When Your Elderly Clients Marry: Prenuptial Agreements and Other Considerations

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> This appeal evolves from the divorce of an elderly, wealthy furniture magnate after less than three years of marriage to his much younger wife. . . . [and we] have no quarrel with the conclusion [of the trial judge] that the wife is not entitled to a $150,000 Rolls Royce. She will just have to be content with her Cadillac, gifts of jewelry in excess of $150,000 and the $700,000 in cash bestowed on her by the [prenuptial] agreement.[1]

A prenuptial agreement for your elderly client? A lawyer typically imagines a scenario like the one above; however, a prenuptial agreement should be considered, although not always drafted and executed, whenever an elderly client decides to marry. A prenuptial agreement should be evaluated for elderly clients not only for the stereotypical reasons but also because elderly clients are more likely to have greater assets to protect, children from prior marriages, health issues and other concerns unique to the elderly that can be addressed in and protected by a prenuptial agreement.

When an elderly client decides to marry and seeks the advice of a lawyer, a prenuptial agreement should be always be discussed. In certain instances, you and your client will decide that such an agreement is unnecessary; however, the pros and cons should be evaluated thoroughly before any decision is made. Section One of this article will address the general requirements for a valid prenuptial agreement. Section Two will outline specific concerns and considerations for the elderly client. This sec-

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1 Levitz v. Levitz, 481 So.2d 1319, 1320 (Fla. Ct. App. 1986).

tion will also provide possible solutions and drafting tips of how best to address the special circumstances of an elderly client that may arise, and provide language for some important provisions.

I. An Overview: General Requirements for Prenuptial Agreements

The Uniform Premarital Agreement has been enacted in twenty-five states and the District of Columbia.[2] Thus, this article will focus most closely on the requirements for a valid prenuptial agreement pursuant to the Uniform Premarital Agreement Act. Since the Act has not been adopted in every state, practitioners must know the law of their state before drafting the agreement. Also, practitioners should remember to include a choice of law provision (as is more fully discussed below) and should know the law of whatever state will govern the prenuptial agreement.

First, a prenuptial agreements should be in writing.[3] Contracts made upon consideration of marriage, e.g., prenuptial

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[2] Uniform Premarital Agreement Act (UPAA), Uniform Laws Annotated, Master Edition, Volume 9B. The Act has been enacted in Arizona (Ariz. Rev. Stat. §§ 25-201 to 25-205 (1999)), Arkansas (Ark. Code Ann. §§ 9-11-401 to 9-11-413 (1999)), California (Cal. Civ. Code §§ 5300 to 5317 (West 1999), Connecticut (Conn. Gen. Stat. Ann. §§ 46b-36a to 46b-36j (West 1999)), Delaware (Del. Code Ann., tit. 13, §§ 321 to 328 (1999)), District of Columbia (D.C. Code Ann. §§ 30-141 to 30-150 (1999)), Hawaii (Haw. Rev. Stat. §§ 572D-1 to 572D-11 (1999)), Idaho (Idaho Code §§ 32-921 to 32-929 (1999)), Illinois (750 Ill. Comp. Stat. Ann. 10/1 to 10/11 (West 1999)), Indiana (Ind. Code. Ann. 31-11-3-1 to 31-11-3-10 (West 1999)), Iowa (Iowa Code Ann. §§ 596.1 to 596.12 (West 1999)), Kansas (Kan. Stat. Ann. §§ 23-801 to 23-811 (1999)), Maine (Me. Rev. Stat. Ann., tit. 19, §§ 601 to 611 (West 1999)), Montana (Mont. Code Ann. §§ 40-2-601 to 40-2-610 (1999)), Nebraska (Neb. Rev. Stat. §§ 42-1001 to 42-1011 (1999)), Nevada (Nev. Rev. Stat. §§ 123A.010 to 123A.100 (1999)), New Jersey (N.J. Stat. Ann. §§ 37:2-31 to 37:2-41 (West 1999)), New Mexico (N.M. Stat. Ann. §§ 40-3A-1 to 40-3A-10 (Michie 1999)), North Carolina (N.C. Gen. Stat. §§ 52B-1 to 52B-11 (1999)), North Dakota (N.D. Cent. Code §§ 14-03.1-01 to 14-03.1-09 (1999)), Oregon (Or. Rev. Stat. §§ 108.700 to 108.740 (1999)), Rhode Island (R.I. Gen. Laws 1956, §§ 15-17-1 to 15-17-11 (1999)), South Dakota (S.D. Codified Laws §§ 25-2-16 to 25-2-25 (Michie 1999)), Texas (Tex. Fam. Code Ann. §§ 4.001 to 4.010 (West 1999)), Utah (Utah Code Ann. §§ 30-8-1 to 30-8-9 (1999)), and Virginia (Va. Code Ann. §§ 20-147 to 20-155 (1999)).

[3] UPAA, § 2 (The Uniform Act requires the agreement to be in writing and provides that no consideration is required).

agreements, fall within the purview of the common law statute of frauds.[4] Even if a state statute or state case law provided for oral prenuptial agreements, to be certain that the agreement as understood by the client is enforced and to document full disclosure of assets and other requirements that are set forth below, the agreement should always be in writing. A prenuptial agreement must also be signed by both parties.[5]

Second, since the parties entering into a prenuptial agreement are entering into a contract, they must have general contractual capacity. The parties must be of legal age (the elderly client undoubtedly will be) and competent to contract (this is essential when it comes to the elderly client and is discussed below). Moreover, there must be sufficient consideration. Although the UPAA provides that an agreement will be enforceable "without consideration," it will only be effective "upon marriage."[6] Thus, as under the common law of many states, the marriage is essentially the consideration.

Third, the parties must enter into the agreement voluntarily and the agreement must be free from fraud, duress and undue influence.[7] A determination of whether there was duress or undue influences is a fact specific analysis. However, a client's age and mental state will be considered in determining whether there was duress in the execution of any agreement. Typically if no duress exists, and the parties have the capacity to contract, had the opportunity to consult with counsel and the agreement was executed weeks in advance of the wedding, the agreement will be found to be voluntary.[8] Specific issues addressing the elderly and the concept of duress and undue influence are fully set forth below.[9]

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4 *See*, *e.g.*, Tatum v. Tatum, 606 S.W. 2d 3, 33 (Tex. Ct. App. 1980) (holding that, under Texas law, an oral promise based upon consideration of marriage is unenforceable under the statute of frauds).

5 UPAA, § 2.

6 UPAA, §§ 3-4.

7 The requirements for finding a premarital agreement enforceable are set forth in UPAA, § 6.

8 *See e.g.*, Lebeck v. Lebeck, 881 P.2d 727 (N.M. Ct. App. 1994) (finding that the short amount of time between the execution of the agreement and the date of the wedding (several days) was insufficient alone to show that there was duress or undue influence.)

9 *See* infra text accompanying note 16.

Fourth, an agreement will be void if it was unconscionable at the time of execution and there was a lack of a "fair and reasonable" disclosure of the "property or financial obligations" or a lack of a waiver of such disclosure.[10] Unconscionability will be determined by a court as a matter of law. Additionally, although not necessarily required by statute, each party should be represented by separate counsel to ensure the validity of any agreement.

The requirements set forth above are the general requirements necessary to ensure the validity of a prenuptial agreement. However, the specific state law should be analyzed to determine if additional requirements for validity exist.

II. Specific Consideration for the Elderly

When an elderly client seeks counsel regarding prenuptial agreements certain unique issues arise. An older person getting married is more likely to have accumulated significant separate assets. A marriage later in life may be a second marriage and there may be children from a prior marriage or marriages. Moreover, many issues related to estate planning, health care and other similar issues should be considered. Set forth below is a discussion of those issues, possible solutions to the problems raised, and sample provisions which may be included in such agreements.

A. *Preliminary Issues*

Even before an agreement is decided upon, several preliminary issues should be addressed:

1. *Marriage versus Cohabitation.*

The parties should understand that even with a prenuptial agreement, financial consequences are associated with the decision to marry that may not be present if the parties cohabit with-

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[10] *See e.g.,* Fick v. Fick, 851 P. 2d 445 (Nev. 1993) (finding agreement to be unenforceable because there was not a full disclosure of assets prior to the execution of the agreement); *see also* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act,* 19 J. Legis. 127 (1993).

out marriage.[11] Marriage may affect a spouse's right to alimony from a former spouse, a spouse's right to trust benefits, or a spouse's right to Social Security benefits from a prior spouse.[12] Taxes, social security, pension benefits, and health insurance, to name a few, may also be implicated when a couple decides to marry. It should also be made clear that although there may be negative financial ramifications associated with marriage, there are also positive ones (e.g., increased gift-giving amounts for estate planning purposes).

2. *Drafting of Other Documents*.

Remarriage is a time for the parties to review and revise their estate plans. This is especially important for elderly clients. The prenuptial agreement can contain a provision requiring the parties to execute joint wills.[13] Other estate planning documents may also need to be modified or created and can be executed at the same time as the prenuptial agreement even if not specifically required in the prenuptial agreement itself.[14] This will insure that the instructions and intentions of the parties are carried out thoroughly.

3. *Clear Identification of Client.*

It is important to remember who the client is when drafting prenuptial agreements for elderly clients. Although the central purpose of many prenuptial agreement drafted for elderly clients is the protection of their children from prior marriages, and often it is a child who has made the referral to the attorney, the attorney must recognize that child is not the client. However, it may be a good idea to have the children represented by separate counsel. It also may be appropriate for the children to be third-party beneficiaries of the agreement, thereby assuring that they

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11 *See* Dianne S. Burden, *Remarriage vs. Cohabitation*, 16 Fam. Advoc. 31 (1993).

12 *See* Harry S. Margolis, *Prenuptial Agreements for Older Clients*, 10 Elder L. Rep. 10 (May 1997).

13 *See* Carolyn L. Dessin, *The Troubled Relationship of Will Contracts and Spousal Protection: Time For an Amicable Separation*, 45 Cath. U. L. Rev. 435 (1996).

14 *See* infra text accompanying note 28.

will be able to enforce their rights and obliging them to abide by and not contest the agreement.

4. *Competency of the Parties.*

The competency of the parties is always a consideration when any legal document is executed; however, particular care is required when older individuals execute a prenuptial agreement.[15] In fact, the attorney may consider videotaping the execution of the agreement, or having the execution of the agreement take place before a court reporter. The videotaping of the signing of the agreement should be carefully considered because both pros and cons are associated with this approach. For example, if the client is bedridden or appears very ill, a videotape may not be a good idea. However, if the client appears well and is able to competently and coherently answer questions on a videotape, the taping may prove helpful.

5. *Duress and Undue Influence.*

A prenuptial agreement executed under duress or with undue influence will not be valid. A common claim of duress is based on an allegation that one party did not have sufficient time to consult with a lawyer and was presented with the agreement within days or hours of the wedding. In a typical case, presentation of an agreement a few weeks in advance of a wedding may be deemed sufficient.[16] In a situation in which an elderly client has certain handicaps (e.g., wheelchair bound, arthritic, difficulty hearing or seeing), an argument could be made that additional time was necessary for the elderly person to make appointments and meet and consult with attorneys and review the agreement. Therefore, more than sufficient time should always be provided when any such claim could be asserted and special considerations may need to be made (e.g., large type agreement).

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15 In fact, in *Penhallow v. Penhallow*, 649 A.2d 1016 (R.I. 1994), counsel for the husband, who was seventy-eight years old at the time of execution of the agreement, attempted to raise on appeal the claim that his client lacked capacity to enter into contracts at the time of execution.

16 *See* Lebeck v. Lebeck, 881 P.2d 727 (N.M. Ct. App. 1994), (deeming several days sufficient).

B. *Drafting Concerns and Sample Provisions*

In drafting the agreement itself, practitioners should consider provisions addressing the following issues:

1. *Choice of Law.*

A choice of law provision indicating which state law shall govern the agreement is essential in prenuptial agreements drafted for elderly clients to insure that their intentions are carried out. Elderly clients are likely to retire to other states where the law governing prenuptial agreements could alter the interpretation of the document and the understanding of the parties. Also, the client's estate may be probated in another state. Pursuant to the UPAA, a prenuptial agreement may identify which state law will govern the construction of the agreement. For example:

[State A] law shall govern this Agreement. The parties consent to jurisdiction and venue in [County Z, State A] for all matters regarding the interpretation or enforcement of this agreement. The parties realize that changes in [State A] law or changes of domicile could, in the absence of this agreement, affect their property and spousal support rights. The parties understand that the laws of other jurisdictions may provide rights, such as community property rights, and that those rights may be greater than the rights contained in this Agreement. The parties intend this Agreement to finally determine their property and spousal support rights as to each other as set forth in this Agreement and do not intend that future changes in the law or in domicile will alter these rights.

2. *Protection of Children (and Grandchildren) from Previous Marriage.*

One of the most frequent goals of prenuptial agreements executed between the elderly is the protection of children and grandchildren from prior marriages. In regard to adult children, often the safeguarding of their inheritance is of central concern. (It has been asserted that such provisions in an agreement often advance family harmony and reduce tension between children and a new spouse because everyone understands that they will

not be cut out of family assets.[17]) This protection can be provided through the use of provisions that clearly characterize the parties property. The following provisions may be considered. First, the parties' property should be clearly characterized:

This Agreement sets forth the rights of the parties in all property or interests in property owned by either or both of them during their marriage, property which will be designated either as "Individual Property" or "Joint Property." There shall be no property which would constitute "marital/ community property" as defined by [State Statute X], or successor provisions.[18]

Individual property should be specifically defined in the agreement and should include all property or interests in property, real or personal, owned by (or acquired and held for the benefit of) either party prior to marriage. Lawyers and their elderly clients should also contemplate provisions stating that the following types of property are deemed individual property: property obtained by inheritance or gift, property received in exchange for individual property, any income from or increase in value of the individual property, any income from employment, any employee benefit plan. Further, the definition of individual property should include all other property that is not specifically defined as joint property. Joint property must also be defined in the agreement and may include any property that is titled in the names of both parties after the marriage ceremony, any property acquired in exchange for joint property, any income from or increase in value of the joint property.

After the property is characterized, the agreement should provide for its distribution upon either divorce or death. For example:

If the parties' marriage terminates for any reason other than the death of either party then the rights of the parties to support and to Individual Property and Joint Property shall be as follows:

Unless the parties agree otherwise, the Individual Property of each party shall continue to belong only to that party. [Or insert provisions relating to what the children will receive.] The value of

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17 *See*, *e.g.*, Charles Cahn II, *Estate Planning to Avoid Complications of Remarriage*, 19 Est. Plan. 268 (1992); Albert B. Crenshaw, *Older Couples Embrace Prenuptial Agreements*, Wash. Post, Apr. 27, 1993, at Z12.

18 Capitalized words in the sample provisions represent words and/or concepts that must be defined elsewhere in the Agreement.

all Joint Property shall be divided equally between the parties. Property division shall be done immediately upon the conclusion of any judicial action which results in a legal separation or the termination of the marriage (the "Determination Event"), including a judgment for legal separation, a judgment of invalidity of marriage, a decree of divorce, a judgment for dissolution of marriage, a decree of annulment, or otherwise (regardless of which party initiates such judicial action).

Upon the death of one of the parties during their marriage, the rights of the survivor in the Individual Property of the decedent and Joint Property are as follows:

Unless the decedent voluntarily provides otherwise, the decedent's Individual Property will be administered, descend and be distributed as if the survivor had predeceased the decedent. Joint Property will be administered, descend and be distributed as follows:

> *(i) Property registered in the names of both parties with a right of survivorship shall become the property of the survivor.*
> *(ii) Unless the decedent voluntarily provides otherwise, the interest of the decedent in all other Joint Property will be administered, descend and be distributed as if the survivor predeceased the decedent.*

The agreement should also include a mutual waiver addressing elective shares, and other rights at common law or established by statute,[19] as follows:

Both parties waive their rights, if any, by statute or otherwise, under the laws of any jurisdiction, to receive any award of support, as spouse of the other, to receive an intestate share of the other's estate and to renounce or to elect to take against or to contest, the provisions of any trust in which the other party may have an interest or a power, the other party's will or any codicil thereto, a beneficiary designation under any employee benefit plan, insurance policy, or any other form of transfer or payment taking effect at the other party's death.

The above-outlined provisions are relatively restrictive and many variations are possible. The agreement could provide that certain property or money will be paid from the wealthier spouse's individual property in the event of divorce or death.

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19 *See*, *e.g.*, In re Estate of Thies, 903 P.2d 186 (Mont. 1995) (upholding prenuptial agreement precluding the wife from taking an elective share where the husband had fairly, although not fully, disclosed his assets).

The provisions can be connected to the length of the marriage. For example:

Upon the determination event, Spouse A [the wealthier spouse] agrees to provide Spouse B with the following sum of money from his Individual Property, depending on when the Determination Event occurs:

Marriage of less than one year	*$100,000 due*
Marriage more than one year, but less than two years	*$200,000 due*
Marriage of more than two years	*$300,000 due*

In the event that Spouse A predeceases Spouse B, then Spouse B shall receive the following sum of money from Spouse A's Individual Property, depending on when Spouse A's death occurs:

Marriage of less than one year	*$150,000 due*
Marriage of more than one year but less than two years	*$300,000 due*
Marriage of more than two years	*$500,000 due*

Another possible means of providing for a spouse is through the acquisition of life insurance. This may be difficult, or at least very expensive, if the spouse desiring to purchase the insurance is elderly; however, the spouse could be named as a beneficiary on an already owned policy.[20] The use of a QTIP trust, or other type trust, may provide income to a spouse during life while allowing the ultimate passage of wealth to the next generation without negative tax consequences.[21]

It is important to note that these types of provisions generally protect the children's interests only in the event of their parent's death or a divorce of the parties. If more assurance or greater limitations are required because of concerns that the parent's assets will be dissipated during the marriage, other solutions should be considered. For example, an irrevocable trust can be created.[22] As discussed above, it is important to remember who your client is and special care should be taken to insure that the

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20 An agreement may also include a provision requiring each spouse to assist the other in obtaining insurance by signing applications and submitting to necessary physical examinations.

21 *See*, *e.g.*, Cahn, *supra* note 17, at 6; Harry S. Margolis, *supra* note 12, at 5.

22 *See*, *e.g.*, Cahn, *supra* note 17, at 6.

client's goals (not the goals of the children who may benefit from the agreement) are met in drafting limiting provisions or other documents targeting dissipation during the marriage.

Another important consideration is how household furnishings and other personal property will be distributed. If a party wants to ensure that his or her children receive certain personal property, a provision addressing its distribution should be included. However, it is important to take into account the effect of such gifts upon the surviving spouse.

3. *Planning for Medical Needs of Spouse.*

For older spouses in particular it is important to consider how certain medical and other health care expenses will be paid. Today, the cost of nursing home and other long-term care is staggering and responsibility for such care can be burdensome.

For Medicaid purposes, both the husband and wife are considered as one. That is, for one spouse to be eligible for Medicaid payment for nursing home care the other spouse must have resources of little more than eighty-four thousand dollars in addition to exempt assets such as a home, a care and furnishings.[23]

A provision could be included protecting the separate property of the spouse not residing in the nursing home or providing that a spouse's separate property shall not be used for the payment of uninsured medical expenses. The extent to which such a provision is enforceable must be thoroughly researched and the client advised of the risk that the provision could be struck down as contrary to public policy or otherwise.[24] Another option may be to purchase a long-term care insurance policy.

In the drafting of prenuptial agreements, the concern regarding medical needs should not be limited to costs. Another

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[23] *See* Clifton Kruse, *Love May be Less Wonderful the Second Time Around*, 13 NAELA Q. 11 (Winter 2000) (describing how pursuant to 42 U.S.C., §§ 396r - 5(b), the income of the spouse not in a nursing home is not required to be used to pay for the spouse's institutional care; however, in reality, the spouse's resources must be used or somehow "spent down" because the non-institutionalized spouse's assets will prevent the institutionalized spouse from receiving Medicaid).

[24] In Illinois, for example, spouses are held jointly and severally liable for family expenses, including medical expenses, pursuant to statute. Thus, any attempt to circumvent the dictates of the statute in Illinois would likely be unsuccessful. Ill. Rev. Stat. § 65/15(a)(2).

important consideration relates to the older individual's personal desires regarding end of life choices. Various health care directives should also be contemplated at the time of drafting the prenuptial agreement. For example, living wills, health care proxies, and powers of attorney should be considered.[25] In most states, if one spouse becomes incapacitated, the other spouse will be given preference to serve as conservator or guardian unless the incapacitated spouse has nominated another individual or has appointed an agent under a durable power of attorney.[26]

4. *Provisions Addressing Death of Spouse.*

Provisions regarding determinations of who will make end of life decisions are addressed above. However, other important considerations related to the death of a spouse may be covered in a prenuptial agreement. The parties may wish to dictate who will make decisions about the funeral and burial. Such considerations may include location of the funeral and burial, considerations regarding cremation or identity of the cemetery and headstone selection, and religious considerations.

In addition, provisions can be included which would prevent one's new spouse from acting as executor, or administrator, of the estate:

The parties each waive his or her right, if any, by statute or otherwise, under the laws of any jurisdiction, to any right of homestead, to act as administrator or personal representative of the other party's estate or to have or exercise any powers or responsibility with respect to property passing by reason of the other party's death.

5. *Decisions Regarding Preliminary Residence.*

If one spouse moves into the other spouse's residence, the inclusion of provisions regarding the residence should be considered. In particular, a provision should be included if the house that the parties will occupy is intended to be left to the titleholder's children.[27]

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25 *See* Burden, *supra* note 11, at 4.

26 *See* Margolis, *supra* note 12, at 5.

27 Further, if the spouse moving into the other spouse's residence sells his or her residence, considerations regarding the timing of the sale should be made. (This is also true if both decide to sell their residences and purchase a

In the event of divorce such provision might read:

No later than thirty days after the commencement of an action by either party that may result in a Determination Event, regardless of which party initiates such judicial action, Spouse A [non-titleholder spouse] agrees to permanently vacate any residential real estate used by the parties either full time or part time as a residence shortly before the commencement of such action [and immediately upon such vacancy, Spouse B agrees to provide Spouse A with a lump-sum cash payment of $50,000 from Spouse B's Individual Property].

The provision may also contemplate the death of the title-holder spouse and provide that the survivor (the non-titleholder spouse) may remain in the residence for life, for a stated period of time or until remarriage. However, in determining the period of time the surviving spouse will remain in the residence, careful consideration should be paid to insure the property will qualify for the marital deduction under the Internal Revenue Code. In the event that the residence is not left outright to the surviving spouse, the agreement should clarify whether the spouse is required to pay the mortgage, taxes, utilities, and maintenance of the residence. Alternatively, the interest could be allowed to pass to the surviving spouse and the agreement could specify that the surviving spouse's will must leave the residence to the title-holder's children.

6. *Inclusion of Estate Planning.*

As discussed above, the parties should consider executing new wills at the time they execute their premarital agreement. The parties may choose to include in their prenuptial agreement an agreement to execute new wills. This contract in the prenuptial agreement can prevent a party from later executing a new will that may frustrate the parties' intentions as outlined in the prenuptial agreement.

In drafting any premarital agreement and concurrent estate planning documents, the right of a spouse to take an elective share should be considered. Under the Uniform Probate Code, a

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new residence together.) The timing of the sale or sales may have significant tax implications. For example, if the spouses marry and take joint title on a home before selling the home, there could be a great tax benefit. *See*, *e.g.*, Cahn, *supra* note 17, at 6.

spouse may waive the spousal elective share before or after marriage by written contract, agreement or waiver.[28] Thus, the attorney should address whether such a waiver will be included in the agreement.

7. *Contemplating Retirement Benefits.*

In drafting a prenuptial agreement special care should be paid to any attempted waiver of surviving spouse benefits from a plan governed by ERISA. A waiver prior to marriage will likely be ineffective since a waiver may only be executed by a spouse (of course, only after marriage is one deemed a spouse).[29] Thus, such a provision might read as follows:

With respect to Employee Benefit Plans, each party waives and releases to the other party all rights and interests he or she may acquire by reason of their marriage by contract or under the laws of any jurisdiction as the spouse, widow, or widower of the other in any employee benefit plan in which the other party is or at any time becomes a participant, including, but not limited to, the right to receive benefits, either during life or on the death of the other party, to elect or consent to the election of a form of benefit, and to alienate any benefits pursuant to a qualified domestic relations order. Each party shall, on the request of the other party, execute or consent to the execution of any additional documents necessary to carry out the intent of this paragraph, including, but not limited to, (1) a beneficiary designation form naming someone other than the spouse as beneficiary, (2) an election to waive any preretirement or survivor annuity, (3) an election to waive any qualified joint and survivor annuity, and (4) an election to designate a benefit payment option. If such party has failed to execute such documents or

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28 U.P.C., § 2 – 204.

29 In interpreting ERISA, the Sixth Circuit held that a waiver of the benefits could only be made after the marriage. *See* Howard v. Branham, Baber Coal, Co., 968 F.2d 1214 (6th Cir 1992). However, some courts have perhaps been more lenient. *See* Horwitz v. Sher, 982 F. 2d 778 (2d Cir. 1992) (reserving judgment on whether the prenuptial agreement "might have operated as an effective waiver if its only deficiency were that it had been entered into before the marriage.") Regardless, waiver made after marriage is most prudent. Furthermore, the waiver should be signed in front of a plan representative or a notary public and the waiver must meet the statutory rules for a waiver of benefits under ERISA. *See* Bart A. Basi & Ed Bodnam, *Retirement Plan Rules Supercede Premarital Contract*, 24 Tax. Law. 226, 228-29 (1996).

if such documents are not effective in carrying out the intent of this paragraph, each party agrees to indemnify the participant for any amounts received by the nonparticipant. Notwithstanding the foregoing, in the case of any death benefit that is payable only to the participant's spouse and, in the absence of such payment, could not be paid to another beneficiary and thereby would be entirely lost, such death benefit shall be paid to the participant's surviving spouse as his or her absolute property.

8. *Alimony.*

A waiver of alimony should be considered. This is an important issue to discuss because even if the marriage is one of short duration, if the spouse becomes infirm prior to a divorce, alimony may be ordered.[30] For example:

The parties each release and waive all rights to claim any support, maintenance, separate maintenance, temporary alimony, alimony, lump-sum settlement, monetary award, or other payment for support and agree to request that a court make no provision for such items.

Moreover, it is essential to understand that the UPAA states that a modification or elimination of spousal support in a prenuptial agreement is not enforceable if it causes one party to the agreement undue hardship in light of circumstances not reasonably foreseeable at the time of the execution of the agreement.[31]

A provision addressing the concept of "foreseeable circumstances" should be considered. Included in the agreement could be a statement that certain situations will not be deemed to be unforeseeable events. The statement should be accompanied by a non-exclusive list of events, including unemployment, disability, or illness. For example, in one case, a waiver of maintenance was upheld where the court explained:

> "[t]he marriage [ ] was of very short duration, between two elderly people who had principally sought companionship, not financial security; they had waived their rights to each other's estates by antenuptial agreement. Prior to the marriage, [the wife] had been entirely self-supporting, and had been so for many, many years. She had indepen-

30 *See* Cary v. Cary, 937 S.W. 2d 777 (Tenn. 1996) (holding that a waiver of alimony provision will be enforced unless the enforcement would render the spouse deprived of alimony a public charge).

31 UPAA, § 6(b).

> dent savings and assets, which she had kept separate during the 18-month period during which the parties cohabitated as husband and wife."[32]

Thus, a provision reciting that the parties are both self-supporting and individually have independent assets to support themselves may be considered in a prenuptial agreement.

9. *Tax Returns.*

A provision requiring the parties to the agreement to file joint tax returns should be contemplated. Additionally, the agreement may dictate who will pay taxes and what types of investments may be made during the marriage (e.g., municipal bonds or stocks). Capital loss allocation should also be addressed.[33]

III. Conclusion

> [Premarital Agreements are] very hard to think about when people are in love. . . I find it very difficult as a planner to raise the issue because in some ways people feel offended. On the other hand, the statistics. . . indicate you are a wise person if you do think about it.[34]

To be a wise counselor to your elderly client, a premarital agreement should always be evaluated. And, as is set forth above in this article, there are many specific and important considerations to address when a premarital agreement is being prepared, or considered, for an elderly client.

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32 *See* Schor v. Schor, 467 N.Y.S.2d 429 (N.Y. 1983).

33 *See* Cahn, *supra* note 17, at 7. (There the scenario where one spouse's capital losses is used to offset the other's capital gain from the sale of a residence (or otherwise). (And nothing that the agreement may provide for some "true up" or other payment in such a situation.)

34 *See* Crenshaw, *supra* note 17, at 212.

Bibliography

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