1)(iii).

<sup>19</sup> See *id.* § 2-205(1)(iv).

<sup>20</sup> See *id.* § 2-205(2)(i).

verse party for the benefit of the decedent,<sup>21</sup> and (8) property transferred two years prior to the decedent's death to or for the benefit of a person other than the surviving spouse to the extent the amount in either year exceeded \$10,000.<sup>22</sup> Therefore, depending on the length of their marriage, Henry or Martha could be entitled to up to fifty percent of virtually all assets in which the other held an interest.<sup>23</sup>

In a typical "what is mine is mine and what is yours is yours" premarital agreement, Henry and Martha release all elective rights and interests in the deceased spouse's estate pursuant to state law. They also specify in their agreement that if they divorce, each will retain his or her separate property and they will divide equally any marital property. They further agree to divide joint property in proportion to the contributions of each party when the property was acquired.

The couple also agree to waive rights each prospective spouse may have in the other's qualified retirement plans. Internal Revenue Code ("Code") section 417(a)(2) states that a spouse may waive a right to a qualified plan benefit if the following requirements are met:

- (1) the waiver is in writing;
- (2) the election must designate a beneficiary that may not be changed without spousal consent (unless the consent of the spouse specifically allows designations by the participant without any further consent by the spouse);
- (3) the spouse's consent acknowledges the effect of the election; and
- (4) the spouse's signature is witnessed by a plan representative or notary public.

However, Treasury Regulations section 1.401(a)-(20), Q & A-28, states, "An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period."

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<sup>21</sup> See *id.* § 2-205(2)(ii).

<sup>22</sup> See *id.* § 2-205(3).

<sup>23</sup> Compare the Uniform Probate Code section 2-205, which provides that the augmented estate includes a revocable inter vivos trust, *with Dumas v. Est. of Dumas*, 627 N.E.2d 978 (Ohio 1994) and *Cherniack v. Home Nat'l Bank & Trust Co.*, 198 A.2d 58 (Conn. 1964), both of which hold that an inter vivos trust executed by the decedent bars the surviving spouse from claiming a statutory elective share in the trust assets even though the decedent reserved the right to amend or revoke the trust.

To indicate clearly their intentions regarding to their retirement plans, Henry and Martha include the following in their premarital agreement:

- (1) a statement that each party acknowledges each would have federally protected rights in the other's retirement plans absent the premarital agreement;
- (2) a statement that each party has knowledge of and understands what each is giving up;
- (3) a standard waiver of all interests in the retirement plans; and
- (4) an agreement by the nonparticipant spouse to consent as appropriate, pursuant to Code section 417(a)(2), and execute all documents necessary to effect the consent.

Furthermore, a copy of the beneficiary designations for each retirement plan the parties own are attached to the premarital agreement along with the consent forms that the nonparticipant spouse must execute after the couple marry.<sup>24</sup>

#### B. Scarred but Stronger<sup>25</sup>

Elaine is a divorced mother of two young children. Her divorce was emotionally draining and left her with virtually no assets. After living with relatives for several years while working two jobs, she began to rebuild her life and to accumulate some savings in an individual retirement account ("IRA"). She hopes to send both of her children to college.

Frank owns a hardware store and has never been married. He expects to play an active role in the lives of Elaine's children and would like to expand their family. Although Elaine expects to be married to Frank for the rest of her life, she wishes to avoid the mistakes she made in her first marriage should her second marriage also end in divorce or dissolution. She believes addressing financial issues before the wedding is imperative in the hope that a potential divorce proceeding would be as straightforward and simple as possible.<sup>26</sup>

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<sup>24</sup> See Springs & Bruce, *supra* note 12, at 7-56.

<sup>25</sup> "Even those contemplating what they believe to be a sound, life-long commitment may pursue a premarital agreement simply because they have lost faith in the legal system to protect their interests in the 'unlikely' event of a divorce." Adams, *supra* note 1, at 122 (citations omitted).

<sup>26</sup> Planning is much less stressful at the time of the marriage than at the time of divorce.



To protect her property and her children, Elaine suggests a premarital agreement. She would like Frank to release all rights on divorce and death to her separate property, including her retirement plan.<sup>27</sup> If the couple decide that Elaine should stay at home to devote all of her time to her children and the couple subsequently divorce, Elaine would like to adhere to spousal support provisions included in the premarital agreement. Elaine also would like Frank's assurance that he will provide for her in his estate plan.

Frank is anxious to conclude the premarital agreement quickly and offers to sign anything Elaine's attorney prepares. At Elaine's insistence, he reluctantly agrees to review the agreement with his attorney.<sup>28</sup>

Frank is rather surprised to learn from his attorney of spousal rights under state law if the marriage terminates by death. For example, he learns that, absent any other planning on his part, state intestacy laws may give Elaine the right to his entire estate regardless of the length of the marriage. If he dies without a will or other estate planning in place and the couple have no children, Elaine is entitled to one hundred percent of his estate because both of his parents are deceased. Even if the couple have children

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Premarital negotiation can be carried out while heads are cooperative and hearts are caring. At that time, it is in the interests of each future spouse to appear reasonable and willing to compromise. At the end of the relationship, antagonism drives out the spirit of conciliation. Divorce signals the end of the need to compromise for the good of the unit. The dissolution process often becomes the avenue for revenge.

Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 419 (1992) (citing ISOLINA RICCI, MOM'S HOUSE/DAD'S HOUSE MAKING SHARED CUSTODY WORK 75 (1980)).

<sup>27</sup> The Supreme Court of Alabama's decision in *Steele v. Steele*, 623 So. 2d 1140 (Ala. 1993), emphasizes the importance of specifying exactly what rights a spouse is releasing through a premarital agreement. In *Steele*, the spouses entered into a premarital agreement through which they limited their claims against each other or each other's estate. *See id.* at 1141. Following Mr. Steele's death, his son filed a wrongful death action on behalf of Mr. Steele's estate. Mrs. Steele filed a complaint seeking one-half of the wrongful death proceeds, and the court held the premarital agreement clearly evidenced that neither Mr. Steele nor Mrs. Steele contemplated a wrongful death action when they signed the agreement. Consequently, pursuant to the Alabama Wrongful Death Act, one-half of the proceeds of the estate's wrongful death action were payable to Mrs. Steele. *Id.* at 1142.

<sup>28</sup> "Nothing in Section 6 [of the Uniform Premarital Agreement Act] makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed." UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9C U.L.A. 50 (1983).

during their marriage, Elaine is entitled to one hundred percent of Frank's estate because his descendants would also be Elaine's descendants.<sup>29</sup> Although he is confident that Elaine will take care of his children if he dies first, Frank would like to ensure that a portion of his assets will be designated specifically for his children.

The couple enter into a premarital agreement under which Frank relinquishes all rights on divorce or death to Elaine's separate assets, including her IRA<sup>30</sup> and all postmarital appreciation of or income arising from Elaine's separate assets. If the marriage ends in divorce, dissolution, or other lifetime termination, Frank agrees to pay spousal support based on a vesting schedule.<sup>31</sup> If they are married less than five years, he will not be obligated to pay any spousal support. If they are married between five and ten years, his spousal support obligation will be based on a percentage of his gross income as defined in Code section 61.<sup>32</sup> For each five-year period thereafter, the percentage increases. However, the premarital agreement includes a "sunset" clause regarding spousal support, which provides that a court of competent jurisdiction will determine support obligations should the couple's marriage end other than by death after twenty-five years of marriage.<sup>33</sup>

To alleviate Elaine's fear of inadequate support if Frank predeceases her, and simultaneously to address Frank's concern that his children may not benefit directly from his estate, the premarital agreement requires Frank to set aside no less than fifty percent of his augmented estate<sup>34</sup> in a qualified terminable interest property ("QTIP") trust for Elaine's lifetime benefit. For the trust to qualify for the marital deduction under Code section 2056, Elaine must be entitled to all income from the trust; in addition, she may receive principal, in the trustee's discretion, for her health, support, and other purposes.<sup>35</sup> If Elaine remarries following Frank's death, the trustee will have sole discretionary authority to distribute principal to her. Elaine

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<sup>29</sup> See UNIF. PROBATE CODE § 2-102 (amended 1993), 8 U.L.A. 81 (Supp. 1995). Interestingly, if Elaine predeceases Frank, Frank would only be entitled to \$100,000 and one-half of Elaine's estate because not all of Elaine's descendants are Frank's descendants. *See id.*

<sup>30</sup> See Springs & Bruce, *supra* note 12, at 7-56.

<sup>31</sup> See *supra* note 6 and accompanying text.

<sup>32</sup> I.R.C. § 61 defines gross income as "all income from whatever source derived. . . ."

<sup>33</sup> See DUBIN, *supra* note 7, at 45 (describing the uses of a sunset clause in a premarital agreement).

<sup>34</sup> See *supra* text accompanying notes 15-22.

<sup>35</sup> See I.R.C. § 2056.

will not have the right to direct the assets remaining on her death.<sup>36</sup> Frank will retain the exclusive right to appoint the trustee of the trust.

Elaine is satisfied with the QTIP trust requirement because she is assured that, at a minimum, she will receive income from fifty percent of Frank's estate during her lifetime. Frank agrees to the QTIP trust requirement because (1) he is assured that any assets Elaine does not need during her lifetime will pass pursuant to Frank's estate plan, and (2) he has the ability to direct the distribution, in trust or otherwise, of the remaining fifty percent of his estate. He may choose to include Elaine and her children or his children, or both of their children as beneficiaries of the assets not allocated to the QTIP trust, but the choice remains his.<sup>37</sup>

#### IV. FAMILY BUSINESS INTERESTS AND INHERITANCE

##### A. The Family Business

Steven is employed by his father's business in which he holds a minority interest. Steven and Marsha plan to marry, but Steven's father is concerned about the possibility that Marsha could gain an interest in the business upon Steven's death or if they divorce. The suggestion that she should sign a premarital agreement offends Marsha because she views it as an indication that Steven and his family do not trust her.<sup>38</sup>

Marsha begrudgingly takes the premarital agreement with which she is presented to her own attorney for review. Because Steven is asking her to forego rights in his business interests that she may otherwise acquire under state law upon his death, Marsha requests financial statements and updated

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<sup>36</sup> Because the assets remaining on Elaine's death will be includible in the gross estate, Elaine's estate will be entitled to recover from the person(s) receiving the assets, the amount by which the total federal estate tax on Elaine's estate exceeds the total federal estate tax if the value of the assets from Frank's estate had not been included in Elaine's estate. *See* I.R.C. § 2207A.

<sup>37</sup> An additional benefit of creating a QTIP trust for less than the entire estate is that it allows Frank to make provisions for his children on his death. Often, spouses in second marriages wish to give assets to their children or others without forcing the beneficiaries to wait until the death of the surviving spouse. This becomes especially important when the surviving spouse is much younger than the deceased spouse.

<sup>38</sup> On the contrary, a premarital agreement says:

I love you and trust you so much that I can share even my most intimate secrets. It is well known that people are intensely private about their money. Most would sooner talk about their sex lives. But in a [premarital agreement], you are candid with your partner about money matters.

DUBIN, *supra* note 7, at 27-28.

valuation reports of the family business. Initially, Steven's father refuses to divulge the information. He believes that because the proposed premarital agreement is fair to Marsha, providing Marsha with financial information relating to the business is unnecessary.<sup>39</sup> After discussing with Steven's attorney the potential risk that withholding the information may invalidate the agreement, Steven's father consents to making the business records available for unrestricted inspection.<sup>40</sup>

Through the premarital agreement, Marsha agrees to relinquish any interest she may have in the family business on death or divorce. Marsha's relinquishment is broad in that it includes all distributions from the business, stock options, stock appreciation,<sup>41</sup> and proceeds from the sale of the business.<sup>42</sup> In exchange, Steven agrees to the following: (1) if they divorce, all assets other than the family business, as specifically defined, will be split equally between the couple; (2) Steven will pay spousal support as a court determines without regard to the value of the family

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<sup>39</sup> See, e.g., *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 20 (Fla. 1962) (holding that a valid premarital agreement contemplates a fair provision for the wife *or*, in the absence of a fair provision, a full and frank disclosure of the husband's worth *or*, absent a full and frank disclosure, a general and approximate knowledge of the husband's property).

<sup>40</sup> "[Y]ou can control disclosure, but you cannot control a hindsight view as to fairness. Do not risk concealment (intentional or otherwise) of a client's financial status. It just isn't worth it." Leonard G. Florescue, *Drafting Matrimonial Agreements—Pre-Nuptial Agreements*, in *DRAFTING MATRIMONIAL AGREEMENTS 2001*, at 44 (P.L.I. Estate Planning & Admin. Course Handbook Series No. D-300, 2001).

In addition to making available the complete financial statements and business interests of each spouse, the attorney should consider providing income tax returns, insurance schedules, deeds, beneficiary designations, and account statements. Also, the attorney should clearly identify in the agreement the date financial information was first provided for inspection. Because the validity of the agreement may be challenged many years after it is signed, the attorney should keep records of the evidence supporting values listed on the financial statements and lists of separate property.

<sup>41</sup> Because Steven is an employee of the family business, absent a premarital agreement, Marsha could assert that the increase in the value of the stock is due in part to his active efforts during the marriage and, therefore, is marital property subject to division on divorce. See *Rowe v. Rowe*, 532 S.E.2d 908, 911 (Va. Ct. App. 2000); *Cowden v. Cowden*, 661 N.E.2d 894, 897-98 (Ind. Ct. App. 1996).

<sup>42</sup> Clearly defining terms is imperative in a premarital agreement. One of the primary advantages of the agreement is that it allows a couple to address the uncertainty of state laws regarding property rights of married persons. Relying on blanket descriptions or statutorily defined terms squelches the opportunity for the prospective spouses to personalize the premarital agreement. What is marital property, separate property, and property divisible on divorce or death should be negotiated carefully and leave little room for interpretation. See Florescue, *supra* note 40, at 48-52.

business; and (3) if Steven predeceases Marsha, forty percent of the value of his gross federal estate,<sup>43</sup> less debts and expenses, will be administered for Marsha's benefit in a QTIP trust.<sup>44</sup>

Marsha understands that she may be a beneficiary of a portion of Steven's family's business by way of the QTIP trust, but the trustee, not Marsha, will control the business interests. The agreement satisfies Steven's family because it is consistent with their goal of maintaining ownership of family business interests in the family bloodline.

Marsha preserves family harmony by signing the premarital agreement. She also realizes the insistence by Steven's family that she execute a premarital agreement is a result of the family's concern over uncertainties in the future and does not reflect any distrust of her. For example, even if, in time, the family did not object to her direct involvement in the business, her possible remarriage upon Steven's premature death could result in an involuntary transfer of business interests to a third party. That Marsha's second husband, someone completely unknown to Steven's family, could receive an ownership interest in the business by exercising his spousal rights is certainly conceivable. Administering the business interests in trust for Marsha's benefit if Steven predeceases Marsha protects against such a potentially disruptive situation.

If Marsha had refused to sign a premarital agreement, Steven's family could have protected the business interests not held outright by Steven by using inter vivos trusts for Steven's benefit, by creating a limited partnership or limited liability company, or by implementing a business continuation (buy-sell) agreement requiring redemption or purchase of Steven's interests on his divorce or death.<sup>45</sup> In addition, a business continuation

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<sup>43</sup> Because the premarital agreement may not become the subject of review and guidance until many years into the marriage, the agreement should define all terms clearly. For federal estate purposes, the Code defines "gross estate." *See* I.R.C. § 2031 (2001). However, the interpretation of gross estate or "taxable estate," if not specifically defined in the agreement, could vary over time as tax laws change. For example, under the Economic Growth and Tax Relief Reconciliation Act of 2001, the federal estate tax is repealed in 2010. *See* I.R.C. § 2031. Using the terms gross estate or taxable estate, without further clarification, could lead to a significantly different result in 2010 than what the parties originally intended.

<sup>44</sup> *See supra* text accompanying notes 34-35.

<sup>45</sup> At a minimum, in the absence of a premarital agreement, the family should require that a business continuation (buy-sell) agreement executed prior to the marriage govern the transfer of ownership interests. Although this type of agreement may force the family to purchase interests that would otherwise be transferred to an unfriendly party, it prevents

agreement with Steven could have required him to forfeit the interests he acquired before the marriage if he did not protect them through a premarital agreement.<sup>46</sup>

#### B. Anticipated Inheritance

Liza is a sculptor. Randall is the beneficiary of several family trusts that provide his primary financial support. Randall also expects to receive a substantial inheritance upon the death of his parents.<sup>47</sup> The thought that Liza will receive substantial family money upon Randall's death or if they divorce concerns Randall's family. Expecting her lifestyle to change dramatically after they marry, Liza is concerned that she will have nothing if Randall predeceases her or that no marital assets will be available to divide should they divorce.

Randall's parents have protected Randall's inheritance by conditioning outright distributions from trusts they created for his benefit. If he does not execute a premarital agreement, all assets of his parents will be administered in trusts for his benefit, and all permissible distributions from the trusts will be subject to the discretion of an independent trustee. If he executes a premarital agreement, the trusts provide that any distributions are subject to the terms of that agreement.<sup>48</sup>

Because most of Randall's assets are held in trusts that Randall does not control, Liza's spousal rights under state law on his death give her little comfort. Therefore, prior to signing the premarital agreement, Randall agrees to a medical examination to secure life insurance payable to Liza. The premarital agreement requires Randall to purchase a policy on his life, to maintain the insurance during his lifetime, and to provide Liza with

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unrelated third party involvement without the family's consent, avoids possible litigation in an attempt to retain intra-family control, and provides certainty as to purchase price and terms.

<sup>46</sup> See Frank S. Berall, *Planning in Anticipation of the Second Spouse or Other Co-Habitant*, ANN. NOTRE DAME TAX & EST. PLAN. INST. 8, 8-29 to 8-30; see also DUBIN, *supra* note 7, at 195.

<sup>47</sup> As part of his financial disclosure to Liza, Randall should disclose the income he receives from trusts and any right of the trustees to invade trust corpus for his benefit. See *Posner v. Posner*, 257 So. 2d 530, 536-37 (Fla. 1972).

<sup>48</sup> "A provision in the will or trust making an inheritance or beneficial interest in a trust subject to the terms of an antenuptial agreement before any marriage is a powerful incentive, since the alternative is what is a probably legally valid loss of the legacy or beneficial interest." Berall, *supra* note 46, at 8-29 (citing 41 AM. JUR. 2D, *Husband and Wife* § 123 n.23 (1995)).

proof of paid premiums and annual in-force illustrations. On his death, Liza either will receive the insurance proceeds or will have a claim against Randall's estate for an equal amount.<sup>49</sup>

Liza agrees to release all potential spousal rights to Randall's inheritance, including appreciation, profits as a result of inheritance, and replacement assets. If they divorce, Randall will be required to pay a lump sum based on a property settlement provision in the premarital agreement. The amount of the settlement escalates based upon the number of years of the marriage.

As further protection for Liza, Randall waives all his rights to her assets on divorce or death, including rights to her artwork.

## V. SOMETHING FOR EVERYONE

Although the list of reasons and situations warranting premarital planning is endless, one commentator indicates that only twenty percent of couples enter into premarital agreements.<sup>50</sup> At a minimum, every couple considering marriage should examine the advantages and disadvantages of a premarital agreement with their legal advisors. Even if a written agreement does not result, the process encourages couples to address potential future problems and to educate themselves on their legal rights as spouses.

Inevitably, all marriages end either by lifetime termination or by death. A premarital agreement allows every couple to create a personal marital contract that promotes the best marriage for as long as it lasts and provides for a clear path at the end of the matrimonial journey.

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<sup>49</sup> *See id.* at 8-42.

<sup>50</sup> *See* DUBIN, *supra* note 7, at 15.