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General Comments regarding New Hampshire Premarital Agreements

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A. <u>In General</u>. With regard to premarital agreements in general, there are a few things prospective spouses should understand before they consider entering into the agreement.

1. There must be a complete and accurate disclosure of each party's assets and liabilities to the other, and each party must have his or her own independent counsel in the negotiation or review of the agreement. Otherwise, a court will not enforce (or respect) the agreement.

2. The terms of the agreement must be fair to each party in order to be held enforceable. Under New Hampshire law, this "fairness" standard is applied both at the time the agreement is entered and later when it is sought to be enforced. While prenuptial agreements are presumed to be valid, a party or his or her representative seeking to challenge an agreement's fairness can rebut that presumption if the agreement loses its validity by reason of changed circumstances which the parties did not contemplate when they entered the contract. In such cases a court will refuse to enforce the agreement in whole or in part if to do so would impose an unconscionable hardship on the party seeking to avoid the agreement. (This very important fairness standard is discussed later in this memorandum and attached Exhibit).

3. Thus, there is no guarantee that any given agreement will be upheld or enforced, even if the legal requirements (full disclosure of assets, each party represented by independent counsel, etc.) are met. Divorce lawyers are getting very creative in finding ways to challenge the validity of these agreements. And, even where the agreement is eventually upheld, the legal challenge to the validity of the agreement still has to be defended, often at significant cost. A premarital agreement should therefore not be relied on as an iron-clad guarantee, but perhaps more realistically as the opening point of negotiation should the marriage later be dissolved.

4. In the absence of a premarital agreement, upon your marriage each spouse will acquire certain rights with regard to the other's property. Those rights will be determined by the law of the jurisdiction -- whether New Hampshire or another jurisdiction -- in which you are residing at the time of

a death or any divorce or separation. The following will briefly describe these rights here in New Hampshire and contrast them with the marital property rights conferred by other states' laws in several noteworthy respects.

a. ***On Divorce or Separation: Support, Alimony and Property Settlements*****.** Each spouse exposes at least certain of his or her assets to division on divorce, and exposes him or herself to the possibility of having to pay alimony on a separation or divorce. Many jurisdictions limit a spouse's property settlement, support and alimony rights to "marital property" -- generally, property acquired during the marriage other than by inheritance and certain gifts -- which is therefore available to be divided on divorce, and preserve each party's right to keep his or her own "separate property" (generally, property inherited by that party and certain other assets). New Hampshire, by contrast, allows the trial judge to consider ***all*** of the parties' property interests, regardless of which spouse acquired them, how they were acquired (e.g., gift, inheritance), or when (before or after the marriage).

For those states which make the separate/marital property distinction, property can be converted from family assets to marital property during the marriage, and one party's payment of certain expenses related to the other's family assets may create an "equitable lien" on that property.

In addition, although a court in a state other than New Hampshire may not be able to order that separate property be ***given*** to the non-owner party on divorce, the court can consider the relative value of the parties' assets in awarding alimony (so that family assets may in fact have to be used to pay alimony).

Again, New Hampshire makes no distinction between marital property and separate property. In the event of divorce all property of both spouses, whether acquired before or during the marriage, is subject to "equitable division" based on what is reasonable or just in the court's discretion. Premarital agreements we propose for our New Hampshire clients therefore most often speak only in terms of each party's "family assets" -- a concept similar to separate property in non-equitable division states. Significantly, many of our agreements do not provide that property acquired and income and capital gains realized by either party during the marriage will be marital property subject to equal division upon a termination of the marriage.

b. ***On Death: "Statutory Share" of the Deceased Spouse's Estate*****.** For purposes of a surviving spouse's right to a deceased spouse's assets, in virtually all states it is irrelevant whether a deceased party's property is "marital" or "separate" property. Each party of the agreement would have the right to elect to take a statutory share of the other's "estate" on death, regardless of the terms of the other's Will.

In New Hampshire where a decedent is survived by both his or her

spouse and children, the surviving spouse has only a right to claim a one-third share of the deceased spouse's "probate estate" - generally, the assets passing under the deceased spouse's will. Other assets, including the assets in a funded revocable trust, joint assets, assets passing to third parties under beneficiary designations (life insurance proceeds, IRA and retirement plan balances, etc.) are not subject to the surviving spouse's claim unless it can be proved that the deceased spouse purposely arranged for them to pass outside the probate estate to avoid the survivor's statutory share rights.

The statutory share is generally <u>not</u> reduced by any estate taxes, so it often
constitutes an even larger percentage of the after-tax estate. In addition, the surviving spouse may be entitled to certain other allowances and elections. Some or all of these rights are often waived in a premarital agreement.

5. Our agreements also typically limit what the spouse will be <u>required</u> to do for each other generally at a time -- before the marriage is entered or in the marriage's early years -- when the parties may not want to do anything for each other. There is no reason why either of them cannot do more for each other in the event of a divorce or death if they wish, but the agreement will specify what our client <u>must</u> do (even if his or her preference at that time would be to do less). For that reason, while the terms of the agreement must be fair to each party (that is, what would be fair to someone giving up the rights described above when the other has the kind and value of property owned by that other party), generally you would not want to promise or agree to do more in this agreement than you would be willing to do if the situation were the worst you could imagine. Our agreements usually characterize all property (except co-owned property acquired during the marriage) as the family assets of either or client or his or her fiancé.

For example, if our client alone owns the primary residence which will be co-occupied by the parties after the marriage, the client may (but is not required to) transfer all or a portion of the client's interest in such residence to the client's spouse as tenant-in-common or joint tenant with rights of survivorship or even as sole owner. Moreover, if the parties (or either of them) in the future sell the primary residence, and replace it with another primary residence, they may take title to such residence in either or both of your names, but neither of them will have any legal obligation to the other in this regard.

6. Even a valid agreement won't always supercede certain laws. For example, even an agreement that requires each spouse to be solely responsible for his or her own support may be ineffective to waive the spousal spend-down requirements in order to qualify the other "impoverished" spouse for Medicaid benefits.

B. <u>Personal Preferences with a view to Living with (or within) an Agreement</u>. Some general observations and advice we give to our clients who

are considering entering into these agreements, or trying to comply with them during the marriage:

1. The agreement should address property division issues in the case of ***both*** (i) a possible separation and/or divorce between the parties, and (ii) a party's death.

2. The agreement should be structured in a way that will allow the parties to, in effect, put it in a drawer and forget about it once the agreement has been negotiated and signed. By that I mean that compliance with the terms of the agreement should not be something the parties have to think about in their daily lives. It should intrude as little as possible in the way the parties want to live their lives and handle their respective financial affairs on a day-to-day basis.

In other words, the provisions of the agreement should be structured as much as possible to reflect and comply with the way you intend to title your property and handle your respective financial affairs - ***but*** a decision with regard to how to title an asset (jointly v. sole name), for example, should prompt you to consider the consequences of that decision under the agreement.

3. The agreement should also be drafted in order to avoid difficult property "tracing" problems on divorce or death (i.e., identifying each party's family assets). This is one of the reasons the two Schedules B and C to our agreements carefully list all of each party's respective family assets existing on the date the agreement is made, all of which will be characterized as their respective family assets after the marriage. But this will not help in determining whether any property acquired ***during*** the marriage is you and your spouse's separate family assets. For that reason, we prefer to rely on title to identify property as one or the other party's family assets. Any change in title (or the decision as to how to initially title property) should prompt you to first consider the consequences under the agreement.

4. We prefer to structure the agreement to provide that each party is waiving ***all*** marital property rights, except as is specifically provided in the agreement.

C. <u>Other Terms of the Agreement</u>. Typically, the terms of a premarital agreement will define the two categories of property referred to above: Husband and Wife's family assets. A party's family assets will belong exclusively to that party and which will not be subject to claims by the other party on either divorce or death. The agreement will then identify the property which falls into each category. These definitions are negotiable, and are often tailored for the particular parties involved.

The agreement should then provide for the disposition of each category of assets in the event of separation, divorce, or a party's death. The "purest" form of agreement -- but not often the form we recommend to our clients unless the

parties' respective economic positions before the marriage are the same or very similar -- provides that each party waives all rights to support from the other, and to the other's family assets, and provides that only assets titled jointly between the parties will be subject to division on death or divorce. The separate memorandum attached as Exhibit "1" addresses the "fairness" issue in the context of a hypothetical client "John" considering a premarital agreement with "Mary", his significantly less wealthy fiancé. Obviously, this is where much of the negotiation comes in.

1. Often, there are special provisions for particular assets. For example, the agreement may require that the party who owns the home in which the parties will reside must include in his or her Will a bequest of a life interest in that home (or use for a period of years) to the surviving party. The agreement will often make specific provisions for the residence, including what happens if the parties decide to take title to that property as joint tenants.

2. Sometimes, the agreement provides that a stated amount will be paid to the survivor on death, or to the less wealthy party in the event of a divorce. Often this amount increases with the duration of the marriage.

3. The agreement should also specifically deal with life insurance policies and proceeds, and interests in various kinds of retirement plans and benefits. Many agreements do this by characterizing all pension and IRA assets and life insurance policies as family assets with respect to which the other spouse waives all rights, interests, etc. They also often require each party to waive any rights to any "qualified joint survivor annuity" which either of them may otherwise be entitled to receive under federal law with respect to any "employer sponsored" pension plan covered by ERISA, the federal pension legislation.