

## **Pre-Marital Agreements From An Estate Planning Perspective**

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Pre-Marital Agreements are an intersection of Divorce and Estate Planning Law. Many people think of Pre-Marital Agreements primarily as a protection in the event of divorce. However, as life expectancies have grown, more older Americans are marrying. These are often people with grown children from a prior marriage and substantial estates. Older people have as much a right to enjoy the social, religious and personal benefits of marriage as younger people, but are in a very different estate planning situation. The law, particularly the Probate Act, is designed to protect a surviving spouse if there is no planning, granting the surviving spouse broad rights which may be wholly inappropriate in a new marriage between older people. Here, the Pre-Marital Agreement serves as an opportunity to plan not only for a divorce, but for a marriage which ends as the parties want the marriage to end: "Till death do us part."

Attached is a simple Pre-Marital Agreement for use with older clients. The Agreement provides for no maintenance at all, since both spouses are retired and have assets before the marriage begins. The Agreement does, however, provide for benefits if a spouse dies during the marriage.

Here are some of the key Estate Planning issues to consider in drafting Pre-Marital Agreements:

1. Each spouse should waive the rights which are granted in the Probate Act and ERISA to a surviving spouse and, instead, any rights should be spelled out in the agreement. The key rights which should be waived are:
  - a. Right to be or appoint the administrator of the Estate;
  - b. Right to Renounce Will;
  - c. Right to Spouse's Award;
  - d. Right to Contest the Validity of a Will or Trust;
  - e. Right to Receive Qualified Plan Benefits. Include an ongoing obligation to sign any additional documents which may be required to waive ERISA rights.
  
2. The Agreement should determine what rights the surviving spouse will have to live in the marital home if the marital home is not to be owned jointly. Typically, either a set period of time (6 months, 1 year, etc.) or the lifetime of the survivor is used. If the survivor has the right to live their for his/her lifetime, the Agreement needs to spell out:
  - a. How title to the residence will be held (in trust or a recorded deed with a life estate and then separately named remaindermen);
  - b. Who will pay the maintenance and taxes;
  - c. How the parties will treat capital improvements;
  - d. Whether the surviving spouse can roll-over the equity into a replacement residence.

3. The Agreement typically provides some minimum monetary benefit to the surviving spouse in lieu of a normal inheritance right. Often, the amount of the benefit is a pecuniary amount, but can instead be a percentage. Care should be taken to describe how and from what source the benefit will be paid; a roll-over from an IRA is less valuable to a survivor than after-tax cash. The amount can change to increase over time if the marriage lasts longer. The agreed amount is only a minimum benefit; either party can make a more generous bequest later as the marriage grows.

4. The Agreement sometimes provides that the deceased spouse's entire estate will be held in trust for the surviving spouse's lifetime, and then, upon the survivor's death, be distributed to the first-to-die's children. If the spouses are close in age this makes more sense than if one spouse is the same age as the other spouse's children. The amount held in trust does not have to be the entire estate; a popular compromise for larger estates is to have the estate tax exempt amount (now \$2 M) be immediately distributed to the children and have the balance, which qualifies for the unlimited estate tax marital deduction, held for the surviving spouse.

5. Assets are held in many different forms, which could allow a spouse who is later seeking to frustrate the Agreement other avenues to pass their estate to their own children and avoid meeting their obligations under the Agreement. The Pre-Marital Agreement should require that any assets held in a living trust will be used to fulfill obligations under the Agreement. If there is no living trust, then the Agreement should include a provision that, if the estate is insufficient to satisfy obligations under the Agreement, a constructive trust will be imposed over any assets passing by joint tenancy, pay-on-death account, life insurance, or otherwise.

6. The Pre-Marital Agreement should be drafted with enough flexibility to allow for estate planning. Spouses often want to transfer title to property during the marriage so that each spouse has enough money in their name to use the full estate tax exemption. These transfers are often made solely for the purposes of minimizing the tax, and not with any intention of changing the marital or non-marital character of the property in the event of a divorce. The Pre-Marital Agreement's definition of "separate property" should not be so absolute as to prevent the parties from minimizing estate taxes.

7. Sometimes people use a living trust as an alternative to a Pre-Marital Agreement. This works in theory so long as the funds in the Trust are maintained as non-marital property.

- a. The funds should be contributed to the Trust before the marriage;
- b. The Trust should be viewed and used as a pipe with a one-way valve; money can only flow out of the Trust, never in;
- c. Not as good an option as the Pre-Marital Agreement; too easy to make a mistake and transmute the Trust into marital property.

Conclusion: Good communication with your client is key to successfully plan for the death of a spouse. Pay particular attention to how the client and their fiancé own their assets and structure a Pre-Marital Agreement which reflects their present intent and but can still be enforced if the fiancé, after the marriage, changes title to assets and then dies before any divorce.

SAMPLE PREMARITAL AGREEMENT FOR SENIORS

THIS AGREEMENT, made and entered into on this \_\_\_<sup>th</sup> day of \_\_\_\_\_, 2006, by and between HUSBAND (“Husband”), residing at \_\_\_\_\_, Lake Forest, Illinois, and WIFE (“Wife”), residing at \_\_\_\_\_, Lake Forest, Illinois.

**RECITALS**

A) The parties intend to enter a marriage relationship with each other on or about the \_\_\_<sup>th</sup> day of \_\_\_\_\_, 2006, by reason of which they are desirous of fixing in advance the rights of each in and to the property of the other, and limiting the claims and demands which each of the parties shall have against the estate of the other by reason of the marriage and to accept the provisions of this Agreement in lieu of and in full discharge, settlement, and satisfaction of all such rights and claims.

B) Husband is possessed of certain property, real and personal, including but not limited to those items set forth in Exhibit A, attached hereto and made a part hereof.

C) Wife is possessed of certain property, real and personal, including but not limited to those items set forth in Exhibit B, attached hereto and made a part hereof.

D) Husband acknowledges that:

- i) He is fully acquainted with the business and resources of Wife;
- ii) He understands that she is a person of moderate wealth;
- iii) She has answered all the questions he has asked about her income and assets;
- iv) He understands that by entering into this Agreement he may receive, as her widower, substantially less than the amount he would otherwise be entitled to receive if Wife died intestate or if he elected to take against Wife’s last will and testament pursuant to statute;
- v) He understands that by entering into this Agreement he may receive, in the event of a Divorce, Legal Separation, or Dissolution of Marriage, substantially less than the amount he would otherwise be entitled to receive if he had not entered into this Agreement;
- vi) He has at all times received the advice of counsel of his own choosing;
- vii) He has carefully weighed all the facts and circumstances, and desires to marry Wife, regardless of any financial arrangements made for her benefit; and
- viii) He is entering into this Agreement freely, voluntarily and will full knowledge.
- ix) He feels the Agreement is a conscionable agreement and:
  1. He has been provided a fair and reasonable disclosure of the property and financial obligations of the Wife; and
  2. He does voluntarily and expressly waive, in writing, any right to disclosure of the property and financial obligations of the Wife beyond the disclosure provided; and

3. He has an adequate knowledge of the property or financial obligations of the Wife.
- E) Wife acknowledges that:
- i) She is fully acquainted with the business and resources of Husband;
  - ii) She understands that he is a person of moderate wealth;
  - iii) He has answered all the questions she has asked about his income and assets;
  - iv) She understands that by entering into this Agreement she may receive, as his widow, substantially less than the amount she would otherwise be entitled to receive if Husband died intestate or if she elected to take against Husband's last will and testament pursuant to statute;
  - v) She understands that by entering into this Agreement she may receive, in the event of a Divorce, Legal Separation, or Dissolution of Marriage, substantially less than the amount she would otherwise be entitled to receive if she had not entered into this Agreement.
  - vi) She has at all times received the advice of counsel of her own choosing;
  - vii) She has carefully weighed all the facts and circumstances and desires to marry Husband, regardless of any financial arrangements made for his benefit; and
  - viii) She is entering into this Agreement freely, voluntarily and will full knowledge.
  - ix) She feels the Agreement is a conscionable agreement and:
    1. She has been provided a fair and reasonable disclosure of the property and financial obligations of the Husband; and
    2. She does voluntarily and expressly waive, in writing, any right to disclosure of the property and financial obligations of the Husband beyond the disclosure provided; and
    3. She has an adequate knowledge of the property or financial obligations of the Husband.

NOW, THEREFORE, in consideration of the promises, and in consideration of the mutual covenants and agreements herein contained, and the marriage of the parties to be solemnized on the \_\_\_\_<sup>th</sup> day of \_\_\_\_\_, 2006, it is hereby covenanted and agreed by and between the parties hereto as follows:

1. Neither Husband nor Wife shall have or acquire any right, title, interest or claim in or to the real or personal estate of the other by virtue of their marriage to each other, upon the death of either party the estate of such deceased party shall go to the person or persons who would receive the same if no marriage had ever taken place between them, it being the wish of each party to keep his or her property and estates separate.
2. The parties acknowledge that the Husband owns or is Trustee of certain parcels of real estate for the benefit of himself and his children, commonly known as \_\_\_\_\_ and \_\_\_\_\_, Lake Forest, Illinois, and legally described in Exhibit "A" attached hereto and made a part hereof.

The parties to this agreement agree as follows:

- A) That the present fair market value of said real estate is as set forth on Schedule A.
- B) That fee simple title to said real estate may remain solely in the name of the Husband or the trustee of the Husband Living Trust u/a/d \_\_\_\_\_ (hereinafter “inter vivos trust”).
- C) That in the event of the divorce or dissolution of marriage of the parties, and upon the effective date of a Judgment of Divorce or Dissolution of Marriage, the Husband or the trustee of his inter vivos trust shall be entitled to retain Title to the real estate and/or sell the real estate pursuant to terms and provisions contained in this agreement.

3. The parties acknowledge that the Wife owns or is Trustee of certain real estate for the benefit of herself and her children certain real estate, commonly known as \_\_\_\_\_, Lake Forest, Illinois, and described in Exhibit “B” attached hereto and made a part hereof.

Said real estate will become the marital residence and the parties agree as follows:

- A) That the present fair market value of said real estate is set forth on Schedule B (“present net value”).
  - B) That fee simple title to said real estate may remain solely in the name of the Wife.
  - C) That in the event of the divorce or dissolution of marriage of the parties, and upon the effective date of a Judgment of Divorce or Dissolution of Marriage, the Wife shall be entitled to retain Title to the real estate and/or sell the real estate pursuant to terms and provisions contained in this agreement.
4. During the marriage, the Husband shall pay for all of the household expenses, which shall be limited to real estate taxes, utilities (including telephone charges), and lawn maintenance charges. Any other expenses shall be shared by the Husband and Wife equally.
5. The Husband hereby agrees that, notwithstanding any other provision of this Agreement, if the Wife is living and married to the Husband at the time of his death, the then-acting trustee of his aforesaid inter vivos trust will pay to her or for her benefit the sum of \_\_\_\_\_ Thousand (\$\_\_\_\_,000) Dollars. The Husband agrees that he has or will amend the terms of his inter vivos trust to provide for this bequest and will not thereafter amend, revoke or divert assets from the inter vivos trust without making alternative and equivalent provisions.
6. All earnings of Husband or Wife earned on or after their marriage and arising from any and all sources, contingent or otherwise, and all income, profits, interest income, and appreciation from investments or use of such earnings from the personal activities, ability, or capacity of either person, and regardless of which person controls or manages such earnings,

shall be separate non-marital property of the person so earning or investing such income or assets and shall not be marital or community property.

7. The Husband and Wife now own property in their own names and/or held by others as Trustee for themselves and others acquired by them prior to their contemplated marriage, and it is agreed that such property shall remain their separate property subsequent to the date of marriage and in the event of a termination of the marriage by death, divorce or dissolution of marriage, that such property and the appreciation in said property or property acquired in exchange for said property, shall remain the property of the respective parties free of any claim of either, except as otherwise provided herein.

A) In the event the parties maintain as their marital residence the separate property of the other, and said property owner dies, the survivor may remain in possession of that marital residence for up to six months. At the expiration of six months, the survivor must surrender possession of the property. In the event there is a breach of this provision, such offending party shall be responsible for the reasonable attorney's fees and court costs for enforcement of this paragraph.

B) Both parties hereby expressly agree that upon termination of the marriage by divorce, dissolution of marriage, annulment or legal separation, they release and waive any and all rights to each other's pension, profit sharing or retirement plans and benefits, whether held in a Section 401(k) Plan, an Individual Retirement Account, or any other method.

8. Any property now owned as separate property, which is transferred to joint ownership between the parties, or property hereafter acquired which is held or owned in the names of the parties hereto as tenants by the entireties or joint tenants with the right of survivorship, or which is in the name of either of them as trustee for the benefit of the other, or which is payable to either of them as co-owner and not as trustee, shall upon the termination of the marriage by divorce or dissolution of marriage, be divided equally between the parties or upon the death of one of the parties, pass and be taken by the other as survivor or beneficiary. Notwithstanding the foregoing if such property is purchased with separate funds, of either party, then upon the termination of the marriage by divorce or dissolution of marriage, that property shall be awarded to that spouse who provided the funds for said purchase.

9. The Husband and Wife further covenant and agree that upon the termination of the marriage by death, divorce or dissolution, all real or personal property (including property held in an inter vivos trust) acquired before, after or during the marriage not held in joint tenancy or tenancy by the entireties shall upon dissolution or divorce be distributed to that party in whose name the real property (including property held in an inter vivos trust) is held.

10. Husband does hereby forever relinquish, release and waive all rights of dower or dower substitute, statutory fee or share, homestead of any type, surviving spouse's award, renunciatory or elective share, inheritance, descent, distribution, community interest, rights to exempt or property, family allowance, and all other rights or claims in the Wife's estate as Husband, widower, beneficiary or otherwise, by reason of the marital relations between the parties, under

any present or future law, which he might be entitled to claim in, to, or against the property of the Wife whether real, personal or mixed.

11. Wife does hereby forever relinquish, release and waive all rights of dower or dower substitute, statutory fee or share, homestead of any type, surviving spouse's award, renunciatory or elective share, inheritance, descent, distribution, community interest, rights to exempt property, family allowance, and all other rights or claims, in Husband's estate as Wife, widow, beneficiary or otherwise, by reason of the marital relations between the parties, under any present or future law, which she might be entitled to claim, in, to, or against the property of Husband whether real, personal or mixed.

12. Husband and Wife agree, in the event that at any time during said marriage now contemplated, they should be or become domiciled in California or some other "community property state," under the laws of which husband and wife, in the absence of a prenuptial or other contrary agreement, acquire property interests in community, or any other state under the laws of which property interest, in the absence of agreement, are different from the property interest of husband and wife under the laws of the states of their present domiciles or any other law governing such interests, their property interests described herein shall nevertheless remain the separate property of the party acquiring the same wholly in the same manner as if acquired in a "common law property state."

13. Each party may make such disposition of his or her property as the case may be by gift, inter vivos trust, or will during his or her lifetime as each sees fit. Notwithstanding the above, each party may make gifts for the benefit of the other, provided, however, that such dispositions of property shall be subject to and shall not defeat or interfere with the obligations of the parties under the terms of this agreement.

14. During the continuance of the marriage of the parties each of the parties is to have the full right to own, control, and dispose of his or her separate property the same as if the marriage did not exist, and each of the parties is to have the full right to dispose of and sell any and all real or personal property now or hereafter owned by either of them without the other party joining, and the transfer by either of the parties to this contract will convey the same title that the transfer would convey if the marriage had not existed. It is further agreed that in case either of the parties desire to sell or convey his or her personal estate, the other will join in any bill of sale or deed of conveyance as may be necessary to make the same effectual.

15. This Agreement shall extend, apply to, inure to the benefit of, and shall be binding upon, the parties hereto, their heirs, executors, administrators, inter vivos trustees, and assigns.

16. This Agreement contains the entire understanding of the parties. There are no representations, warranties, promises, covenants or undertakings, oral or otherwise, other than those expressly set forth herein, and the parties acknowledge that no representations or promises of any kind whatsoever have been made by either of them to the other with respect to any bequests or devises. No modification of this Agreement shall be binding unless such modification is in writing and signed by the parties hereto.

17. Each party shall, upon the other's request, take any and all steps and execute, acknowledge and deliver to the other party any and all further instruments necessary or expedient to effectuate the purpose and intent of this Agreement.

18. The parties agree that in the event that a proceeding for divorce, dissolution of marriage or legal separation is instituted by either party, Husband and Wife each waive any right to alimony, maintenance, or support of any kind. The parties agree that the purpose of this paragraph is to promote marital harmony and to discourage either party from obtaining monetary benefits by breach of the marital relationship and the institution of proceedings for legal separation, dissolution of marriage or divorce.

19. This Agreement is made in contemplation of the impending marriage between the parties, and in the event that marriage does not take place, for any reason, this Agreement shall be null and void.

20. This Agreement is being executed in the State of Illinois and is to be governed and interpreted under the law of Illinois. If any provision of this Agreement is interpreted in such a manner as to be prohibited or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Agreement.

**IN WITNESS WHEREOF**, the parties hereto have hereunto set their hands and seals the day and year first above written.

\_\_\_\_\_  
HUSBAND

\_\_\_\_\_  
WIFE

State of Illinois     )  
                                  ) ss  
County of Lake     )

I, \_\_\_\_\_, a Notary Public, in and for the said County, in the State aforesaid, do hereby certify that HUSBAND personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
Notary Public

State of Illinois        )  
                                  ) ss  
County of Lake         )

I, \_\_\_\_\_, a Notary Public, in and for the said County, in the State aforesaid, do hereby certify that WIFE, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
Notary Public

**CERTIFICATION OF ATTORNEY FOR HUSBAND**

I hereby certify that I am an attorney at law, duly licensed and admitted to practice in the State of Illinois; that I have been employed by HUSBAND, a party to this Agreement, and that I have advised such party with respect to this Agreement and explained to him the meaning and legal effect of it; and that HUSBAND has acknowledged his full and complete understanding of the said Agreement and its legal consequences, and has freely and voluntarily executed the Agreement in my presence.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Fredric Bryan Lesser  
Bollman, Lesser & McGlynn, LLP  
Attorney for Husband

**CERTIFICATION OF ATTORNEY FOR WIFE**

I hereby certify that I am an attorney at law, duly licensed and admitted to practice in the State of Illinois; that I have been employed by WIFE, a party to this Agreement, and that I have advised such party with respect to this Agreement and explained to her the meaning and legal effect of it; and that WIFE has acknowledged her full and complete understanding of the said Agreement and its legal consequences, and has freely and voluntarily executed the Agreement in my presence.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Attorney for Wife