

## Romantic Premarital Agreements: Solving the Planning Issues Without “The D Word”

by  
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### I. Introduction

When a couple is planning to marry, either or both may be urged by friends, family, financial advisors and/or business partners to consult an attorney to prepare a premarital agreement. For many hopeful prospective brides and grooms, the suggestion is immediately and viscerally rejected. Most often one of the couple more than the other will not consider a premarital agreement in contemplation of “The D Word.”<sup>1</sup> He or she will abhor the thought of reading a premarital agreement with detailed pro-

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<sup>1</sup> Social psychologists and behavioral economists have begun studying the heuristics of bargaining between potential spouses in the context of prenuptial agreements and marriage and divorce. This research may inform policy development as prenuptial agreements become more of the norm in the United States. See Brian Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. OF MATR. LAW. 249, 256 (2010) (“Problems of bounded rationality and the absence of knowing consent have been noted even for the decision to get married. Premarital agreements are standardly considered an even stronger case of bounded rationality.”); Helmut Rainer, *Should We Write Prenuptial Contracts?*, 51 EURO. ECON. REV. 337, 338 (2007) (“In spite of the increased practical relevance of prenuptial agreements in Europe and elsewhere, there is still much debate about their role. Advocates of prenuptial agreements see their advantages in terms of the benefits of certainty and contractual autonomy in the context of heterogenous marital circumstances. Critics suggest that prenuptial agreements may increase — rather than decrease — the likelihood of divorce by requiring couples to consider explicitly the terms of a divorce settlement.”); Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 110 (2008) (“Thus, even if private ordering is theoretically desirable, questions remain. Are private negotiations an effective means to attain a mutually beneficial contract? What background legal rules might support such a regime? Why do women fare worse in these private negotiations? This Article reviews empirical evidence suggesting that men and women bargain differently.”).

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visions and limitations on rights and interests in the event of divorce. They recoil from even thinking about problems during their marriage. Yet addressing shared plans could be practical and strengthen their commitment. In some cases, one fiancé wants to protect certain interests and is unaware of options that may satisfy planning needs without mentioning divorce. The couple or fiancé may welcome suggestions and options without even using “The D Word” in premarital documents.

The family law lawyer needs to anticipate and address a wide range of motivations and emotions in such circumstances.<sup>2</sup> The lawyer needs to study and analyze closely the primary goals of the client and reasons for the premarital plan. A client may instruct counsel that the word “divorce” shall not be in a premarital agreement for religious or emotional reasons. In some cases, the fiancé will want some language to address economic concerns that the couple may share or concerns raised by insistent third parties. The lawyer may recommend a unilateral document be drafted, such as a trust signed by one fiancé to provide for premarital planning without involving the other spouse. In other situations, a fairly limited premarital agreements could be drafted to address special planning needs. Premarital plans can be made that do not mention divorce, but will actually be protective of the client if marital problems lead to a divorce. What becomes crucial to explain is that the enforceability, or viability, of the prenuptial agreement depends extensively on the explicit terms at the time of execution and the subsequent behaviors of the client after the marriage.<sup>3</sup>

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<sup>2</sup> For a comprehensive article on this point, see Janet Weinstein & Ricardo Weinstein, *I Know Better Than That: The Role of Emotions and the Brain in Family Law Disputes*, 7 J.L. & FAM. STUD. 351 (2005).

<sup>3</sup> See *In re Estate of Barrows*, 913 A.2d 608, 612 (Me. 2006) (“Despite the fact that the prefatory clause states that the parties desire to fix their mutual property rights and obligations upon the death of either of them, none of the provisions that actually speak to the disposition of property explicitly reference death. They refer specifically to “non-marital property,” a term of art relating to property rights upon legal separation or divorce, and each cite to former 19 M.R.S.A. § 722-A, which governed property rights upon divorce and annulment. They do not cite to the probate code.”); see generally Chelsea Biemiller, *The Uncertain Enforceability of Prenuptial Agreements: Why the Extreme Approach in Pennsylvania Is the Right Approach for Review*, 6 DREXEL L. REV. 133 (2013).

The first section of this article will describe criteria for a premarital agreement under the Uniform Premarital and Marital Agreements Act, including meeting the requirements of the jurisdiction at the time of marriage, and considering the risks if a divorce occurs in another jurisdiction and the premarital agreement is subject to challenge. The second section addresses terms of premarital agreements that are respectful of religious restrictions on a premarital agreement and address a range of economic plans without mentioning divorce. The third section describes how one spouse avoids the prospect of a premarital agreement by placing premarital assets in an irrevocable settlor trust, a Domestic Asset Protection Trust.

## II. Premarital Agreements *Sans* Mention of Divorce

### A. *Requirements at Execution; Challenges in a Different Jurisdiction at Divorce*

The National Conference of Commissioners on Uniform State Laws approved and recommended the Uniform Premarital and Marital Agreements Act (UPMAA, or the Act) for enactment in all states at the July, 2012 Annual Conference and published January 2, 2013.<sup>4</sup> The UPMAA provides model legislation for premarital (and marital) agreements. The Act states in its definitional section:

“Premarital Agreement” means an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or non-occurrence of any other event.<sup>5</sup>

The Comment to the definitions notes that while most premarital agreements will be stand-alone documents, a fragment of a writing that deals primarily with other topics could also constitute a premarital agreement for the purpose of the act.<sup>6</sup>

Lawyers advising clients due to marry need to caution clients that the jurisdiction at time of dissolution could affect which

<sup>4</sup> UNIF. LAW COMM’N, <http://www.uniformlaws.org/Act.aspx?title=premarital%20and%20Marital%20Agreements%20Act> (last visited Sept. 8, 2016).

<sup>5</sup> UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 2 (2015).

<sup>6</sup> *Id.*

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state's law will be applied when the premarital agreement is interpreted. In its section regarding what law governs, the UPMAA provides:

The validity, enforceability, interpretation and construction of a premarital agreement or marital agreement are determined:

- (1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy of this state; or
- (2) absent an effective designation described in Paragraph (1), by the law of this state, including the choice-of-law rules of this state.<sup>7</sup>

Whenever an attorney drafts a premarital agreement, the attorney should advise about the possible problems with enforcement based on where the parties move and reside thereafter.<sup>8</sup>

When the premarital agreement is drafted the client will want assurance that the agreement will be enforced regardless of where the parties ultimately reside.<sup>9</sup> Most states require consideration (often simply the occurrence of the marriage), access to independent legal representation, voluntary execution, and disclosure of finances. While many states require the agreement to not be unconscionable or in violation of public policy, these re-

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<sup>7</sup> *Id.* § 4.

<sup>8</sup> See *Wellin v. Wellin*, 135 F. Supp. 3d 502, 523 (D. S.C. 2015) (applying Florida law, “Wendy argues that the Wellin children’s claims for breach of the prenuptial agreement should be dismissed because the Wellin children are not parties to the agreement, and are not entitled to enforce the agreement as third party beneficiaries”); *Rivers v. Rivers*, 21 S.W.3d 117, 120-22 (Mo. Ct. App. 2000) (finding that Missouri law applies to a premarital agreement that the parties entered into in Louisiana, even though the parties lived in Louisiana for twelve years before moving to Missouri); *Black v. Powers*, 628 S.E.2d 546, 553 (Va. Ct. App. 2006) (“We hold that, unless the parties clearly intended for the prenuptial agreement to be governed by the laws of a specific jurisdiction, the validity of that agreement—as with any other contract—is governed by the jurisdiction where the agreement was executed, unless the substantive law of that jurisdiction is contrary to the established public policy of the Commonwealth. Because the parties did not clearly intend for Virginia law to govern the validity of the agreement, and because neither party argues that the substantive law of the Virgin Islands regarding prenuptial agreements is contrary to Virginia’s established public policies, we hold that the trial court erred in applying Virginia law to resolve the validity of the agreement.”).

<sup>9</sup> Joan F. Kessler, *Can You Choose the Law to Govern Your Marital Agreement*, 8 J. AM. ACAD. MATRIM. LAW. 107 (1992).

quirements are not universal.<sup>10</sup> And in some states, fairness is measured at execution, in other states at enforcement.<sup>11</sup>

In a state like Pennsylvania, current law clearly favors the enforceability of a premarital agreement as long as full and fair disclosure is provided<sup>12</sup> or specifically waived.<sup>13</sup> Pennsylvania case law applies the same principles to both premarital and marital agreements. The Divorce Code<sup>14</sup> allows a party to waive economic disclosure in a divorce agreement and case law applies this principle to premarital agreements.<sup>15</sup> When a fiancé had possession of her engagement ring, grossly overvalued in the premarital agreement, a Pennsylvania court found she had had adequate opportunity to verify its value and could not claim fraudulent misrepresentation in the premarital agreement.<sup>16</sup> Other state laws have more rigorous requirements giving significant power to the reviewing court: to refuse to enforce where the court deems the terms to have been unconscionable; to refuse enforcement where the result would create a substantial hardship for a party; or to find material change in circumstances arising after the agreement was signed. Under the enforcement provisions of the UPMAA, the enacting state can select among optional clauses including one that the court may refuse to enforce a term of a premarital agreement if it finds the term was unconscionable at the time of signing. A further optional provision allows a finding of substan-

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<sup>10</sup> *Id.* at 112; *see* *Blanchard v. Blanchard*, No. 15-504 2016 WL4608177 ¶¶18-19 (Me. Sept. 6, 2016) (“‘Even when a premarital agreement is otherwise valid, however, a premarital agreement, “under all of the circumstances existing in a particular case, may be so unconscionable that [we] will not aid in its enforcement even if the prospective [spouse] had full knowledge of the property affairs of the other party.’ The party seeking to invalidate the contract on the ground of unconscionability—in this case, Sharon—bears the burden of timely raising the issue in the trial court proceedings and demonstrating that the contract in question is unconscionable.”]. When the party with the burden of proof appeals from a judgment, “the appellant must show that the evidence compels a contrary finding.” Unconscionability can be considered through two lenses: procedural and substantive.”) (citations omitted).

<sup>11</sup> *Kessler*, *supra* note 9, at 114-15.

<sup>12</sup> *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990); *Karkaria v. Karkaria*, 592 A.2d 64 (Pa. Super. 1991).

<sup>13</sup> *Lugg v. Lugg*, 64 A.3d 1109 (Pa. Super. Ct. 2013).

<sup>14</sup> 23 PA.CON.S. STAT. § 3106(a)(2)(ii) (2004).

<sup>15</sup> *Lugg*, 64 A.3d at 1113.

<sup>16</sup> *Porreco v. Porreco*, 811 A.2d 566 (Pa. 2002).

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tial hardship at enforcement due to marital change of circumstances.<sup>17</sup>

In a state protective of the agreement, like Pennsylvania, these factors, unconscionability and financial hardship, are irrelevant.<sup>18</sup> In states where the reviewing judge has the discretion to decide on unconscionability or substantial hardship, even if the couple agreed Pennsylvania law would be the governing law, the reviewing court could determine the premarital agreement is contrary to a fundamental public policy of the reviewing state. To avoid such a challenge, the parties may be well advised to address the likely financial circumstances to avoid the risk of a court finding unconscionability (for example, force a former spouse to become a public charge).<sup>19</sup>

The client who seeks premarital planning without mentioning divorce in the document may well turn against counsel later if the lawyer did not anticipate that unhappy prospect of divorce. A client who does not want to mention “The D Word” may still instruct counsel to draft protective provisions, just in case the marriage fails. Under the UPMAA, financial disclosure will be required for economic terms. It is the responsibility of the lawyer to caution the client regarding the risk that the reviewing court, in a state different from the state of execution and applying a different choice of law rule, will scrutinize a premarital agreement.<sup>20</sup> A plan that may pass muster in the execution state could be upended in the reviewing state. In most cases if the agreement does not specify consequences for divorce, the likelihood of unfairness, unconscionability, and violation of public policy, will likely be diminished.

*B. Premarital Agreements With a Catholic Fiancé or Couple*

An astute lawyer will identify issues when a fiancé has a conservative religious or cultural background that does not allow a

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<sup>17</sup> UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 9(f).

<sup>18</sup> *Colonna v. Colonna*, 791 A.2d 353 (Pa. Super. Ct. 2001).

<sup>19</sup> Kessler, *supra* note 9, at 122.

<sup>20</sup> See generally Amberlynn Curry, *The Uniform Premarital Agreement Act and Its Variations Throughout the States*, 23 J. AM. ACAD. MATRIMONIAL LAW. 355 (2010).

pre-marriage contract that contemplates divorce.<sup>21</sup> For example, the intended groom talks to an attorney about preparing a prenuptial agreement because his family wants the old family money protected in the event the parties divorce. When introductory matters are reviewed, such as the place of the wedding, the attorney discovers that the bride-to-be is planning a Catholic wedding service. The attorney ought to tell the groom that his Catholic bride may well refuse to sign a premarital agreement describing the consequences of divorce. The groom may refuse to pay for the lawyer's time to draft a document that will be unacceptable to his Roman Catholic fiancé.

In the early history of the Catholic Church, the Roman law concept of a marriage contract per the mutual consent of the parties was refined to add an important qualifying element – the irrevocability of marital consent. The only way to address a broken marriage was to prove the original consent was substantially defective.<sup>22</sup> Canon law, first codified in 1917, was further reviewed during the Second Vatican Council, held from 1963 to 1965. The Catholic Church clarified the essence of the marriage commitment between two persons would be contradicted by assigning conditions on the marriage.<sup>23</sup>

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<sup>21</sup> Another policy and legal problem may arise when the parties agree to a prenuptial agreement and arbitration by a religious tribunal. *See e.g.* Lang v. Levi, 16 A.3d 980, 982 (Md. Ct. Spec. App. 2011) (“Appellant Julie Lang and Appellee Zion Levi were married on June 22, 2003, and entered into both a secular marriage under Maryland law and a Jewish marriage. That same day, the parties signed a prenuptial agreement and an arbitration agreement. The prenuptial agreement provided that if the parties did not continue to reside together, Levi would pay Lang \$100 a day from the day they no longer resided together until the end of their Jewish marriage. The arbitration agreement provided that if the parties no longer lived together as husband and wife, they authorized an arbitration panel, the Beth Din, to decide all issues involving the Jewish divorce and premarital agreements, including monetary disputes. This agreement stated: “The decision of the Bet Din shall be made in accordance with Jewish Law (Halakhah) and/or the general principles of arbitration and equity (Pesharah) customarily employed by rabbinical tribunals.”) (footnote omitted).

<sup>22</sup> Azizah Y. al-Hibri, *Symposium on Religious Law*, 16 LOY L.A. INT'L & COMP. L.J. 22, 61, 69 (1993).

<sup>23</sup> *Id.* at 64.

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The Code of Canon Law provides: “A marriage subject to a condition about the future cannot be contracted validly.”<sup>24</sup> To provide in a premarital agreement that a wife will marry a husband if there are specific rights or waivers in the event of divorce clearly presents a condition precedent to the sacrament of marriage. The Canons of the Catholic Church reaffirm the lifetime sacramental commitment of the spouses.<sup>25</sup> Premarital agreements are not expressly prohibited and can legitimately be executed by a Catholic spouse. A typical example addresses the interests of a widow who is already a parent that defines separate property to protect inheritance interests of each spouse’s children.<sup>26</sup> The priest officiating the wedding may require any premarital agreement be sent to the Catholic diocese’s Department for Canon and Civil Law Services for evaluation to determine if the agreement would render the marriage invalid.<sup>27</sup>

Lawyers represent clients from many different religious backgrounds and it is the lawyer’s responsibility to understand the basic religious principles that affect the negotiation and drafting of a premarital agreement. Since the Roman Catholic annulment proceeds under canon law, this requires the church’s tribunal to determine whether the marriage was entered into validly or invalidly *ab initio*. The tribunal will analyze whether one or both parties failed to validly enter the marriage, i.e., was it subject to a condition about the future.<sup>28</sup> Logically, one way to establish a basis for Catholic annulment is for the tribunal to find that the marriage was invalid from the beginning. Other listed impediments to a valid sacramental marriage under canon law addresses incapability to contract, ignorance of permanent partnership, description, and other factors and variables.<sup>29</sup>

In many ways the Roman Catholic marriage, subject to the canons, reflects a religious premarital agreement in the typical vow to love, honor and obey, until death. In comparison, both Judaism and Islam also have specific laws and traditions that ap-

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<sup>24</sup> 1983 CODE C. 1120 § 1.

<sup>25</sup> Cheryl I. Foster, *When a Prenup and Religious Principles Collide*, 33 FAM. ADVOC. 34, 35 (Winter 2011).

<sup>26</sup> Ken Doyle, askfatherdoyle@gmail.com, posted Nov. 17, 2011.

<sup>27</sup> Foster, *supra* note 25, at 35.

<sup>28</sup> 1983 CODE C. 1120 § 1

<sup>29</sup> 1983 CODE C. 1095-1098.



ply in event of divorce. A premarital agreement could be ineffective to overcome the Jewish or Islamic law.

Since Jewish law recognizes the right to enter into a mutual contract about financial matters, there is no prohibition to a premarital agreement about post-divorce financial promises.<sup>30</sup> Jewish law provides that only a husband may seek a divorce. The *ketubah*, an integral part of a Jewish marriage, contemplates the groom's responsibility to his bride, including the jurisdiction of the *Bet Din* (Jewish house of judgment) in the event of death. Under Jewish law, however, the husband decides whether to give his wife a *get* (Jewish divorce); and the husband must act without constraint of his own free will. The Jewish tradition allows the husband to control whether a wife divorced civilly will receive a religious divorce.<sup>31</sup> New York State legislature enacted the *Get* statute,<sup>32</sup> which requires divorcing parties in a religious ceremony to lift religious barriers to remarriage. Since Jewish law provides a coerced *get* is not valid, the New York law appears to create an inherent conflict if a husband does not choose to file for a *get*.<sup>33</sup>

In the Islamic tradition, marriage is a contractual arrangement devoid of sacramental significance.<sup>34</sup> Prenuptial agreements appear superfluous because the marriage contract itself contains financial terms in the event of the husband's death or if the parties divorce.<sup>35</sup> The Islamic contract (*mahr*) is negotiated on behalf of the wife by her father, and this includes payment of a dower at marriage and deferred dower paid in the event of death or divorce. If the wife seeks a divorce she may be required to repay the *mahr* paid at marriage.<sup>36</sup> Since the Islamic tradition includes the financial commitment in the *mahr*, a prenuptial agreement is an acceptable financial arrangement to address fu-

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<sup>30</sup> al-Hibri, *supra* note 22, at 74.

<sup>31</sup> Lara Traum, Note, *How Mediating Halakhic Prenuptial Agreements Honors Jewish and American Law and Builds Happy Families*, 17 *CARDOZO J. CONFLICT RESOL.* 179 (2015).

<sup>32</sup> N.Y. DOM. REL. LAW § 236B (McKinney Supp. 1993).

<sup>33</sup> Traum, *supra* note 31, at 186.

<sup>34</sup> Foster, *supra* note 25, at 36.

<sup>35</sup> al-Hibri, *supra* note 22, at 67-68.

<sup>36</sup> Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 *WM. & MARY BILL RTS. J.* 925, 929 (2010).

ture problems with some certainty.<sup>37</sup> Divorce courts have diverged in the treatment of a couple's *mahr* when one seeks enforcement in a divorce, as if it is a premarital agreement. The civil court could find the negotiated *mahr* sets the limit of a wife's economic claims.<sup>38</sup> Alternatively, it has been viewed as contrary to a state's public policy, particularly when negotiated under duress as guests arrived for the wedding.<sup>39</sup> Under Islamic law, husband's *mahr* obligation if unpaid becomes a debt of the husband upon the death of either spouse.<sup>40</sup>

### C. *Specific Premarital Clauses not in Contemplation of Divorce*

Regardless if the motivation is personal, moral, or religious, a premarital agreement can address specific or generalized financial plans of a couple without mentioning divorce. While a Catholic fiancé should not sign a premarital agreement contemplating divorce, communication about finances and lifestyle decisions (typical Pre-Cana topics) can lead to a healthy marriage or stronger commitment. Psychologically healthy people should be willing to address their expectations, which can increase the chance of a successful marriage.<sup>41</sup>

#### 1. *Payment of Premarital Debt*

A couple wants a premarital agreement because parents of the bride are concerned about the infusion of premarital funds to elevate the parties' lifestyle during marriage. A bride-to-be who has received money from loved ones to give her an enhanced economic start in life plans once married to use those funds to benefit the couple. She is marrying her true love who is deeply in debt. As they make their wedding plans, they discuss using her reserved funds to pay off the groom's debt. The two of them

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<sup>37</sup> al-Hibri, *supra* note 22, at 69.

<sup>38</sup> Odatalla v. Odatalla, 810 A2d 93 (N.J. Super. Ct. Ch. Div. 2002) (the *mahr* limited the wife's economic claims in divorce to \$10,000).

<sup>39</sup> Zawahiri v. Alwattar, No. 07AP-925, 2008 WL 2698679 at\*6 n.23 (Ohio Ct. App. July 10, 2008) (the \$25,000 *mahr* obligation after a short failed marriage was found to be unenforceable); *see also* Ahmed v. Ahmed, 261 S.W.3d 190 (Tex. 2008) (the court found the *mahr* did not qualify as a prenuptial agreement but remanded to determine if it constituted a binding contract).

<sup>40</sup> al-Hibri, *supra* note 22, at 69.

<sup>41</sup> Jerome H. Poliacoff, *What Does Love Have to Do With It?*, 33 FAM. ADVOC. 12, 15 (Winter 2011).

want to qualify for a mortgage and purchase their first home. Her family does not want her contributing her premarital money, particularly that which was funded by other family members. The bride's family arranges for an attorney consultation, and is monitoring very closely whether their daughter is "cooperating." Ethically, the lawyer for the daughter represents her interests, not those of her parents, even if they are paying the legal fees. The daughter instructs her attorney: "You may not mention divorce in our agreement, or I won't sign."

Under such circumstances, the scrivener will draft without The D Word. The lawyer advises that the bride's money, which will be used to pay off the groom's debt, will be the subject of a loan, with repayment over time. Accordingly a detailed promissory note is prepared, acknowledging that the groom's premarital debt will be paid with the bride's premarital assets. The note should state an interest rate, so one is not imputed. The note will provide the bride has the option to enforce the periodic payment on the note, to extend the repayment schedule with interest, or to release the groom from payments by periodic gifts. One can envision if the marriage goes well, the forgiveness of the periodic obligation of the husband; such gifts should be formalized in writing when the bride affirmatively waives one or more of the periodic payments. This required formality will better protect the bride. The repayment of the obligation will have nothing to do with the parties' marital status. Consequently, the obligation continues regardless of death, separation, or divorce. The note will provide effective, but limited, protection addressing the designated assets and liabilities, specifically the funds utilized to pay the groom's separate debt using the bride's premarital assets. The document need not reference divorce or separation.

## *2. Waiver of Interest in Premarital Businesses or Other Designated Assets*

The waiver of interest in one or more assets by agreement, without mentioning separation or divorce, will require negotiations and full and fair disclosure like a typical premarital agreement.<sup>42</sup> Any agreement should be based on full and fair disclosure of the asset in question. If the bride is a business

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<sup>42</sup> UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 9(a)(4).

owner and her partners demand she sign a premarital agreement to protect the business from a possible divorce, the bride will ask the groom to disclaim any interest in her business forever (regardless of marital bliss or strife). The agreement should clearly provide for financial disclosure.

A confidentiality agreement signed by the groom will protect proprietary information. The groom should have access to business books and records. If he opts to forgo review, a waiver should be signed. The agreement will more likely pass a fairness challenge if the groom receives specified economic benefits in return. For example, the parties agree to the joint use of income from the business for marital bills and asset acquisition. With independent representation for the husband and acknowledgment of adequate consideration, the terms are more likely enforceable. The couple has to decide if such terms satisfy their needs legally, and the agreement coupled with the commitment to marriage need not refer to separation or divorce. The waiver of interest applies regardless of marital status. The lawyer should advise the parties of the rights and responsibilities in the event of divorce, and the risk of divorce even though the agreement makes no mention of divorce.

### 3. *Real Estate Agreements*

Often premarital agreements focus on one party's residence, which is expected to become the joint residence after marriage. By signing an agreement about use and shared occupation of the residence, clearly identified and valued, the parties can address various scenarios, without referencing divorce. In most states the premarital value of a separately owned asset (or liability) is by definition non-marital; therefore, any agreement noting the asset value(s) sets a baseline upon which a court could later rely in the event of a marital separation.

An agreement addressing the house may provide that if the bride owned the house before marriage, she will continue to own the house with no claim by the groom. If the groom intends to move into the house and contribute toward the mortgage payments and other expenses, the parties could acknowledge this and go several steps further. The parties can agree the groom will acquire an equitable interest limited to the increase in value after the agreed date of marriage value. The agreement could

provide that the groom's interest in any jointly titled house would be a minority interest or no interest at all or an interest equivalent to any house payments made. Such terms do not provide for the extensive protection possible with a premarital agreement that addresses separation and divorce, but they reduce controversy over the claim to a premarital home.

Often when couples re-marry, the marital home will eventually pass to the owner's children. An agreement should be drawn anticipating consequences if the owner becomes too ill to remain in the home or dies. If the owner reaches an agreement with her fiancé, this communication before the marriage will avoid problems with children later. If the owner becomes ill or dies, the premarital agreement provides a clear message to children about the owner's wishes as well as a financial plan to preserve the children's interest in the home. And if possession passes to the non-owner spouse after disability or death of the owner spouse, the obligation to support the home can be clearly outlined in the premarital agreement.

### **III. Premarital Trust to Exclude Assets From Consideration as Part of the Marital Estate**

All assets owned by a fiancé in her or his name alone, or with someone other than the intended spouse, should be carefully described and disclosed if the parties sign a premarital agreement. While clear waiver of disclosure of premarital assets may be sufficient to uphold the enforcement of a premarital agreement,<sup>43</sup> this is surely risky if a reviewing court finds the failure to disclose, even if waived, is contrary to public policy and refuses to enforce premarital agreement terms.<sup>44</sup> Premarital assets that are by definition non-marital, often have an impact on the equitable distribution of the marital estate. In some states the increase in value of the premarital assets creates a marital value acquired during the marriage.<sup>45</sup> A reviewing court may de-

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<sup>43</sup> *Lugg*, 64 A.3d 1109.

<sup>44</sup> UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 9(f).

<sup>45</sup> 23 PA. CONS. STAT. § 3501(a)(8).

termine that non-marital assets generate income available to pay child support, spousal maintenance, and post-divorce alimony.<sup>46</sup>

Many premarital agreements involve the economically superior fiancé asking the other spouse (who may or may not have individual resources) to waive any claim or interest to the premarital assets and to further waive rights that may be available in the event of death or divorce relative to the premarital estate, including income generated, assets acquired in exchange, and the increase in value of the premarital assets. The economically superior fiancé who does not want to disclose premarital assets, does not want to seek a waiver of disclosure, fears the risk of waiver being overturned by a reviewing court, or does not want to broach the topic of any premarital agreement signed by the fiancé has an option that counsel can propose which involves no disclosure to or a mutual agreement with one's fiancé.

A Domestic Asset Protection Trust (DAPT) is available in sixteen states: Alaska, Colorado, Delaware, Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming<sup>47</sup> In DAPT states an irrevocable self-settled trust provides specified access to funds by the settlor as a discretionary beneficiary.<sup>48</sup> Assets put in trust before the wedding can keep those assets outside the marital estate because they are no longer owned by

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<sup>46</sup> The definition of "income" includes compensation for services, interest, dividends and any form of payment due to and collectible by an individual regardless of source. 23 PA. CONS. STAT. § 4302.

<sup>47</sup> David G. Shaftel, *ACTEC Comparison of the Domestic Asset Protection Trust Statutes* (updated through Sept. 2015), <http://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf>.

<sup>48</sup> See *In re Porco, Inc.*, 447 B.R. 590, 596-97 (Bankr. S.D. Ill. 2011) ("As pointed out earlier, the purpose of § 548(e) was to reverse the actions of state legislatures that had overturned the common law that a self-settled spendthrift trust could be reached by creditors or a trustee in bankruptcy. The basis of the state legislation was to authorize or legitimize "domestic asset protection trusts."). These domestic asset protection trusts generally require (1) an irrevocable trust; (2) an independent trustee; (3) absolute discretion; and (4) distributions to beneficiaries, including the settlor. See David G. Shaftel, *Comparison of the Twelve Domestic Asset Protection Trust Statutes*, 34 ACTEC J. 293 (2009) ("Accordingly, these requirements contemplate the creation of an express trust.").

the grantor.<sup>49</sup> Such funds are placed in trust, without disclosure to or consultation with the fiancé. No mutual premarital agreement is signed; thus, the full and fair disclosure requirement (or waiver) is not applicable.

Domestic Asset Protection Trust laws are often modeled after Delaware legislation first passed in 1997. A DAPT is available under South Dakota law and its provisions are touted as a top-rated DAPT state for protecting the interests of the grantor. The DAPT features in Delaware and South Dakota are outlined below.

Delaware's Qualified Dispositions in Trust Act<sup>50</sup> defines the trust instrument as one that provides that the interests of the transferor (or other beneficiary) may not be transferred, assigned, pledged, or mortgaged, whether voluntarily or involuntarily, before the qualified trustees actually distribute the property or the income therefrom to the beneficiary.<sup>51</sup> At least one of the trustees must be qualified, defined as a resident of Delaware or an institution (bank or trust company) which is qualified to do business in Delaware. The Delaware qualified trustee must be in control of some of the property, as well as maintain records, arrange for preparation of the trust's fiduciary income tax return, participate in administration, etc.<sup>52</sup> The trust instrument must specifically incorporate Delaware law and provide an irrevocable spendthrift clause. Irrevocability will not be violated if the grantor receives income and in specified situations distribution of principle, so long as within the discretion of the trustee as set forth in the trust.<sup>53</sup>

The recourse of a creditor is generally limited to those whose claims arose before the disposition of the assets into the trust. The legislation provides a limited option for a creditor whose claim arose post-funding, like a spouse who married after the trust was funded. The creditor will only succeed in cancelling

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<sup>49</sup> Mark Merric & Daniel G. Worthington, *Domestic Asset Protections Trusts: Which Jurisdictions Are the Most Effective to Set Up This Powerful Tool?*, 152 TR. & EST. 52 (Jan. 2013).

<sup>50</sup> 71 DEL LAWS c.159 § 1 (1997); DEL. CODE. ANN. tit. 12 §§ 3570-3576 (2015).

<sup>51</sup> DEL. CODE. ANN. tit. 12, § 3570 (11)c (2015).

<sup>52</sup> *Id.* § 3570 (8).

<sup>53</sup> *Id.* § 3570 (11) b.

the disposition into trust if the creditor can prove the funding was done with actual intent to defraud, which claim must be filed within four years of the disposition of the subject property into trust.<sup>54</sup>

The South Dakota law allowing Domestic Asset Protection Trusts (DAPTs) uses this directed trust model to create a legal framework so trustees and beneficiaries (including the grantor) work with asset managers and independent trust companies of their choosing.<sup>55</sup> The settlor may appoint the qualified trustees as trust advisor, an administrative trustee (distinct from the trust advisor), and an investment trustee/committee, with parallel requirements to those in Delaware law.<sup>56</sup> The investment trustee/committee may select outside investment advisors and/or managers to manage the trust investments. Every trustee need not be qualified under the statute. A settlor may provide input under the terms of the trust, but does not serve as a co-trustee.

The South Dakota DAPT, as in Delaware, allows the settlor to receive financial benefits from the trust, including income and discretionary principal distributions. While the assets are protected from creditor claims and lawsuits, the directed trust structure allows control over the investment management function.

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<sup>54</sup> *Id.* § 3574.

<sup>55</sup> David A. Warren, *Use of Asset Protections Trusts in Lieu of or in Conjunction With Prenuptial Agreements*, Bridgeford Trust Company (last visited Aug. 18, 2016), <http://bridgefordtrust.com/wp-content/uploads/2013/11/11.18.13-Use-of-Asset-Protection-Trust-in-Lieu-of-or-Conjunction-with-Pre-2.pdf>

<sup>56</sup> The criteria in South Dakota for establishing a DAPT are:

- (i) The DAPT trust must be irrevocable;
- (ii) A trustee must be appointed with the discretion to administer the trust and make discretionary distributions;
- (iii) A trustee must be appointed that is a resident of the jurisdiction in which the trust is formed;
- (iv) The trust must contain a spendthrift clause, which restricts the transferability of a beneficiary's interest in the trust property, whether involuntary, before the trustee actually distributes the property to the beneficiary;
- (v) The trust must be properly administered in accordance with trust language and applicable state laws; and
- (vii) Proper trust administration, accounting, and record keeping are essential for protection of assets in a DAPT.

S.D. CODIFIED LAWS § 55-16-2 (2016); Warren, *supra* note 55, at 6 (adding that for a prenuptial plan “The trust must be established and funded prior to marriage”).



Distinct from Delaware, under South Dakota law, there is only a two year “look-back.” Therefore, someone (like a fiancé) who becomes a creditor subsequent to the transfer of property into trust, must make a clear and convincing challenge under South Dakota’s Voidable Transactions Act, within two years after the transfer is made.<sup>57</sup>

The fiancé who puts premarital assets into a Domestic Asset Protection Trust does so outside the disclosure requirements of premarital agreement statutes and therefore without the responsibility of disclosure. In a marriage that crumbles, one can anticipate that the reviewing jurisdiction’s voidable transfer statute<sup>58</sup> will be invoked. The divorce court may seek to identify DAPT assets to address the needs of a dependent spouse or minor children who are not enjoying the benefits available to the settlor, as noted by Linda Lea Viken in her presentation at the American Association of Matrimonial Lawyers.<sup>59</sup> In South Dakota, however, after the two-year lookback has elapsed, the South Dakota courts will refuse to require the DAPT trustees to respond to discovery.<sup>60</sup>

In light of the case law that developed surrounding challenges to premarital agreements, counsel for the client funding a DAPT will want to review the protections afforded by the Uniform Voidable Conveyances Act (UVCA).<sup>61</sup> Voidable transactions relating to future creditors are those made with actual intent to defraud the creditor, which is rarely proven without di-

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<sup>57</sup> S.D. CODIFIED LAWS § 55-16-10 (2016).

<sup>58</sup> Recently, many jurisdictions followed the recommendation to replace a Uniform Fraudulent Conveyance Act with the Uniform Voidable Transactions Act; Uniform Law Commission, Fraudulent Transfer Act - now known as the Voidable Transactions Act, <http://www.uniformlaws.org/Act.aspx?title=Fraudulent%20Transfer%20Act%20-%20now%20known%20as%20Voidable%20Transactions%20Act> - now known as Voidable Transactions Act (last visited Sept. 8, 2016).

<sup>59</sup> See Linda Lea M. Viken, *Guarding the Home Front; Protecting the Spouse*, AAML Mid-Year Meeting (2016).

<sup>60</sup> South Dakota is the only DAPT state that has a total privacy seal forever on the existence of a trust, its provisions or beneficiaries. Warren *supra* note 55, at 4.

<sup>61</sup> Gregory M. Monaco, *A Practitioner’s Primer on the Pennsylvania Uniform Fraudulent Transfer Act*, 86 PA. B. ASS’N Q. 18 (Jan. 2015).

rect evidence under the totality of the circumstances.<sup>62</sup> While the creditor need not show proof by clear and convincing evidence (traditionally associated with fraud claims), the burden rests with the creditor.<sup>63</sup> Creditors under UVCA can seek to show constructive fraud, under one of two tests: first, where the debtor is about to engage in a business or transaction for which remaining assets of the debtor were unreasonably small in relation to the business or transaction; or second, where a debtor reasonably should have believed the debtor would incur debts beyond the debtor's ability to pay them as they came due. Neither test permits proof of fraud by hindsight.<sup>64</sup> It strains the imagination to think marriage is one of the transactions or businesses to which this analysis of constructive fraud would apply.<sup>65</sup>

When counselling the client, the lawyer should explain how the conflict of laws issue discussed above (in the context of a premarital agreements) will be relevant in cases of a DAPT. Will the reviewing state be willing to apply the law of the DAPT jurisdiction; will the reviewing jurisdiction give full faith and credit to the DAPT state if the reviewing state finds a DAPT is contrary to public policy?<sup>66</sup> Will a reviewing state that allows statutory exemptions (common for child support and in some cases alimony)

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<sup>62</sup> *Id.* at 29. The creditor needs to show the trust was funded at a time when the settlor had claims pending threatened or expected, and the transfer to trust leaves the settlor virtually insolvent and unable to satisfy the expected claims, Edward D. Brown & Hudson Mead, *Divorce and the Self-Settled Trust*, 153 TR. & EST. 5 (Feb. 2014).

<sup>63</sup> Monaco, *supra* note 61, at 30.

<sup>64</sup> *Id.* at 30-31.

<sup>65</sup> See *Cook v. Cook*, 574 A.2d 1353, 1355 (Me. 1990) ("Frederick's secret creation of a lien on the family home in favor of his mother, Phyllis's foreclosure action, and Frederick's failure to defend against his mother's foreclosure action despite the substantial equity apparently existing in the property—all during the pendency of the contested divorce proceeding—do indeed raise serious factual questions whether the notes and mortgages and the attempted mortgage foreclosure were frauds upon Felicia's marital rights). Cf. RESTATEMENT (SECOND) OF PROPERTY § 34.1(1) (Tent. Draft No. 13, 1990) ("spousal rights cannot be cut off by a donative transfer made in contemplation of an imminent divorce).").

<sup>66</sup> Many argue that non-DAPT states may choose not to apply the DAPT state public policy, for example if the non-DAPT state finds a fraudulent conveyance. See Trent Maxwell, *Domestic Asset Protection Trusts: A Threat to Child Support?* 2014 BYU L. REV. 477, 490.

supersede the DAPT protections for the obligor?<sup>67</sup> The creditor spouse in the non-DAPT state will want to have jurisdiction over the DAPT assets, but if all trustees and the cash, securities and real estate are in the DAPT state, the state of the creditor spouse may not have the minimum contacts to establish jurisdiction. If some assets are in the non-DAPT state and the judgment is entered, the DAPT state may give full faith and credit, but the law of the DAPT state may provide no remedy.<sup>68</sup> One can imagine the litigation to prove voidable transactions will be difficult particularly within the limited lookback windows: two years for South Dakota or four years for a Delaware DAPT.<sup>69</sup>

A Domestic Asset Protection Trust executed before the marriage allows the financially secure spouse to avoid uncomfortable and perhaps confrontational conversations before the marriage. One feature of the New Hampshire UVCA appears to protect spouses and ex-spouses' by giving them special status as creditors allowed to enforce support and property division judgments against DAPT assets'; however, the protection is limited to someone married when the asset disposition occurred. The DAPT funded before marriage is attractive in lieu of the onerous requirement of an antenuptial agreement.<sup>70</sup> To claim a voidable conveyance, the spouse must claim the transfer to the DAPT pre-marriage was a voidable transfer and raise the claim with the applicable statute of limitations (for example, within two years of funding in South Dakota, or within four years in Delaware). The trust is designed to preclude consideration of assets put in trust from being treated as part of the marital estate. Control in a DAPT situation is curtailed by the terms of the trust; however,

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<sup>67</sup> Since Nevada's DAPT statute provides no exception for child support it has become the standard for the "race to the bottom" protecting trust assets. Maxwell *supra* note 66, at 498.

<sup>68</sup> Wesley D. Cain, *Judgment Proof: Can Connecticut Residents Insulate Assets From Creditors Using a Delaware Domestic Asset Protection Trust*, 47 CONN. L. REV. 1463, 1488-89 (2015).

<sup>69</sup> See *5 Problems With Domestic Asset Protection Trusts* (Mar. 29, 2012), [www.thinkadvisor.com](http://www.thinkadvisor.com), (suggesting offshore trusts are clearly preferable over DAPTSS). See also Brown & Mead, *supra* note 62, at 4-6.

<sup>70</sup> See Christopher Paul, *Innovation or a Race to the Bottom? Trust – Modernization in New Hampshire*, 7 U.N.H. L. REV. 353, 370 (2009) ("Under New Hampshire DAPT law, even valid claims of involuntary creditors such as post-disposition tort victims or spouses will be extinguished.").

DAPT legislation is designed to permit trust terms allowing the grantor beneficiary to have directive input.<sup>71</sup>

It is easy to envision cases in which business partners and family members (and others who seek to exclude involvement of the new spouse with assets currently owned by the bride/groom to be) will promote the use of the Domestic Asset Protection Trust. Couples marrying in their later years who have children from a prior marriage that ended in death or divorce could address the concerns of family members and loved ones by creating the Domestic Asset Protection Trust before embarking on the new marriage.

#### **IV. Conclusion**

Premarital planning based on communication can be used to strengthen partnership before marriage. If a fiancé does not want to talk about premarital planning, a Domestic Asset Protection Trust or other trust vehicle could be formed before the marriage to secure the separate interests of one party. The lawyer could draft a limited purpose premarital agreement that provides some protections without mentioning divorce. A practical lawyer will draft an agreement to best protect the couple in the event of divorce, without reciting the possibility of divorce.

In American society fewer couples are making the commitment to marry, and more young people are growing up in families where their parents have divorced.<sup>72</sup> While most lawyers encourage a client to write a premarital agreement that addresses divorce, a couple will benefit from recognizing the need to make a financial plan albeit without The D Word. Couples who want to enter the marriage recognizing each other's financial position and financial priorities can work with lawyers to prepare a premarital agreement without The D Word. The dialogue will allow the parties to talk about finances in a mature, logical, and constructive way.

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<sup>71</sup> The settlor will balance the convenience of the DAPT with the expense of an Offshore Asset Protection Trust (OAPT) where some feel assets are more secure. Brown & Mead, *supra* note 62, at 5-6; Maxwell, *supra* note 66, at 488.

<sup>72</sup> See JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 1 (2014).

It would be better to discuss financial issues before the marriage with sufficient time to allow for careful disclosure and negotiation than to enter the marriage starry-eyed and fumble along making financial mistakes that eventually cause turmoil.<sup>73</sup> Talking about their finances, their plans, and their priorities before they marry could well be the ticket to a successful partnership, and the prospect of a strong and healthy marriage. In the case of a spouse using a DAPT to assure pre-marital assets remain non-marital, one may opt to disclose the trust to avoid the specter of challenges later that the funding of the trust was a voidable transaction. While starting a discussion of finances can be difficult and sometimes disruptive as a couple plan their marriage, there is also a likelihood that the premarital planning will become a great testing ground for the couple's ability to talk about tough issues and find a solution that makes sense for both of them throughout their marriage.

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<sup>73</sup> See Thomas J. Oldham, *With All My Worldly Goods I Three Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 127 (2011) ("The UPAA's most glaring problem is that it has sanctioned oppressive bargaining").

