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Marital Agreements from A to Z

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CHARLES A. REDD

Charles A. Redd is a partner in the St. Louis, Missouri, office of the law firm of STINSON LLP. Mr. Redd concentrates his practice in estate planning, estate and trust administration and estate and trust-related litigation. Prior to joining Stinson, Mr. Redd was a partner in and Vice Chairman of the Trusts & Estates Practice Group at the law firm of SNR Denton US LLP (now Dentons US LLP). Mr. Redd was also previously a partner in the law firm of Armstrong, Teasdale, Schlafly & Davis (now Armstrong Teasdale LLP) and was Chairman of that firm's Trusts & Estates Department. He was previously employed as a Trust Administrator by First Wisconsin Trust Company (now U.S. Bank, N.A.), Milwaukee, Wisconsin, and as an Assistant Counsel by Centerre Trust Company of St. Louis (now Bank of America Private Bank).

Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, marital agreements and other estate planning documents; (b) pre- and post-death tax planning for individuals, trusts and estates; (c) preparation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (d) representation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (e) representation of individual and corporate fiduciaries and (f) litigation in the Probate Division and other equity divisions of the Circuit Court. Mr. Redd has worked on estates and estate planning projects, some involving assets valued at over a billion dollars, and has successfully handled numerous estate tax, gift tax and generation-skipping transfer tax matters, will and trust construction cases, will contests, contests of trust agreements, alleged breach of fiduciary duty cases and other types of cases involving estates and trusts.

Mr. Redd is a member of the State Bar of Wisconsin, The Missouri Bar, the Illinois State Bar Association, The Bar Association of Metropolitan St. Louis and the Estate Planning Council of St. Louis.

Mr. Redd was Chairman of the Missouri Bar's Health Care Durable Power of Attorney Subcommittee, and he played a significant role in the drafting and enactment of the Missouri Durable Power of Attorney for Health Care Act. In 1991, Mr. Redd received The Missouri Bar President's Award. Mr. Redd was the principal draftsman of the Missouri Family Trust Company Act.

Mr. Redd is an elected member of The American Law Institute and a Fellow of The American College of Trust and Estate Counsel (Past Missouri State Chair; Past Regent; Past Chair of Communications Committee; Estate and Gift Tax Committee; and Fiduciary Litigation Committee). He was an adjunct professor of law (Estate Planning) at Northwestern University School of Law for fifteen years. He serves as a member of the Advisory Committee for the Heckerling Institute on Estate Planning and is Co-Chair of the Editorial Advisory Board of, and writes a regular column in, TRUSTS & ESTATES magazine. In 2018, he was inducted into the Estate Planning Hall of Fame® by the National Association of Estate Planners and Councils. In 2023, he was recognized by the Estate Planning Council of St. Louis as Distinguished Estate Planner of the Year. Mr. Redd is listed in The Best Lawyers in America and is "Band 1" ranked by Chambers and Partners in their High Net Worth guide. He frequently writes and lectures nationally on topics in the trusts and estates field.

Turney P. Berry

Turney P. Berry concentrates his practice in the areas of estate planning, fiduciary matters, and charitable planning. Mr. Berry is the leader of Wyatt, Tarrant & Combs' Trusts, Estates & Personal Planning Service Team and a past member of the firm's Executive Committee. Mr. Berry is active in the American College of Trust and Estate Counsel (ACTEC), and served as President of the ACTEC Foundation, Regent of the College, State Chair for Kentucky, Chair of the Estate & Gift Committee, and Chair of the Charitable and Tax-Exempt Committee. Currently he serves as Chair of the State Laws Committee, and a member of the Long Range Planning Committee.

As a Uniform Law Commissioner, Mr. Berry currently serves as Chair of the Study Committee on Transfers to Minors Act, Vice-Chair of the Drafting Committee on Conflicts of Laws in Trusts and Estates, Member of the Electronic Estate Planning Documents Committee, Member of the Joint Editorial Board for Uniform Trust and Estate Acts, and Member of the Drafting Committee on Uniform Determination of Death Act. He has served as chair of the Uniform Fiduciary Income and Principal Act (UFIPA), chair of the Uniform Power of Appointment Act, Vice Chair of the Drafting Committee on Electronic Wills Act, Co-Chair of the Drafting Committee on Uniform Cohabitants' Economic Remedies Act, and as a member of the drafting committees for the Directed Trust Act, the Revised Fiduciary Access to Digital Assets Act, the Trust Decanting Act, the Insurable Interests in Trusts Act, the Premarital and Marital Agreements Act, the Transfer on Death Deeds Act, the Revised Disposition of Community Property Rights at Death Act, and the Uniform Probate Code Artificial Reproductive Technology provisions, and an adjunct member of the Fundraising Through Public Appeals Act.

Mr. Berry is a Fellow of the American College of Tax Counsel, a member of the American Law Institute, a member of The International Academy of Estate and Trust Law, a member of the Advisory Council of the Heckerling Institute on Estate Planning, a Member of the Advisory Board of Trusts and Estates Monthly, and a member of the Bloomberg BNA Tax Advisory Board (Estates, Gifts, and Trusts). He serves as Adjunct Professor at the University of Miami Estate Planning LLM Program (teaching Business Succession Planning), and has served as Adjunct Professor at Vanderbilt University, the University of Missouri, and the University of Louisville, and regularly speaks at the nation's leading estate planning conferences. Since 1996, Mr. Berry has served as Co-Chair of the Midwest/Midsouth Estate Planning Institute at the University of Kentucky (the longest continuously run CLE event in Kentucky).

Mr. Berry has been certified as an Accredited Estate Planner® (AEP®) by the National Association of Estate Planners & Councils and is a member of its Estate Planning Hall of Fame [Kentucky does not recognize legal specialties]. He is listed in Woodward/White's The Best Lawyers in America® and in the Kentucky Super Lawyer Magazine in the area of Trusts and Estates.

A native of Tennessee, Mr. Berry received his B.A. and B.L.S. in 1983 from the University of Memphis and his J.D. in 1986 from Vanderbilt University.

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TABLE OF CONTENTS

Page

Marital Agreements from A to Z

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I. INTRODUCTION

Marriage dissolution, and the financial obligations that often flow from it, has become so prevalent that a client's planning for this possibility is sometimes nearly as important as his or her core estate planning instruments. Thus, marital agreements, especially among those who have been through divorce, are becoming a foundational component of some clients' financial security. These agreements must be closely coordinated with the client's estate plan.

Under the Uniform Premarital Agreement Act ("UPAA")[1] § 3, parties to a premarital agreement may contract with respect to:

- The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
- The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- The disposition of property upon separation, marital dissolution, death or the occurrence or nonoccurrence of any other event;[2]
- The modification or elimination of spousal support;
- The making of a will, trust, or other arrangement to carry out the provisions of the agreement;
- The ownership rights in and disposition of the death benefit from a life insurance policy;
- The choice of law governing the construction of the agreement; and

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[1] The Uniform Premarital Agreement Act ("UPAA") was promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), now known as the Uniform Law Commission, in 1983. In 2012, NCCUSL approved and recommended the Uniform Premarital and Marital Agreements Act ("UPMAA"). The UPMAA was intended to supersede the UPAA, but, practically, that hasn't happened. The UPMAA has been enacted in two states, Colorado and North Dakota. By contrast, the UPAA (or some variation of it) is law in 27 jurisdictions: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia and West Virginia.

[2] Presumably, this component of UPAA § 3 would encompass the waiver of an elective share (in non-community property jurisdictions) and other property interests otherwise conferred on spouses under applicable state law.

- Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.[3]

Additionally, it's fairly common for marital agreements to contain provisions waiving rights (if) any to serve in certain fiduciary roles, *e.g.*, executor, administrator, personal representative, guardian, conservator.

II. What are Essential Requirements for All Marital Agreements

A premarital agreement must be voluntary and not unconscionable when signed (and, in some jurisdictions, when implemented), and there must be certain financial disclosures between the parties.[4]

A. Must Be Voluntary

A premarital or postmarital agreement may be challenged on the basis that a spouse didn't enter into the agreement voluntarily because of fraud, duress or undue influence. Because neither the Uniform Premarital Agreement Act ("UPAA") nor the Uniform Premarital and Marital Agreements Act ("UPMAA") defines the term "voluntary," courts look to case law and a variety of factors to determine whether a marital agreement was entered into voluntarily. Numerous cases are cited in the comment to UPAA § 6.

The risks of undue influence may be greater with a premarital or postmarital agreement than with a Will because of the nature of the fiduciary relationship between spouses-to-be in negotiating and executing this type of contract.[5]

B. Must Not Be Unconscionable

"In the context of negotiations between spouses as to the financial incidents of their marriage, [unconscionability] includes overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.[6]

C. Financial Disclosures

The financial disclosures requirement is satisfied if, before execution of the agreement, the spouse seeking enforcement: (1) was provided a fair and reasonable disclosure of the property or financial obligations of the other party; (2) voluntarily and expressly waived in writing any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; or (3) had, or reasonably could have had, adequate knowledge of the property or financial obligations of the other party.[7] The UPAA does not define "fair and reasonable"

[3] The UPMAA has no provision comparable to UPAA § 3.
[4] UPAA § 6. *See*, *also*, UPMAA § 9.
[5] *See* Ravdin, 849-2nd T.M., *Marital Agreements*.
[6] UPAA § 6, cmt.
[7] UPAA § 6; UPMAA § 9(d).

disclosure. The UPMAA replaces "fair and reasonable disclosure" with "reasonably accurate and good faith estimate of value."

D. Minimizing Risks of Litigation Regarding the Validity of Marital Agreements

1. *Separate Counsel*

If each party agrees to separate representation (and the wealthier spouse should insist that the less wealthy spouse have separate counsel), include in the agreement the name of each lawyer and have both lawyers sign the agreement indicating they explained the agreement to their respective clients and believe their clients understand the agreement they are making.[8] Neither lawyer should be required to endorse the agreement. There are occasions when a client wants to make an agreement against the advice of counsel.

2. *Timing of the Agreement*

The lawyer should plan the negotiations and other meetings related to the agreement, as well as its execution, well in advance of the wedding. A claimant will then have more difficulty proving duress or undue influence.

3. *Disclosures*

The lawyer should assist the client in completing a comprehensive list of the client's assets (with corresponding values), financial obligations of the client and the client's income.[9] That list should be attached as an Exhibit to (or at least explicitly referred to in) the agreement. The client should review the list carefully to ensure its accuracy, and the other party to the agreement should be required to sign it signifying his or her receipt of and satisfaction with it.

4. *Specific Reference to Rights and Interests Being Waived*

To the extent the agreement is not specific as to the marital rights being waived, they may not be waived.[10]

[8] Notably, the UPAA doesn't require, as a condition of enforcement, that the party against whom enforcement is sought was represented by separate counsel. However, UPMAA § 9 does require that the party against whom enforcement is sought had access to independent legal representation.
[9] *See* UPMAA § 9(d)(1).
[10] *See*, *e.g.*, *Bauer v. Piercy*, 912 S.W.2d 457 (Ky. App. Dec. 22, 1995). A surviving spouse renounced her predeceased husband's Will. The spouses had contracted not to revoke or change their Wills. In holding the surviving spouse hadn't breached the contract, the Court said: "The study and practice of law, perhaps more than any other profession or art, depends on precision and clarity in language. The terms revocation and renunciation, while perhaps holding the same meanings for the layperson, have unique and specific meanings for attorneys. Language is the medium through which the parties' intentions are expressed and the "meeting of the minds" accomplished. Thus specificity and clarity of the words employed are of utmost importance." *Cf. In re Estate of Sharpe*, 814 S.E.2d 595 (N.C. App. March 6, 2018), in which the Court held a surviving spouse had waived her right to an elective share in a premarital agreement that didn't specifically address the elective share but stated: "each party has the sole and exclusive right at all times to manage and control their respective separate property to the same extent as if each were unmarried[,]" and

5. *Recitals*

Recitals are useful because each spouse (and counsel) will have read the recitals before execution, making it more difficult to claim later that the facts and circumstances described in the recitals were untrue or didn't exist. Particularly helpful recitals include:

- Each party understands he or she would have substantial rights, under applicable state law, in the property of the other in the absence of the agreement.

- Each party has had ample opportunity to review and discuss the agreement with his or her own counsel.

- Each party acknowledges he or she has received and accepted from the other party what the acknowledging party believes to be a full and accurate disclosure by the disclosing party of all property owned by, the liabilities of and all matters pertinent to the net worth and income of the disclosing party.

- The parties accept that certain assets disclosed in the Exhibits are difficult to value, that the values assigned to those assets are good faith estimates and understand that the non-owning party may take steps to verify the accuracy of those values.

- The parties acknowledge that the agreement has been under negotiation for a sufficient period of time, they have freely and voluntarily entered into the agreement without any duress or coercion and with full knowledge and understanding of each and every provision.

6. *Provide Incentives to Avoid Litigation*

Consider including a provision require the party who breaches the agreement to pay the attorney's fees incurred by the other party in seeking enforcement of the agreement.

III. TAX ISSUES TO CONSIDER IN DESIGNING MARITAL AGREEMENTS

A. Income Tax Apportionment

The parties to a marital agreement should consider addressing how their respective annual income tax liabilities will be handled. If the parties plan to file their own, separate annual income tax returns as "Married Filing Separately," and pay their own respective income taxes, that intention should be articulated. They may prefer, however, to file their annual income tax returns together as "Married Filing Jointly." In that case, their marital agreement should so state and should then address how their respective tax burdens shall be allocated between them. The

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"[e]ach party specifically waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have made to the other's separate property under the laws of this state."

agreement could provide that one spouse or the other shall be solely responsible for both spouses' combined tax liability, or the agreement could allocate the combined liability based on each spouse's own income, deductions and credits. The most common and fair way to effectuate such allocation, which may be spelled out in the agreement, is to require that each party pay (unless the parties agree to another method of allocation) that portion of their aggregate joint tax liability equal to the total amount of such liability multiplied by a fraction the numerator of which is equal to such party's tax computed as if such party filed separately and the denominator of which is equal to the aggregate total of such parties' tax computed as if both parties filed separately.

B. Alimony and Separate Maintenance

The 2017 Tax Act[11] eliminated the above-the-line deduction for alimony and separate maintenance payments under IRC[12] § 215. In addition, the 2017 Tax Act eliminated IRC §§ 61(a)(8) and 71, which required payees of alimony and separate maintenance to include such payments in gross income.

The 2017 Tax Act also repealed IRC § 682, which provided that, if one spouse created a grantor trust for the benefit of the other spouse and the spouses divorced, thereafter the trust income would not be taxed to the donor spouse to the extent of any income that the donee spouse is entitled to receive.

These changes are effective for divorce decrees and separation agreements entered into after 2018. Modifications entered into after 2018 are subject to the 2017 Tax Act if the modification expressly states that this provision of 2017 Tax Act applies.[13] No sunset applies to the repeal of the above-discussed provisions regarding alimony and separate maintenance payments and IRC § 682.

A post-2018 marital agreement can't impact the non-deductible, non-taxable characteristics of alimony and separate maintenance payments, but the above-referenced changes wrought by the 2017 Tax Act should be taken into account when negotiating other marital agreement provisions.

C. Transfers of Property Incident to Divorce; Certain Property Transfers

IRC § 1041 provides, among other things, that a property transfer to a spouse, or to a former spouse if the transfer is "incident to divorce," is treated as acquired by the transferee by gift (not as income to the transferee). No gain or loss is recognized. The basis of the transferee in the property is the transferor's adjusted basis. "Incident to divorce" means: (1) within one year after the date of marriage cessation; or (2) related to marriage cessation. That a property transfer was

[11] An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97 (December 22, 2017).
[12] All references to "IRC" are to the Internal Revenue Code of 1986, as amended.
[13] 2017 Tax Act § 11051(c)(2).

"related to marriage cessation" should be easily established if the transfer was pursuant to a marital agreement.

IRC § 2516 provides, among other things, that transfers of property pursuant to a written agreement between spouses in settlement of their marital or property rights shall be deemed to be transfers for a full and adequate consideration in money or money's worth (not a gift) if divorce occurs during the three-year period starting on the date one year before the agreement was entered into.

D. Trusts as to Which Divorced Spouse Has Interests and/or Powers

IRC § 672(e)(1)(A) provides that the grantor of a trust shall be treated as holding any power over or interest in such trust held by any individual who was the spouse of the grantor at the time of the creation of such power or interest. IRC § 674(a) provides, in general, that the grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the trust assets is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.[14] IRC § 677(a) provides that the grantor of a trust shall be treated as the owner of any portion of a trust, whether or not the grantor is treated as such owner under IRC § 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be distributed to the grantor or the grantor's spouse, or held or accumulated for future distribution to the grantor or the grantor's spouse.

Considering the repeal of IRC § 682 and the continued vitality of IRC §§ 672(e)(1)(A), 674(a) and 677(a), grantor trust status with respect to a trust, once established, may continue, even after spouses divorce, due to the non-grantor spouse's beneficial interests in and/or powers over such trust. This possibility could be addressed in a marital agreement – either by requiring the non-grantor spouse to relinquish such interests and/or powers in the event of divorce or by the non-grantor spouse's giving the grantor spouse financial concessions to offset the detriment to the grantor spouse and benefit to the non-grantor spouse.

E. Portability of the Deceased Spousal Unused Exclusion Amount

Under IRC § 2010(c), a surviving spouse may be able to supplement his or her basic exclusion amount by the deceased spousal unused exclusion amount ("DSUEA"). The result (slightly over-simplified) is that a surviving spouse can in some circumstances effectively double the amount he or she can transfer tax-free during life and/or at death (from $13,610,000 to $27,220,000 in 2024).

[14] IRC § 674(d), however, provides that IRC § 674(a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a Trustee or Trustees, none of whom is the grantor or spouse living with the grantor, to distribute, apportion or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, if such power is limited by a reasonably definite external standard that is set forth in the trust instrument.

Because "portability" of the DSUEA is potentially valuable for married couples, provisions regarding the use of a future spouse's applicable exclusion amount have become a common point of discussion in negotiating premarital agreements. Although the presumptively wealthier future spouse may not seek direct financial concessions from the presumptively less wealthy future spouse, if the less wealthy spouse predeceases the wealthy spouse and the less wealthy spouse's executor elects portability, significant estate tax savings could result for the estate of the wealthier spouse (and his or her beneficiaries). Agreeing to include a provision in a marital agreement binding the less wealthy future spouse's executor to transmit DSUEA to the wealthier spouse may be a valuable element of leverage enabling the less wealthy future spouse to negotiate financial considerations from the wealthier future spouse.[15]

For an individual's DSUEA to be transferred to a surviving spouse, the appropriate election must be made on a timely-filed, complete and properly prepared Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.[16] For the election to be made, a federal estate tax return for the deceased spouse's estate must be filed even though no estate tax is owed at the death of the deceased spouse.

In situations where the parties to a marital agreement agree that a portability election, if available, shall be made at the death of the less wealthy spouse if he or she is the first to die, consideration should be given to whether the marital agreement should include a provision requiring the surviving spouse to pay (or reimburse the predeceased spouse's estate for) the costs associated with preparation of the federal estate tax return for the deceased spouse's estate. Such a provision implicitly recognizes that the portability election potentially benefits the surviving spouse and his or her successors but provides no economic benefit to the predeceased spouse or his or her successors.

Additionally, consideration should be given to including a provision in the premarital agreement regarding cooperation with the surviving spouse by the deceased spouse's executor. The presumptively less wealthy future spouse could be required to provide in his or her Will that his or her executor will communicate with the surviving spouse regarding the estimated DSUEA and provide a copy of the filed federal estate tax return to the surviving spouse.

F. Anticipating Future Tax Law Changes

Consideration should be given to including a provision in a premarital agreement to acknowledge and address anticipated tax law changes, such as the various 2017 Tax Act provisions that are to sunset in the year 2026, if not repealed or changed before then, including those involving individual tax rates and brackets, basic exclusion amounts and various deductions.

[15] *See, e.g.*, *Estate of Vose v. Lee*, 390 P.3d 238 (Okla. 2017) (surviving spouse able to force predeceased spouse's executor to elect portability despite having waived any claim to predeceased spouse's estate in premarital agreement).
[16] Treas. Reg. § 20.2010-2(a).

IV. SPOUSAL RIGHTS IN RETIREMENT ASSETS

A. ERISA and REA for Estate Planners

Most types of qualified plans must comply with ERISA.[17] ERISA was intended to provide a uniform scheme of regulation of various types of qualified plans and preempt state law.[18]

Estate planners must understand which types of plans are subject to ERISA, as a plan's status under ERISA determines whether a spouse's or creditors' rights under state law are preempted by ERISA. For example, generally, IRAs, Roth IRAs and governmental plans aren't subject to ERISA. On the other hand, IRC § 401(k) plans and most other qualified plans are subject to ERISA. ERISA may also apply to IRC § 403(b) plans if such plans meet certain requirements.[19]

REA[20] added important provisions that are applicable to ERISA plans. REA provides that the "nonparticipant spouse" is entitled to at least a portion of a death benefit under an ERISA plan. The participant may waive the surviving spouse's benefit but only if the nonparticipant spouse consent to the waiver. The plan must provide a written explanation of the participant's and nonparticipant's rights under the plan.[21]

The surviving spouse's benefit under an ERISA plan may be waived in a marital agreement but only *after* the parties are married. It may therefore be appropriate to include in a premarital agreement a provision requiring the spouses to sign a separate waiver document after the marriage.[22]

B. Case Law Regarding Spousal Rights

1. *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*[23]

a. <u>Facts</u>

The participant had the power to designate beneficiaries under his ERISA plan (a savings and investment plan) and remove and replace such designations. If the participant was not survived by a spouse and no beneficiary was designated, the plan provided that the plan proceeds would be distributed to the participant's estate. The participant designated his spouse as beneficiary under the plan. The participant didn't designate a contingent beneficiary. The participant and the spouse were later divorced, and, as specified in the divorce decree, the spouse

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[17] The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406.
[18] S*ee, e.g.*, *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001) (ERISA preempts state statute that revokes beneficiary designation in favor of ex-spouse).
[19] Labor Dept. Reg. § 2510.3-2(f).
[20] The Retirement Equity Act of 1984, Pub. L. No. 98-397.
[21] IRC §§ 401(a), 417; Treas. Reg. § 1.401(a)-20.
[22] IRC § 417(a); Treas. Reg. § 1.401(a)-20, A-28, -31; Notice 97-10, 1997-1 C.B. 370 (sample waiver clauses).
[23] *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L.Ed.2d 662 (2009), *aff'g*, 497 F.3d 426 (5th Cir. 2007).

released any rights to the plan. The participant never removed the ex-spouse as the beneficiary under the plan.

The participant was survived by his ex-spouse. After the participant's death, the participant's employer distributed the plan proceeds to the ex-spouse. The participant's estate sued the employer, claiming that the distribution to the ex-spouse, after she waived her right to distributions under the divorce decree, violated ERISA.

b. **Supreme Court's Holding**

The United States Supreme Court explained that the plan administrator is obligated to act "in accordance with the documents and instruments governing the plan,"[24] and ERISA provides no exception to this duty regarding the distribution of benefits. The Supreme Court then observed that one of the policies of ERISA is to establish rules that provide participants and employers with certainty; the governing documents of the plan control the administration and disbursement of benefits, and establishing rules that would allow other documents, such as a divorce decree, to control the disbursement of benefits would be contrary to this policy. Consequently, the Supreme Court ruled that the plan administrator properly distributed the plan benefits to the ex-spouse.

2. ***Becker v. Williams***[25]

a. **Facts**

The decedent was a participant in two ERISA-qualified employee benefit programs at his death. The decedent named his then-spouse as beneficiary of the plans. Following their divorce, the decedent called and told the plan representative that he wished to name his son as beneficiary of the plans. Each time the decedent was sent beneficiary forms, which he failed to complete and return to the plan administrator. After the decedent's death, his former spouse as well as his son submitted claims for the retirement benefits. The plan administrator then interpleaded both parties for a determination as to the proper beneficiary.

b. **Ninth Circuit's Holding**

The United States Court of Appeals for the Ninth Circuit analyzed the plan documents and determined that such documents did not require use of a beneficiary designation form to change beneficiaries.

Further, the Ninth Circuit relied on an interpretation of ERISA from a previous ruling finding that plan documents and "other instruments under which the plan is established or operated" relate only to those documents that provide information about the plan

[24] 29 U.S.C. § 1104(a)(1)(D).
[25] *Becker v. Williams*, 777 F.3d 1035 (9th Cir. 2015).

and describe the benefits in more detail.[26] The Ninth Circuit cited the Supreme Court decision in *Kennedy*, summarized above, in which it is stated that "documents and instruments governing the plan" under 29 U.S.C. § 1104(a)(1)(D) and "other instruments" under 29 U.S.C. § 1024(b)(4) overlap, for the notion that only documents providing "information as to 'where [the participant] stands with respect to the plan'" qualify as documents with which a plan administrator must comply in awarding benefits. Additionally, the plan documents on record did not reference any required forms for *unmarried* persons. Accordingly, the beneficiary designation forms were not plan documents governing benefit awards.

The decedent's former spouse then argued that, even if beneficiary designation forms are not "plan documents," if a plan grants the administrator discretion to determine benefit eligibility, then the exercise of such discretion should be upheld as reasonable. The Ninth Circuit rejected the former spouse's contention that either the employer or the plan administrator exercised any discretion. To the contrary, held the Court of Appeals, the plan administrator failed to exercise any discretion as evidenced by its decision to interplead the former spouse and the son rather than determine whether the decedent's telephonic designation was valid. The Ninth Circuit concluded that none of the plan documents explicitly required unmarried persons to use the beneficiary designation form but that the plan documents did encourage participants to telephone the employer to change beneficiaries. Thus, the Ninth Circuit concluded that decedent substantially complied with the plan documents by calling the employer to convey his intention.

3. *Hebert v. Cunningham*[27]

a. Facts

The decedent (Kevin) and Betty were married in 1981. Kevin participated in his employer's IRC § 401(k) plan. In November of 1998, Kevin, using a proper beneficiary designation form, named Betty as primary beneficiary of his account. In November of 2003, Kevin and Betty's marriage was dissolved by the Circuit Court of Cook County, Illinois. Paragraph 5 of the divorce decree provided that "each party shall retain sole ownership of their separate retirement assets, free and clear from any claim of the other party, as follows: [Kevin] shall retain sole ownership of his…401(k) account…"

The divorce decree contained the following additional language:

> Except as otherwise provided herein, each of the parties hereto does hereby forever relinquish, release, waive, and quitclaim to the other party hereto all property rights and claims which he or she now has or may hereafter have, as husband, wife, widow, widower or otherwise, or by reason of the marital relations now existing between the parties hereto or by virtue of any present or future law of any state or of the United States of America or any other country,

[26] *See Hughes Salaried Retirees Action Comm. v. Adm'r of the Hughes Non-Bargaining Ret. Pl*an, 72 F.3d 686 (9th Cir. 1995).
[27] *Hebert v. Cunningham*, 129 N.E.3d 539 (Ill. App. 1st Dist. 2018).

in or to or against the property of the other party or his or her estate, whether now owned or hereafter acquired by such other party. Each of the parties hereto further covenants and agrees for himself and herself and his or her heirs, executors, administrators and assigns, that he or she will never at any time hereafter sue the other party or his or her heirs, executors, administrators and assigns, for the purpose of enforcing any of the rights relinquished under this paragraph.

Kevin died in March of 2014. He had not changed his designation of Betty as primary beneficiary of his IRC § 401(k) account.

Kevin's executor, appointed by the Probate Division of the Circuit Court of Cook County in July, informed the IRC § 401(k) plan custodian in August 2014 that Kevin's account proceeds should be paid over to Kevin's estate. The plan administrator and plan trustee concurred. On October 16, 2014, Betty filed, in the Circuit Court of Cook County, a complaint for declaratory judgment asserting she was the rightful beneficiary of Kevin's account. The plan administrator removed the case to federal district court. The District Court entered an order to the effect that Betty was the rightful beneficiary under ERISA but specifically declined to address the executor's claim for relief under Illinois law.[28] The District Court dismissed the executor's claim against Betty that she was in breach of the divorce decree "without prejudice to refiling in the Circuit Court of Cook County."

The executor took the not-so-subtle hint and, on November 15, 2014, filed her own complaint for declaratory judgment and other relief in the Cook County Circuit Court. On July 25, 2017, the Circuit Court entered its order imposing a constructive trust on the IRC § 401(k) funds and requiring Betty to turn over the funds to the executor.

b. Appellate Court's Holding

The Appellate Court of Illinois affirmed the order of the Cook County Circuit Court. In so doing, it first rejected Betty's claim that the Circuit Court's order was barred by the doctrine of *res judicata* because the order of the District Court was clearly limited to determination of Betty's ERISA-based claim and specifically avoided making any ruling or pronouncement on the Illinois law issue addressed by the Circuit Court.

Next, the Appellate Court distinguished *Kennedy*,[29] which Betty claimed was dispositive. As discussed above, in *Kennedy*, the Supreme Court held that the "plan administrator did its statutory ERISA duty by paying the benefits to [decedent's former spouse] in conformity with the plan documents, notwithstanding the divorce decree." However, *Kennedy* didn't determine whether a named beneficiary is entitled to retain funds *after* their initial distribution by an ERISA plan administrator. Indeed, in a footnote, the Supreme Court declined

[28] *Cunningham v. Hebert*, No. 14 C 9292, 2016 WL 6442180 (N.D. Ill. 2016).
[29] *Supra*, *note* 23.

to "express any view as to whether the Estate could have brought an action in state or federal court against [decedent's former spouse] to obtain the benefits after they were distributed."

Finally, the Appellate Court disposed of Betty's argument that the divorce decree didn't clearly enough reflect an intention on the part of Betty to waive any interest in Kevin's IRC § 401(k) account. In so doing, the Court stated: "We find that th[e] broad waiver language unequivocally encompassed *all* property rights of any nature, including the beneficial property interest in the 401(k) at issue in this case. Indeed, it is hard to imagine how the waiver could have been worded more broadly."

V. ANTICIPATING AND HANDLING MARITAL ISSUES WITH CLOSELY-HELD BUSINESS INTERESTS

A. Introduction

A marital agreement may allow a business owner to specify the effect that the owner's death or dissolution of marriage will have on disposition of the owner's closely-held business equity. Most importantly, marital agreements may define what constitutes marital and nonmarital property for dissolution purposes and set the price at which the business is to be valued at the owner's death or in the event of divorce.

B. Examples

As an example, the agreement could state that, in the event of divorce, the owner's spouse is not to receive any interest in the owner's nonmarital property. "Nonmarital property" would be defined in the agreement specifically to include the business interests and any income derived therefrom other than salary or salary equivalent. The agreement would state explicitly that the prohibition against the owner's spouse's receiving any closely-held business equity is to apply even if the owner's spouse actively works, or has actively worked, in the business. The agreement could provide that the spouse's share of marital property is to be determined in some manner that takes into consideration the value of the business. That value may be referenced in the agreement as: (a) the purchase price set out in a separate buy-sell agreement as; (b) the fair market value of the business as a going concern as determined by an independent appraiser; or (c) the amount arrived at pursuant to a formula that's set forth in the agreement. Setting clear expectations regarding how the business equity is to be valued and distributed can prevent or at least minimize time-consuming and expensive disagreements during divorce proceedings.

Marital agreements are particularly helpful within the context of blended families or when the business is a joint venture between spouses. Blended family concerns typically arise when an owner's children from a previous relationship are involved in the family business but the owner is unsure whether children will be born into or adopted during a new marriage. The owner may want his or her existing children's interests protected but may also want to preserve the right to provide property and/or beneficial interests to future children through his or her own estate plan should they become involved in the business.

Where the business is a joint venture of the spouses, a marital agreement can set forth how the business will be operated if the spouses agree to continue the business together after marriage dissolution or whether one spouse will then convey all business interests to the other spouse in exchange for other property and/or cash consideration.

Despite their usefulness in addressing business succession planning, marital agreements may be off-putting for younger business owners entering their first marriages. Therefore, estate planners should carefully guide younger clients regarding the benefits of addressing family business succession planning "upfront."

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May 21, 2024

Laurie Sebestyen

Laurie Sebestyen
Professional Education Coordinator

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- **Certified Retirement Plan Professional (CRPP™)** — **2.0 credit hours**
- **Certified Trust Operations Professional (CTOP™)** — **2.0 credit hours**
- **Certified Fiduciary and Investment Risk Specialist (CFIRS™)** — **2.0 credit hours**
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Any questions regarding CE credit, please contact Laurie Sebestyen at (706) 389-7645.
Fax (706) 353-3994, Email lsebestyen@CannonFinancial.com
355 Oneta St. Building D 500, Athens, GA 30601

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May 21, 2024

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Sebestyen

Laurie Sebestyen
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

The following states have been approved for 1.5 hours of General Credit: (Course number is indicated in parenthesis):Alabama, Arkansas (FAM94088), California, Delaware, Georgia, Idaho, Illinois, Iowa (402046), Kentucky (259790), Louisiana, Maine, Minnesota (494092), Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee (Distance Ed), Texas (174208590), Utah, Vermont, Virginia, Washington, Wisconsin, & Wyoming

These states have been approved for the following General Credit: Colorado – 2 hours, Florida - 2 hours (2309920N) including 2.0 for the following: Marital & Family Law, Missouri –1.8 hours (731345), Oklahoma – 2 hours, West Virginia – 1.8 hours

The following states either do not require/do not accept outside CLE Credit/or do not accept teleconference calls for CLE Credit: District of Columbia, Maryland, Massachusetts, Michigan & South Dakota

The following states have special circumstances:

Alaska-Attorneys can use this certificate to submit to Alaska State Bar for 1.5 credits

Arizona-On honor system 1.5 credits

Connecticut-Attorneys can use this certificate to submit to Connecticut MCLE 1.5 credits

Hawaii- Attorneys can use this certificate for Hawaii CLE for 1.5 General credits (Reciprocity Rule)

Indiana-Site Coordinators must apply for credit as the sponsor for participants to receive credit

New Hampshire- *NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. NH attendees must self-determine whether a program is eligible for credit and self-report their attendance.*

New Jersey-Attorneys can use this certificate for New Jersey CLE for 1.5 General credits (Reciprocity Rule)

New York–Attorneys may use this certificate to report their attendance as it is accredited by Approved NY Jurisdictions: AL, AR, DE, GA, KY, LA, MS, NM, NC, ND, OK. Type of credit: Areas of Professional Practice 1.5 Credits

****As required by the following State Bars, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits **ONLY** in the following states: Alabama, California, Delaware, Georgia, Idaho, Illinois, Louisiana, Maine, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, and West Virginia. ****

Any questions regarding CE credit, please contact Laurie Sebestyen at (706) 353-3346.
Fax (706) 353-3994, Email lsebestyen@CannonFinancial.com
355 Oneta St. Bldg D 500, Athens, Georgia 30601

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

To be Completed by the Provider

Provider: Cannon Financial Institute (CA Provider #12179)

Subject Matter/Title: Marital Agreements From A to Z

Date and Time of Activity: May 21, 2024, 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT, 10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics:

Elimination of Bias in the Legal Profession:

Competence:

To Be Completed by the Attorney after Participation in the Above-Name Activity

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: ______________________

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

Legal Ethics:______________________

Elimination of Bias in the Legal Profession:______________________

Competence: ______________________

Attorney Signature:

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.

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Certificate of Attendance

____

(Participant Name)

____

(Colorado Attorney Registration #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Marital Agreements From A to Z

(834689)

May 21, 2024

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Sebestyen
Professional Education Coordinator

<u>Continuing Legal Education Credits for this course are as follows:</u>

Colorado – 2.0 General Credits

****As required by the State of Colorado, attorneys must submit their own credits.

Any questions regarding CE credit, please contact Laurie Sebestyen at (706) 389-7645
Email lsebestyen@CannonFinancial.com
355 Oneta St. Building D 500, Athens, Georgia 30601

Virginia MCLE Board

Certification of Attendance (Form 2)

Certify your attendance online at www.vsb.org

MCLE requirement pursuant to Paragraph 17, Section IV, Part Six, Rules of Virginia Supreme Court and MCLE Board Regulations

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

A $100 fee will be assessed for failure to comply with either deadline.

Member Name: ______________________________ **VSB ID#:** ______________________

Address: ______________________________ **Phone:** ______________________

____

______________________________ **Email:** ______________________

City **State** **Zip**

Course ID:	NLL1111		
Sponsor:	Cannon Financial Institute		
Title:	Marital Agreements from A to Z		
Credits:	1.5 **CLE**	0.0 **(Ethics)**	0.0 **Well-being**

Date Completed: ______________________________ **Location:** ______________________

By my signature below I certify:

___ I attended a total of _____ (hrs/mins) of approved CLE of which (_____) (hrs/mins) were approved Ethics and _____ (hrs/mins) were approved Well-being.

Credit is awarded for actual time in attendance (0.5 hr. min) rounded to the nearest half hour. (1hr 15 min = 1.5hr)

___ The sessions I am claiming had written instructional materials to cover the subject.

___ I participated in this program in a setting physically suitable to the course.

___ I was given the opportunity to participate in discussions with other attendees and/or the presenter.

___ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.

___ I understand that a materially false statement shall be subject to appropriate disciplinary action.

NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

______________________ ______________________________________

Date **Signature**

This form may be mailed to:
Virginia MCLE Board
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
(804) 775-0577 / MCLE@vsb.org

Course Type: Live

Delivery Method: Webcast