

Strafford

Presenting a live 110-minute webinar with interactive Q&A

Prenuptial Agreements for First, Subsequent and Later-In-Life Marriages

Negotiating and Crafting Agreements to Protect and Provide for Distribution of Assets

THURSDAY, AUGUST 16, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Julia Swain, Partner, **Fox Rothschild, Philadelphia**

Leonce A. Richard, Shareholder, **Mariscal Weeks McIntyre & Friedlander, Phoenix**

Jeffrey A. Soilson, Partner, **Sally & Fitch, Boston**

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial **1-866-961-9091** and enter your PIN -when prompted. Otherwise, please **send us a chat or e-mail sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.



FOR LIVE EVENT ONLY

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the **SEND** button beside the box

Strafford

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the + sign next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Pre-Nuptial Agreements for the First-Time Marriage

Stafford Publications
Leonce A. Richard, Esq.
Mariscal, Weeks, McIntyre, & Friedlander, PA
Certified Family Law Specialist

Unique Considerations For First-Time Marriages

- **Most parties tend toward a younger age –20's to early 30's.**
- **Generally the most accepting of pre-nuptial agreements.**
- **Limited assets**
 - Debts usually equal or exceed asset values.
 - *Potential* for future income and asset acquisition is generally the focus rather than existing asset values.
 - Having children and the resulting impact on one or both of the parties' chosen careers is a primary consideration.
 - A substantial portion are already cohabiting and may have established a financial framework that they are following: E.g., **Joint accounts; Method of paying for common expenses; Joint Residence; Common Property (furniture, pets)**

First Time Marriages are also...

- **Prone to external motivating factors**
 - Often the parties themselves do not generate the idea of a pre-nuptial agreement, but rather a party's parents or their parents' legal and/or financial advisor(s) insist on such an agreement.
 - General focus of such external factors is on such concerns as family trusts, inheritances, and family business interests.
 - Actual "client" may be nonchalant or hostile to the idea of a pre-nuptial agreement.
 - Ethical considerations regarding conflict of interest.
- **A highly mobile group: relocation to another jurisdiction is often contemplated or at least considered a possibility.**
 - Must consider the impact of the law of other jurisdictions on any pre-nuptial agreement.
 - If relocation is clearly contemplated, may want to consult with a family law attorney in the other jurisdiction in drafting the agreement.

There May Also Be Choice of Law Concerns...

- ***Uniform Premarital Agreement Act (“UPAA”) vs. Non-Act State Law***
- **States that have adopted the act:** Arizona; Arkansas; California; Connecticut; Delaware; Florida; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Maine; Montana; Nebraska; Nevada; New Jersey; New Mexico; North Carolina; North Dakota; Oregon; Rhode Island; South Dakota; Texas; Utah; Virginia.
- Section 6 of the *UPAA* provides an agreement complying with minimal requirements of the act is presumptively valid and the party opposing enforcement of the agreement has the burden of proving either of the following to defeat the agreement:
 - (1) He or she did not voluntarily execute the agreement; or
 - (2) The agreement was unconscionable *when it was executed; and* he or she was not provided a fair and reasonable disclosure of the other party’s property and debts; and he or she did not voluntarily and expressly waive in writing a right to disclosure beyond what was provided; and he or she did not have, or reasonably could not have had, adequate knowledge of the other party’s property and debts.
- The Act further provides that the question of whether the Agreement was unconscionable when it was executed shall be decided by the court *as a matter of law*.

Community Property vs. Equitable Distribution States

- In most instances, the definition of “community property” is similar to that for “marital property”. The definition of “separate property” is usually very similar to that for “non-marital property”.
- However, there are subtle differences. Generally, community property states draw a solid line between community property and separate property (usually premarital and inherited property). In most cases, a spouse’s rights in his or her separate property are protected and the other spouse generally has no claim against such property. For instance, in Arizona, the divorce court has no *jurisdiction* to apportion separate property. By contrast, in equitable distribution states, the divorce court often has the authority to apportion marital and non-marital assets between the parties.
- Knowing whether your pre-nuptial agreement is to operate within the confines of a community property state, an equitable distribution state, or possibly both is therefore crucial to how you draft your agreement.

Basic Requirements for a Presumptively Valid Premarital Agreement

Uniform Premarital Agreement Act (“UPAA”) requirements:

- **An agreement between prospective spouses (§1);**
- **In contemplation of marriage (§1);**
- **Conditioned on marriage actually occurring (§§1,4);**
- **In writing (§2);**
- **Signed by both parties (§2).**
- **Note: No contractual consideration is required to support a Prenuptial Agreement (§2). Accordingly, you may want to avoid including traditional “consideration” language in your Agreements as such language may open the Agreement to a possible challenge for a “failure of consideration” later.**

Many States Add Variation to the Act's Basic Requirements...

- Some states apply the act to 'civil unions' (e.g., New Jersey) or 'domestic partnerships' (e.g., District of Columbia).
- Some states also require the agreement to be acknowledged or notarized (e.g., Arkansas, Idaho, New Mexico).
- Some states require a waiting period (e.g., California – 7 days – plus requires attorney advice or an express waiver)
- Practice tip: always check your state's own statutes.
- *Non-Act States*: must consult your own state's unique statutes.

Premarital vs. Post-Nuptial Agreements

- Be careful to note the difference between a Prenuptial Agreement and a Post-Nuptial Agreement: Prenuptial Agreements are agreements entered into by two legal strangers before they acquire all the fiduciary rights and obligations of a married couple.
- Post-Nuptial Agreements are agreements between existing spouses – which means that the parties may have a fiduciary relationship with one another that heightens the bar for a valid waiver of rights.
- Many states view Post-Nuptial Agreements suspiciously and do not give them the presumption of validity that Prenuptial Agreements generally enjoy (e.g., Arizona expressly holds that, unlike Premarital Agreements, which are presumptively valid, Post-Nuptial Agreements are presumptively invalid).
- Practice tip: don't let your client inadvertently convert your Prenuptial Agreement into a Post-Nuptial Agreement by signing it AFTER the wedding ceremony. Many clients suggest this as a means of dealing with the time constraints that they face prior to the wedding. Don't let them do it.

Drafting the Premarital Agreement

- Step One: divine the purpose for the Agreement.
 - *Asset protection in event of divorce*
 - *Asset protection from creditors*
 - *Estate Planning*

Drafting the Premarital Agreement

- **Step Two:** determine what “type” of Prenuptial Agreement is desired.
- “Minimalist” Agreement: what the parties own before marriage stays separate/non-marital property; what the parties acquire during marriage is community/marital property.
 - These are probably the most common type of PMA.
 - They actually require more work and thought than the “Maximum” type of agreement discussed below as the agreement needs to provide various “firewalls” between separate/non-marital and community/marital property.
- “Maximum” Agreement: there is no community/marital property – the concept is totally abrogated by the agreement; while the parties are legally married, they remain financial strangers and each keeps his or her income, acquisitions, property and debts as his or her separate/non-marital property.
 - Actually the easiest agreement to draft as everything is black and white.
 - These agreements are the most immune to parties subsequently contravening the purpose of their Agreement.
 - Provides each party with the greatest amount of freedom to do whatever he or she wants with his or her property vis-à-vis his or her spouse.

Drafting the Premarital Agreement

- Step Two (continued)...

Another type of agreement...



- “Custom” Agreement: the Agreement is highly tailored to fit the parties’ specific circumstances and needs.
 - These Agreements are the most difficult to draft and require special attention to detail as there are often multiple assets and multiple ways in which assets can be held or classified.
 - They are often very complex and place the maximum burden on clients to pay attention to the terms of the agreement during their marriage.

Drafting the Premarital Agreement

- **Step Three: determine what subjects are to be covered.**
 - Section 3 of the *Uniform Act* / UPAA sets out the permissible topics that can be covered in a Prenuptial Agreement. The statute is very broad in the topics that can be addressed by the agreement. The few exceptions are:
 - ❖ The Agreement cannot address child custody or visitation.
 - ❖ The Agreement cannot “adversely affect” child support (§3b).

(Query: can it provide for an increase in child support?)

Drafting the Premarital Agreement

- **Step Three (continued)...** *Another exception to the broad topics that can be addressed in an Uniform Act / UPAA Agreement. . .*
 - ❖ The right to waive spousal maintenance is limited under (§6b)
 - ❖ Under the Act, irrespective of a waiver or limitation of spousal maintenance, the Court can require one party to pay support “to the extent necessary” to avoid the other party’s eligibility for public assistance
 - ❖ Some states prohibit any waiver or contractual limitation on spousal maintenance (e.g., California (unless advised by counsel), New Mexico, South Dakota).
 - ❖ Waiver of attorney’s fees is questionable – not specifically mentioned in the Act (§3a).

Topics That Should Be Covered in a Premarital Agreement

- **Statutory waiver of further disclosure:** “Each party hereby voluntarily and expressly waives any right to disclosure of the property or financial obligations of the other party beyond the disclosures provided herein.” (§6a(2)(ii))
- **General explanation and the parties’ acknowledgment of the rights being affected by the Agreement.**
- **Acknowledgment that the parties are not currently married.**
- **This may be a particular concern in states that recognize common law marriages and the parties have been cohabiting for some time.**
- **This issue may still be a concern even if your particular state does not have common law marriages but does recognize established common law marriages of another state and the parties cohabitated for a time in such a state. May provide an argument for voiding the Agreement by claiming that the parties are already married.**

Topics That Should Be Covered in a Premarital Agreement

- **Waiver and release of possible rights and claims arising from the parties' cohabitation.**
- **The case law in many states provides that parties may acquire certain quasi-contractual rights against one another by virtue of cohabiting – especially if there is a “pooling” of assets or joint financial arrangement. The Agreement should address these possible rights.**
- **The parties may also have entered into contractual arrangements that are independent of their particular relationship (e.g., personal loans). These types of contracts should also be specifically addressed in the Agreement (i.e., either affirmed or waived).**
- **Clear definition of community/marital, joint and separate/non-marital property as used in the Agreement.**

Topics That Should Be Covered in a Premarital Agreement

- Specific and precise lists of each party's separate/non-marital property and debts. (This list is crucial as it is the starting point for subsequently determining what property belongs to a party as his or her separate/non-marital property. The property should therefore be described with enough specificity that there is no subsequent confusion about its identity – e.g., 15 years later when the divorce occurs and everyone's memory has faded).
- Rules governing and defining “gifts” between the parties during marriage and the parties’ rights in “gifted” property – including property gifted by third parties and family members (e.g., was aunt Matilda’s sterling silver a gift only to wife or to the parties as a couple?).
- Provisions governing the ownership, use, and improvements to premarital residences and the rights of each party in the residence – particularly upon its future sale.
- Classification and disposition of premarital and marital retirement benefits. What rights will the new spouse have in the other’s existing and continuing retirement plans?
- **Note:** Qualified retirement plans are governed by federal ERISA rules that supersede the terms of the parties’ agreement. These rules require the execution of separate releases and notices by the parties to effectuate a waiver of an interest in the plan. Therefore, the agreement will need to place an affirmative duty on the parties after they are married to undertake whatever action is necessary to effectuate the other party’s contractual rights in the retirement plans at issue. The parties then need to be advised that they will actually have to carry through with this obligation in order to create legally binding rights in the retirement plan.

Topics That Should Be Covered in a Premarital Agreement

- Rules governing the classification of debts incurred during the marriage as either community or separate and the allocation of responsibility for payment of those debts.
- Rules governing the handling of everyday living expenses. This may include the creation of a designated “household” account with specific rules covering contributions to and withdrawals from the account. If the parties have established a system that works for them, they should incorporate it into the Agreement.
- A determination about whether reimbursement will be required for the expenditure of community/marital monies on separate/non-marital expenses and vice versa and, if so, the method for calculating and paying such reimbursement.
- Rules governing the classification of real and personal property acquired during the marriage as community/marital, joint, or separate/non-marital property.

Topics That Should Be Covered in a Premarital Agreement

- **Provisions for the preparation of tax returns: joint or separate? If joint returns, how is the responsibility for paying the reported taxes to be allocated between the parties' community/marital and separate/non-marital income? Similarly, how are such things as tax loss carry forwards and deductions to be allocated?**
- **Provisions governing the disposition of property upon divorce.**
- **Provisions governing spousal maintenance upon divorce or a waiver of spousal maintenance.**
 - The impact of children and child rearing on a party's career and earning potential is a particular concern among younger, working couples.
- **Most young couples plan to have children. Is it appropriate to waive spousal maintenance where wife gives up or suspends her career to raise the children (thus diminishing her earning potential) while husband continues to advance his career and earning potential?**
- **Provisions governing the disposition of property upon death. This requires that the terms of the Agreement be consistent with the terms of the parties' current or contemplated estate plan/wills.**
- **Anti-commingling provision: e.g., the fact that community/marital money may find its way into a designated separate/non-marital bank account will not transmute the separate/non-marital account into community/marital property.**

Topics That Should Be Covered in a Premarital Agreement

- **Special provisions:**
 - ❖ “Gap” coverage for the period between the execution of the Agreement and the wedding if there is a significant delay between the two.
 - ❖ “Penalty” clauses for infidelity.
Enforceability of these types of clauses is questionable.
Need to advise client that enforcement is not a sure thing.
 - ❖ Definition of “infidelity” must be narrowly and precisely defined. Can be very impolitic.

Drafting the Premarital Agreement

- **Step Four:** reviewing and negotiating the proposed Agreement.
- Each party should be advised by independent counsel.
- Parties should be encouraged to discuss the terms of the proposed Agreement with each other to see if the terms will “work” or not.
- Process should not be adversarial, but constructive. Purpose of a Prenuptial Agreement is not to set up the marriage or the other party for a divorce; it is to help build a healthy foundation on which to build a healthy marriage by getting everyone on the same financial page. Financial disputes are a major driving factor for divorces in today’s world.
- Document and keep a record of all *negotiated* changes to the agreement (e.g., correspondence and drafts).
- Collect all unsigned disseminated drafts of the Agreement.

Drafting the Premarital Agreement

- **Step Five: Executing the document.**
- **Varying degrees of formality:**
 - Simply have the parties sign and notarize.
 - Have a “signing party” with parties and counsel present where the agreement is gone through one last time before signing.
 - Have a court reporter present at the “signing party” and ask each party on the record about the agreement and their willingness to sign it.
 - Same as above, but have the proceeding videotaped.



Thank you for your participation.

Leonce A. Richard, Esq.
Mariscal, Weeks, McIntyre, & Friedlander, PA
Certified Family Law Specialist
(602) 285-5025

Prenuptial Agreements

Jeffrey A. Soilson

Sally & Fitch LLP
One Beacon Street
Boston MA 02108
Telephone: 617-542-5542
Fax: 617-542-1542
Email: jas@sally-fitch.com

Prenuptial Agreements

Prenuptial Agreements allow you to:

Contract for a lower standard of living after divorce

– the proponent of the prenuptial agreement can circumvent substantial rights of, and obligations to, a future spouse with a significant degree of certainty

– establish rights and obligations prior to marriage in the event the marriage terminates either by divorce or death

Deviate from what a Judge might determine after the parties reach a settlement agreement during a pending divorce, or after a full evidentiary divorce hearing

– In pending divorce cases dealing with parties joined by marriage, statutory factors that govern the award of property and support inform, in part, the fairness and reasonableness of a separation agreement (the separation agreement is a substitute for the independent application by a judge of those same statutory factors)

– Prior to marriage, the parties are permitted to define the material aspects of their relationship before they enter into the status of marriage (if such aspects are unacceptable to either party, that party is simply free to not marry)

- ▶ See DeMatteo v. DeMatteo, 436 Mass. 18 (2002)

Prenuptial Agreements

Marital assets: A Big Pot in Massachusetts without a Prenuptial Agreement

Considered in the division of assets (and alimony determinations) upon divorce in Massachusetts:

- Assets acquired before the marriage
- Assets acquired during the marriage as Gifts
- Assets acquired during the marriage as Inheritance

See M.G.L. Chapter 208, § 34 for the statutory factors a MA judge must consider in determining alimony and property division (shall the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income, the present and future needs of the dependent children of the marriage; may the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit)

Prenuptial Agreements

“Two Look” Test for Enforceability in Massachusetts

- In MA, a trial court must apply the “Two Look Test” first enunciated in *DeMatteo v. DeMatteo*, 436 Mass. 18 (2002) as the standard when determining whether to enforce a prenuptial agreement in connection with a divorce action
- The “Then and Now” test:
 - Was it fair then?
 - And is it still fair now?

Prenuptial Agreements

Overriding Theme for Enforceability: Full and Fair Financial Disclosure

- ▶ Parties by definition occupy a confidential relationship. The burden of disclosure rests upon both parties. See Rosenberg v. Lipnick, 377 Mass. 666 (1979).
- ▶ In Rosenberg, the MA Supreme Judicial Court recognized that the majority of cases in other jurisdictions at the time held that the parties to an prenuptial agreement generally do not deal at arm's length. Rather, they occupy a relationship of mutual trust and confidence and as such must exercise the highest degree of good faith, candor, and sincerity in all matters bearing on the proposed agreement.
- ▶ The burden is not on either party to inquire, but on each to inform, for it is only by requiring full disclosure of the amount, character, and value of the parties' respective assets that courts can ensure intelligent waiver of the statutory rights involved.
- ▶ Each party should provide the other with information of a general and approximate nature concerning their respective net worth.
 - Practice Pointer Have the document itself record the disclosure, either by attachment or exhibit pages that list the assets and values of those assets, or by attaching a Rule 401 Financial Statement.
- ▶ Fair disclosure is not synonymous with detailed disclosure.
- ▶ The timing of the disclosure and whether negotiation occurs are factors relevant to a determination of full and fair disclosure.

Prenuptial Agreements

Obligations to a Former Spouse / Protecting Assets for the Benefit of Children from Prior Relationship

- ▶ New marriages often involve couples in which one or both were previously married. Because such marriages can involve parties with significant wealth, and/or children from a prior marriage, many couples enter their new marriages subject to the provisions of a prenuptial agreement.
- ▶ These agreements can be used to assure children of an inheritance free from the claim of a stepparent, or could provide for survivor's benefits to a spouse who gives up other benefits upon the marriage (including spousal elective/forced share, dower, homestead, allowances, intestate share, required consent on change of beneficiary designation of life insurance and retirement plans).
- ▶ Specifically, this is accomplished through **waivers** in the premarital agreement.
- ▶ Practice Pointer
- ▶ How to waive these rights?
- ▶ Similar to waivers of alimony and property division, a prenuptial agreement can completely waive any survivorship rights or include limitations.
- ▶ Consider complete waivers. They should be general so as to cover all possible survivorship rights in any state, but be specific as to the list of rights that a surviving spouse might have.
- ▶ Consider partial waivers/contractual survivorship rights. Consider a contractual commitment to create certain rights under a will or a trust.
- ▶

Prenuptial Agreements

Obligations to a Former Spouse / Protecting Assets for the Benefit of Children from Prior Relationship (continued)

- ▶ Estate/Gift Tax Considerations: beware of significant estate tax implications for wealthier spouse if his or her estate exceeds the applicable estate tax exemption available to the wealthier spouse upon death.
- ▶ Love grows (sometimes): draft provisions allowing the parties to be more inclusive by changing their estate plans as the marriage progresses. Consider a provision that allows a spouse's estate plan to override a general waiver.
- ▶ Be sure to disclose beneficial interests in the schedule of assets and liabilities.
- ▶ Practice Pointer (Retirement Plans):
- ▶ Spouse as beneficiary: Some retirement plans require you to name your spouse as the beneficiary, unless he or she signs a written waiver consenting to your choice of another beneficiary.
- ▶ Tips:
 - ▶ If your spouse agrees to a waiver, he or she may need to sign a form provided by the plan, with the plan's representative or a notary acting as witness. A spouse who consents to a particular beneficiary may withdraw that consent if you later name a different beneficiary.
 - ▶ A prenuptial agreement cannot take the place of a waiver because the law requires your spouse--not your intended spouse--to sign. But a prenuptial agreement can contractually obligate a party to execute an appropriate waiver.

Prenuptial Agreements

Utilize life insurance to compensate the surviving spouse or provide for children from a previous marriage

In many prenuptial agreements, the parties provide for a death benefit, whether the death occurs during the marriage or following a divorce. Life insurance can fund a party's obligation to provide such a benefit. When the agreement specifies a death benefit to the survivor who dies while married to the insured, the death benefit provided to the survivor can be used to make up for the assets that pass to the children of a prior marriage. When a prenuptial agreement provides for a death benefit to a divorced spouse, life insurance can provide the source of funds.

Practice Pointer Think about formulating separate financial obligations and utilize the prenup-with-life insurance arrangement to facilitate a fixed payout for your spouse, and to give your kids from a previous marriage their full inheritance (i.e. by making children beneficiaries of policies you own). Alternatively, you can compensate your children by setting up an irrevocable life insurance trust (ILIT) to buy life insurance for your children's benefit and potentially minimize federal estate and income taxes.

Prenuptial Agreements

Valuation Methods in Event of Divorce

- Why is it important? Recapture: allowing each party to be reimbursed in cash for the full value of their separate property acquired by gift/inheritance, etc., utilized in connection with the acquisition of the after-acquired property, prior to the disposition of any equity in said after-acquired property; allowing each party to be reimbursed proportionately to the amount of their original contribution for the increase of value of said property.
- Practice Pointer Agree in the Prenuptial Agreement on the method and procedure of valuation
 - For example, in the context of professional practices, are the parties going to utilize the capitalization of excess earnings method, which requires that the earnings from a business are capitalized only to the extent that the earnings exceed the earning power of the professional. Are historical earnings or projected earnings the focus? Will any discounts apply?
 - In the context of recapture as a result of sale of real property, consider certified appraisal by mutually-agreed upon appraiser, comparative market analysis by one, mutually-agreed upon broker, or a third chosen by two others, etc.

Prenuptial Agreements

Jeffrey A. Soilson

Sally & Fitch LLP
One Beacon Street
Boston MA 02108
Telephone: 617-542-5542
Fax: 617-542-1542
Email: jas@sally-fitch.com
Website: www.sally-fitch.com



Pre-Nuptial Agreements For Later-In-Life Marriages

August 16, 2012

Presented by:
Julia Swain, Esq.
Fox Rothschild

Divorce Rates

- Divorce rate among baby boomers (born between 1946 and 1964) has doubled.
- Divorce rates:
 - 50% of first marriages end in divorce
 - 67% of second marriages end in divorce
 - 73% of third marriages end in divorce

Why get re-married?

- Companionship
- Rebound – vulnerable
- Not concerned with another divorce
- Fall in love – met the “right one”
- Practicality
- Religion

Before Walking Down the Aisle...

- Some important considerations:
 - Estate planning
 - Financial planning
 - Divorce planning
 - Benefits of staying single

Reasons for Pre-Nuptial Agreements for Seniors

- Planning for future financial security
- Asset acquisition years are over or nearly over
- Wage earning years also over or nearly over
- Secure or maintain existing financial obligations
- Avoid loss of assets in divorce
- Avoid loss of assets by way of elective share
- Beneficiary designations on bank accounts, securities, IRAs
- Protect estate for adult children and other heirs
- Plan for future health care, death and disability

Pre-Nup Philosophy...

- First Time Marriages v. Senior Marriages
 - Provide more generous provisions for division of assets and income over the course of the marriage
 - Little or no division of assets and income designed to fully protect each spouse's individual financial position

Do Your Homework

- Identify all assets, liabilities, income sources
- Review: tax returns, wills, living wills, trusts, property/marital settlement agreements from prior divorce(s), insurance coverage
- Decide client's goals for prenup

Designate

- Which assets will remain separate
- Which liabilities will remain separate
- Which assets will be subject to division
- Which liabilities will be subject to division
- How will assets be divided
- How will liabilities be divided

Most Common Designation

- What's yours remains yours
- What's mine remains mine
- Increase (or decrease) in value excluded
- Jointly titled assets split 50/50
- Waiver of Estate Rights
- Life Insurance designation in favor of financially dependent spouse
- Support Waiver

Housing Options

- Selection of marital home – buying, selling, renting
- Add spouse to deed
 - Financial consideration
 - Impact on mortgage
 - Impact on estate planning
- Create life estate
 - Duration
 - Carrying Costs
 - Terminating events

Beneficiary Designations

- Retirement assets in lieu of life insurance
- Survivor benefit election
- Financial accounts
- Real Estate
- Waiver of Designations

Managing the Marital Household

- Create one joint bank/checking account for payment of recurring monthly expenses
- Decide on each spouse's monthly contribution to joint bank/checking accounts
 - Can be equal contribution
 - Can be in proportion to income

In Sickness and In Health

- Long term care – range of services and support to meet health and personal needs over a long period of time
- Long term care is NOT medical care but rather assistance with activities of daily living – bathing, dressing, eating, using bathroom, transferring from bed to chair
- Long term care can also provide assistance with instrumental activities of daily living – housework, meal preparation, taking medication, grocery shopping, managing money, caring for pets, responding to emergency alerts
- Used in the event of sudden illness, chronic condition or accident
- Almost 70% of people over age 65 will require long term care
- Medicare does NOT pay for long term care

Medicaid – Need to Know

- Medicaid covers nursing home cost when a senior's assets are less than \$2,000 – otherwise the senior (or the family) must pay
- Prenup does NOT protect excluded assets from other spouse's nursing home costs
- Medicaid counts assets of other spouse to determine eligibility
- Spousal Impoverishment Rules – at home spouse can keep half of the couple's assets, up to \$101,640

Social Security – Need to Know

- Qualification for retirement benefits
 - At age 66 if born between 1943 – 1954
 - At age 66 and 2 months if born 1955
 - At age 66 and 4 months if born 1956
 - At age 66 and 6 months if born 1957
 - At age 66 and 8 months if born 1958
 - At age 66 and 10 months if born 1959
 - At age 67 if born 1960 or later
- Early retirement age 62 – reduced benefit

Social Security Derivative Benefits

- Spouse (or former spouse) who is age 62 or older - if married for 10 years or more
- Widow or widower at age 60; or at age 50 if disabled
- Children up to age 18; or 19 if full time high school student
- Disabled children, even over age 18

Just for Seniors

- Who will handle finances if one or both become incapacitated
- What will happen upon the first spouse's death; upon the second spouse's death
- Consult with:
 - CPA on taxability of retirement benefits, assets classes, filing of joint/individual returns
 - Elder law and/or estate law attorney for updates to wills, trusts, long term care options
 - Family members

Longevity Planning

- Lifespan v. Wealthspan
- Onset or managing chronic condition
- Getting around – driving
- Downsizing house
- Long term care/nursing home insurance
- Goal is financial and health security

Choice of Law Provisions

- Choose law of the state where couple will be living
 - Legal residence
 - Domicile
 - Snow birds
- Even if subsequent move, election applies – nationally and internationally
- Choose effective date
 - Date of signing of agreement
 - Date of future implementation (or challenge)

Is it valid?

- Full financial disclosure
 - State it
 - Document it
 - State it again
- Other avenues for challenge
 - Know your state's law
 - Reasonable provisions?
 - Subject to Pre-Marital Agreements Act?
 - Formalities for signing? Time? Notary? Competency?

Litigating Validity

- Discovery – what's available
- Petition to Enforce or Declaratory Judgment
- Documentation of financial disclosure



And they lived happily ever after

Presented By:

Julia Swain, Esquire

Fox Rothschild, LLP

2000 Market Street, 20th Floor

Philadelphia, PA 19103

215-299-2000 Main

215-299-2794 Direct

215-299-2150 Facsimile