

FAMILY LAW CONTRACTS- PROBATE IMPLICATIONS

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RELATIONSHIP DISSOLUTION PLANNING
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I. Prenuptial and Postnuptial Agreements.

A. Types of Nuptial Agreements.

1. Prenuptial Agreements. Prenuptial agreements (also known as premarital agreements or antenuptial agreements) are agreements entered into by the parties contemplating marriage prior to marriage that set forth the rights and obligations of each party in the event of death or divorce, and during the marriage.
2. Postnuptial Agreements. Postnuptial agreements (also known as postmarital agreements) are agreements entered into by the parties after marriage that set forth the rights and obligations of each party in the event of death or divorce, and during the marriage.

Postnuptial agreements can be used when no divorce is contemplated or when divorce is not imminent. When divorce is imminent, postnuptial agreements are referred to as separation agreements.

B. Purposes of Nuptial Agreements.

1. Protection of Assets In the Event of Divorce. When property is divided in a divorce, Florida follows the theory of equitable distribution. In other words, the court will make an “equitable” distribution of the property and assets of the marriage based on the circumstances of the parties. Florida Statutes Section 61.075 provides for the equitable distribution of marital assets and liabilities.

Until the landmark Florida case, *Posner v. Posner*,¹ most courts refused to enforce the provisions of a nuptial agreement relating to divorce or separation, reasoning that nuptial agreements covering divorce encouraged divorce and violated legal principles requiring marriage until death. In *Posner*, the Court began to eradicate the idea that nuptial agreements which focused on the possibility of divorce were void per se.

2. Protection of Assets Upon Death. A common use of nuptial agreements has been planning in the event of death. Certain provisions should be included in a nuptial agreement to ensure that each party's assets are protected in the event of such party's death.
3. Obligations During Marriage. Nuptial agreements are also used to delineate the obligations of each party during the marriage. For instance, the nuptial agreement may address which party is responsible for certain expenses during the course of the marriage. The nuptial agreement may also dictate whether the parties must file joint federal income tax returns, or must do so only at the request of one party.

C. Requirements of Nuptial Agreements. With respect to the requirements that must be satisfied to have a valid nuptial agreement, Florida adopted the UPAA on June 19, 2007 (the "Florida UPAA").² The Florida UPAA applies to pre-nuptial agreements executed on or after October 1, 2007. In addition, Florida statutes and case law provide that nuptial agreements that meet certain requirements will be enforced by a court.³ Where appropriate, the requirements below refer to those for prenuptial agreements pursuant to the UPAA and the Florida UPAA and prenuptial and postnuptial agreements pursuant to Florida Statutes and case law. Absent such a reference, the requirements are those under Florida Statutes and case law.

¹ 233 So. 2d 381 (Fla. 1970). Although *Posner* is a Florida case, its reasoning has been widely adopted by other states. See, e.g., *Valid v. Valid*, 286 N.E.2d 42, 46-47 (Ill. App. 1972); *Buettner v. Buettner*, 505 P.2d 600, 603 (Nev. 1973); *Scherer v. Scherer*, 292 S.E. 2d 662, 664 (Ga. 1982); *Marschall v. Marschall*, 477 A.2d 833, 836 (N.J. Super. 1984).

² FLA. STAT. § 61.079.

³ FLA. STAT § 61.052(5) provides that the court may enforce an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. See also, *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987), in which the court made no distinction between prenuptial agreements and postnuptial agreements executed prior to the filing of a divorce action for purposes of determining the validity of such agreements.

1. Complete Financial Disclosure.

Requirements for Prenuptial Agreements pursuant to UPAA:

Under Section 6(a) of the UPAA, a prenuptial agreement is not enforceable in an action or proceeding if the party against whom enforcement is sought proves that the agreement was unconscionable when it was executed and, before execution of the agreement, that party (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, (ii) did not voluntarily and expressly waive, in writing, any right to financial disclosure of the other party beyond the disclosure provided, or (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.⁴

Requirements for Prenuptial Agreements pursuant to Florida UPAA:

The requirements under Section (7)(a)3 of the Florida UPAA relating to financial disclosure of a party to a prenuptial agreement are identical to those under the UPAA.⁵

Requirements for Prenuptial and Postnuptial Agreements Pursuant to Florida Statutes and Case Law:

Individuals who contemplate marriage are in a confidential relationship with each other under the laws of Florida. Florida case law provides that this confidential relationship gives rise to a duty to make a full and fair disclosure of the nature, extent and value of the assets that each party holds so the other party may make an informed decision as to what will be relinquished as a result of entering into the nuptial agreement.⁶ Notwithstanding the foregoing, Florida Statutes Section 732.702(2) provides that while disclosure is required in connection with an agreement

⁴ The Uniform Premarital Agreement Act, *supra* note 2, § 6(a)(2).

⁵ FLA. STAT § 61.079(7)(a)3.

⁶ *See, e.g., Doig v. Doig*, 787 So. 2d 100 (Fla. 2d DCA 2001); *O'Connor v. O'Connor*, 435 So. 2d 344 (Fla. 1st DCA 1983). Note that some other states do not recognize a confidential relationship between individuals contemplating marriage. In such jurisdictions, each spouse has “a duty to make some inquiry to ascertain the full nature and extent of the financial resources of the other.” *Mallen v. Mallen*, 662 S.E.2d 812, 816 (Ga. 2005) (reasoning that the lack of a confidential relationship gives rise to both a duty to disclose and a duty to “exercise ordinary diligence in making independent verification of contractual terms and representations”); see also *Beesley v. Harris*, 883 P.3d 1343 (Utah 1994) (holding that disclosure is an affirmative duty, the failure to do so is nondisclosure, and the burden is not on the other party to inquire); *DeLorean v. DeLorean*, 511 A.2d 1257, 1262 (N.J. Super. 1986) (finding that the burden is “not on either party to inquire, but on each to inform” as to the nature and extent of his or her finances).

waiving rights in the event of death that is executed after marriage, no disclosure shall be required for such an agreement, contract or waiver executed before marriage. It is strongly recommended, however, that each party provide the other with full and fair disclosure in order to avoid a Florida court concluding that the nuptial agreement is invalid.

- a. Assets, Liabilities and Income. Each party must disclose his or her net worth (all assets and liabilities, and the values and amounts thereof), as well as income.⁷ While the income tax returns of each party should certainly be reviewed, the preparer of the nuptial agreement must be cognizant that such returns do not include all types of nontaxable income.
- b. Details Regarding Value. Disclosure must be complete, but it need not be exact.⁸ The nuptial agreement should indicate what the value reflects (fair market value, book value, cash value, etc.). Information regarding such values, such as the party's federal income tax returns for the three years prior to the date of the nuptial agreement, appraisals and brokerage statements, should be provided to the other party and his or her attorney for review.
- c. Circumstances when Financial Disclosure is Unnecessary. Complete financial disclosure is unnecessary if the nuptial agreement makes a fair and reasonable provision for the other party or if the other party has a general knowledge of the character and extent of the other's assets, liabilities and income.⁹ However, complete financial disclosure is recommended in order to avoid a court's later interpretation that the nuptial agreement does not make a fair and reasonable provision for the other party, or that the other party did not have knowledge as to the assets, liabilities and income of the first party.

2. Consideration.

Requirements for Prenuptial Agreements pursuant to UPAA:

⁷ *O'Connor*, 435 So. 2d 344; *see also DeLorean*, 511 A.2d at 1262.

⁸ *See, e.g., Waton v. Waton*, 887 So. 2d 419 (Fla. 4th DCA 2004).

⁹ *See Casto*, 508 So. 2d at 333.

Pursuant to Section 2 of the UPAA, a prenuptial agreement is enforceable without consideration.¹⁰ The agreement must reflect a degree of mutuality of benefits to support its enforceability, and a ceremonial marriage is a prerequisite to the effectiveness of the prenuptial agreement. Pursuant to Section 5 of the UPAA, an amended, revoked or abandoned premarital agreement is enforceable without consideration.¹¹

Requirements for Prenuptial Agreements pursuant to Florida UPAA:

Pursuant to Section (3) of the Florida UPAA, a prenuptial agreement is enforceable without consideration other than the marriage itself.¹² Note that this is different from the UPAA, since the UPAA provides that there need not be any consideration for a prenuptial agreement to be valid. However, pursuant to Section (6) of the Florida UPAA, an amended, revoked or abandoned premarital agreement is enforceable without consideration.¹³

Requirements for Prenuptial and Postnuptial Agreements Pursuant to Florida Statutes and Case Law:

The nuptial agreement must recite the consideration for it. In the case of a prenuptial agreement, the consideration is the marriage.¹⁴ In the case of a postnuptial agreement, mutual promises encompassing various rights of the parties, in addition to disposing of property owned by them, have been considered sufficient consideration.¹⁵

3. Formalities of Execution.

Requirements for Prenuptial Agreements Pursuant to UPAA:

Pursuant to Section 2 of the UPAA, a prenuptial agreement must be in writing and signed by both parties.¹⁶

¹⁰ The Uniform Premarital Agreement Act, *supra* note 2, § 2.

¹¹ The Uniform Premarital Agreement Act, *supra* note 2, § 5.

¹² FLA. STAT § 61.079(3).

¹³ FLA. STAT § 61.079(6).

¹⁴ *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. 2d DCA 1996).

¹⁵ *See, e.g., Abbott v. Kiser*, 654 So. 2d 640 (Fla. 4th DCA 1995).

¹⁶ The Uniform Premarital Agreement Act, *supra* note 2, § 2.

Requirements for Prenuptial Agreements Pursuant to Florida UPAA:

Pursuant to Section (3) of the Florida UPAA, a prenuptial agreement must be in writing and signed by both parties.¹⁷ This provision does not affect the requirement under Florida law that a nuptial agreement that contains testamentary provisions must be executed in conformity with the requirements for a Last Will and Testament (i.e., it must be signed in the presence of two witnesses who must also sign in the presence of each other).¹⁸

Requirements for Prenuptial and Postnuptial Agreements Pursuant to Florida Statutes and Case Law:

There are no specific formalities of execution required with regard to a nuptial agreement under Florida law. However, if the nuptial agreement contains testamentary provisions, it should be executed in conformity with the requirements for a Last Will and Testament.

4. Waiver of Alimony and Spousal Support.

Requirements for Prenuptial Agreements Pursuant to UPAA:

Pursuant to Section 3(a)(4) of the UPAA, the parties to a prenuptial agreement may contract with respect to the modification or elimination of spousal support.¹⁹

Requirements for Prenuptial Agreements Pursuant to Florida UPAA:

Pursuant to Section (4)(a)4 of the Florida UPAA, the parties to a prenuptial agreement may contract with respect to the establishment, modification, waiver or elimination of spousal support.²⁰ The Florida UPAA does not alter the fact that temporary alimony (during the divorce proceeding) cannot be waived under Florida law.

Requirements for Prenuptial and Postnuptial Agreements Pursuant to Florida Statutes and Case Law:

¹⁷ FLA. STAT § 61.079(3).

¹⁸ FLA. STAT. §§ 732.701 and 732.502.

¹⁹ The Uniform Premarital Agreement Act, *supra* note 2, § 3(a)(4).

²⁰ FLA. STAT. § 61.079(4)(a)4.

If intended, the nuptial agreement must expressly waive the party's right to alimony.²¹ The waiver provision should include all types of alimony, such as rehabilitative, permanent periodic, bridge-the-gap and lump sum alimony. Note that in Florida, temporary alimony (during the divorce proceeding) cannot be waived.²²

5. No Waiver of Child Support, Custody and Visitation. It is well-settled under each of these sources of law (the UPAA, the Florida UPAA, and Florida Statutes and case law) that rights regarding child support, custody and visitation *cannot* be waived in a nuptial agreement and, therefore, should not be included in such agreement.²³
6. Waiver of Equitable Distribution of Property and Interest in Marital Earnings and Appreciation of Separate Property. Pursuant to Florida case law, the court must uphold the intent of the parties as expressed in the agreement regarding the waiver of equitable distribution of property.²⁴

If the parties intend to keep all income and earnings, including such income earned during the marriage, as separate property, such intention must be clearly stated in the nuptial agreement. Otherwise, income and earnings, and the assets acquired with such income and earnings, will be marital property subject to equitable distribution.²⁵

In addition, if the parties desire to ensure that separate property, including all appreciation thereon, remains separate property, the nuptial agreement must clearly state such desire. Furthermore, the nuptial agreement should specifically refer to active appreciation on such separate property; otherwise, only

²¹ *White v. White*, 617 So. 2d 732 (Fla. 2d DCA 1993).

²² *Belcher v. Belcher*, 271 So. 2d 7 (Fla. 1972).

²³ *See, e.g., Ervin v. Chason*, 750 So. 2d 148 (Fla. 1st DCA 2000); *Feliciano v. Feliciano*, 674 So. 2d 937 (Fla. 4th DCA 1996); FLA. STAT. § 61.079(4)(b); the Uniform Premarital Agreement Act, *supra* note 2, § 3(b). Although such *waivers* are void as against public policy, the Florida Supreme Court upheld the validity of a *no-challenge provision* by which the former wife was ordered to forfeit a substantial settlement as a result of requesting a modification to the parties' child custody agreement. *Morris v. Morris*, 932 So. 2d 1007 (Fla. 2006).

²⁴ *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962), *superseded on other grounds by statute*, FLA. STAT. § 732.702(2) (1983).

²⁵ *Irwin v. Irwin*, 857 So. 2d 247 (Fla. 2d DCA 2003).

passive appreciation on such property would remain separate property.²⁶

7. Waiver of Interest in Homestead Property. Pursuant to Florida case law, a provision waiving a party's constitutional right to homestead property may only be waived knowingly and intelligently.²⁷ Accordingly, if each party intends to waive his or her homestead rights in the other party's homestead property, the nuptial agreement should provide the following: (1) the definition of homestead property; (2) the homestead rights that each spouse would enjoy in the absence of the nuptial agreement; and (3) that each party knowingly and intelligently waives such homestead rights. Such a waiver may read as follows:

If a party is a permanent resident of Florida and owns and resides in a residence in Florida, such residence shall be considered homestead property under Article X, Section 4 of the Florida Constitution, and Florida Statutes Sections 732.401 and 732.4015. During the owner's lifetime, if the owner desires to transfer the homestead, the joinder of his or her spouse would be required. In addition, upon the owner's death, his or her surviving spouse would be entitled to a life estate in the homestead. The parties hereby acknowledge that they understand the rights set forth herein regarding homestead property, and they hereby waive such rights, and agree to execute the necessary documentation, if any, to effectuate such waiver.

Because Florida law provides that a valid homestead waiver must be made knowingly and intelligently, issues could arise for a non-Florida resident who executes a nuptial agreement, and subsequently becomes a Florida resident. Such individual may incorrectly assume that his or her spouse has validly waived homestead rights in the nuptial agreement. However, it is likely that a court would find that a spouse could not validly waive his or her homestead rights, as such waiver could not be made knowingly and intelligently if the homestead did not even exist when the nuptial agreement was executed. Accordingly, it is recommended that if an individual becomes a Florida resident after he or she has entered into a nuptial agreement, and if the

²⁶ *Doig v. Doig*, 787 So. 2d 100 (Fla. 2d DCA 2001).

²⁷ *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007); *Hartwell v. Blasingame*, 564 So. 2d 543 (Fla. 2d DCA 1990), *approved* 584 So. 2d 6 (Fla. 1991); *Rutherford v. Gascon*, 679 So. 2d 329 (Fla. 2d DCA 1996).

individual desires his or her spouse to waive homestead rights, an amended nuptial agreement (or postnuptial agreement) should be entered into by the parties, in which the spouse specifically waives his or her homestead rights.

8. Waiver of Interests in Retirement Plans. For many clients, the most significant asset is the client's retirement plans. Accordingly, the preparer of the nuptial agreement must ensure that any waiver of retirement benefits complies not only with Florida law, but with federal law as well. The following are the federal laws of which the preparer should be aware in connection with the waiver of rights to retirement plans:
 - a. The Employee Retirement Income Security Act of 1974 ("ERISA") and The Retirement Equity Act of 1984 ("REA"). ERISA was enacted to provide protection to employee retirement benefits. ERISA overrides state law. REA amended ERISA to provide protection to spouses and descendants of employees. Under REA, a surviving spouse must receive certain benefits from a qualified plan of a spouse who was a plan participant even if the participant dies prior to retirement age. It is important to note that Individual Retirement Account ("IRA") benefits are *not* subject to REA.
 - b. Internal Revenue Code of 1986, as amended (the "Code"). Section 401(a)(11)(A) of the Code requires that the surviving spouse receive a qualified pre-retirement survivor annuity benefit if the participant spouse died before the annuity starting date or a qualified joint and survivor annuity benefit if the participant died after the annuity starting date.

Section 417(a)(2) of the Code provides that a spouse may waive a right to a qualified plan benefit if the waiver meets the following requirements:

- i. The waiver is in writing;
- ii. The election must designate a beneficiary that may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse);

- iii. The spouse's consent must acknowledge the election's effect; and
- iv. The spouse's signature must be witnessed by a plan representative or a notary public.

In nuptial agreement planning, most clients desire to waive their rights to the other party's retirement benefits. However, the Treasury Regulations to the Code provide that an agreement entered into prior to marriage does not satisfy the applicable consent requirements of Sections 401(a)(11) and 417 of the Code.²⁸

Accordingly, the nuptial agreement should require the nonparticipant party to sign the applicable waivers after the parties are married. In addition, the participant spouse must be sure to actually obtain the applicable waivers from his or her spouse after marriage.

The nuptial agreement should also provide that the nonparticipant spouse releases all claims to the retirement plan benefits. To the extent that the participant spouse fails to obtain the required waivers from the nonparticipant spouse, and the nonparticipant spouse fails to release his or her claims to the retirement plan benefits, the heirs of the participant spouse may have a cause of action against the nonparticipant spouse.

With regard to a plan not required to provide the qualified joint and survivor annuity to a married participant, a participant can withdraw his or her interest in the plan and roll it over to an IRA. By doing so, the participant could defeat the requirement that the nonparticipant spouse waive his or her right to the death benefits of the retirement plan.

Notwithstanding the foregoing, although federal law does not require that a nonparticipant spouse waive his or her rights in an IRA, some financial institutions impose such requirement.

- 9. Waiver of Rights Upon Death. Pursuant to Florida Statutes and case law, if intended, the nuptial agreement should provide that

²⁸ Treas. Reg. § 1.401(a)-(20) Q and A-28.

each party waives the following rights upon the death of the other party:

- a. Rights to elect against the Will or any other testamentary instrument of the other party (i.e., elective share rights);
- b. Rights as intestate successor;
- c. Rights as a pretermitted spouse;
- d. Exempt property rights;
- e. Family allowance rights;
- f. Homestead rights (discussed above);
- g. Right to qualify and serve as personal representative of the other party's estate or trustee of any trust created by the other party.

It is important that the parties specifically waive the foregoing rights in the nuptial agreement, as illustrated in the recent case of *Weisfeld-Ladd v. Ladd*.²⁹ In *Weisfeld-Ladd*, the parties entered into a prenuptial agreement prior to getting married. The prenuptial agreement provided, in relevant part, the following:

All of the property, both personal and real, including but not limited to bank accounts, stock, certificates of deposit, retirement accounts and all other items of personal property, tangible or intangible, which are in his name alone shall remain the sole and separate property of [Husband] through the marriage, under his sole management and control, and he may encumber, sell or dispose of any of said assets without the consent of the other party. [Husband] will also be receiving various assets from . . . his elderly mother, upon her death, and those assets will remain his separate property. [Wife] shall not claim or acquire any interest in any such property during the marriage or in the event of dissolution of the marriage. It is [Husband's] intent that, in the event of his death, all of this separate property be given to his children . . . or as otherwise provided for in his Last Will and Testament.

²⁹ 920 So. 2d 1148 (Fla. 3d DCA 2006).

Upon Husband's death, Wife filed her Election to Take Elective Share. Husband's children filed an objection, stating that Wife had waived her rights to Husband's separate property, and that pursuant to Florida Statutes Section 732.702, the prenuptial agreement operates as a waiver of Wife's right to take elective share.

Section 732.702(1) of the Florida Statutes provides that an individual may waive in writing his or her right to an elective share. Additionally, Section 732.702(1) of the Florida Statutes provides "[u]nless the waiver provides to the contrary, a waiver of 'all rights' or equivalent language, in the property or estate of a . . . prospective spouse . . . is a waiver of all rights to the elective share. . . ."

Wife argued that the prenuptial agreement did not specifically state that she waived her right to an elective share. Husband's children argued that the prenuptial agreement contained "equivalent language" sufficient for Wife to waive her elective share rights.

The Third District Court of Appeals determined that the prenuptial agreement in this case was ambiguous as to whether Wife waived her elective share rights, and, thus, that the trial court properly admitted parol evidence regarding the parties' intent. While the court ultimately determined that Wife waived her elective share rights after reviewing Wife's testimony regarding the intent of the parties, the case illustrates that it is critical that the parties *specifically* waive their elective share rights in the nuptial agreement, if intended.³⁰

10. Timing of Execution. In the case of a prenuptial agreement, all meetings with the attorneys, the negotiations and the execution of the prenuptial agreement should occur well in advance of the wedding in order to make it more difficult for a challenging spouse to assert duress or undue influence.³¹
11. Separate Counsel. While not required under Florida law,³² it is recommended that each party obtain separate representation with regard to the nuptial agreement. Separate representation

³⁰ See also *Estate of Barrows*, 945 A.2d 1217 (Me. 2008).

³¹ See, e.g., *Hjortaas v. McCabe*, 656 So. 2d 168 (Fla. 2d DCA 1995), in which the Court set aside a prenuptial agreement executed two days prior to the wedding; *contra In re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000).

³² *Casto, infra*.

can help refute a claim that the nuptial agreement was entered into under duress or as a result of undue influence.

D. Tax Related Issues.

1. Income Tax Issues.

- a. Income Tax Effect of Payments of Alimony. Cash payments of alimony are generally taxable to the recipient spouse and deductible by the payor spouse. Specifically, Section 71(b) of the Code provides that a stream of cash payments to or on behalf of a spouse or former spouse pursuant to a divorce or separation instrument, whether for support or as part of a property payout, is taxable to the payee and deductible to the payor if the liability for payment ceases upon death of the payee, is not fixed as child support, and so long as the divorce or separation instrument does not designate such payment as a payment which is not includible in the gross income under Section 71 of the Code and not allowable as a deduction under Section 215 of the Code.

Both parties must be aware of the recapture rules applicable to excess spousal support payments, and care must be taken to avoid the imposition of such rules in the nuptial agreement. Section 71(f) of the Code provides that if during the first three post-separation years there is impermissible front loading of a cash payment determined under the Code to be alimony, phantom taxable income could be attributable to the payor, and a deduction could be created for the payee, in the third post-separation year. This rule is intended to prevent spouses from characterizing non-deductible property settlement payments as deductible alimony payments.

- b. Federal Income Tax Returns. The nuptial agreement may mandate that the parties file joint or separate federal income tax returns. Alternatively, the nuptial agreement may mandate that the parties file joint or separate income tax returns if either party makes such a request of the other party. The latter option is generally preferred, as it provides for maximum flexibility each year. The parties should be aware that the filing of a joint tax return imposes joint and several liability on both spouses.³³

³³ I.R.C. § 6013(d)(3).

2. Gift Tax Issues.

- a. Transfers Incident to a Divorce. Transfers incident to a divorce may be considered gifts for purposes of the federal gift tax. Section 2512(b) of the Code provides that any transfer for less than “full and adequate consideration in money or money’s worth” is a gift. The following are exceptions to the treatment of a transfer incident to a divorce as a gift:
- i. Section 2516 Payments. Section 2516 of the Code provides that the transferor spouse will be deemed to have received full and adequate consideration if the payment is made from one spouse to the other pursuant to a written agreement and the agreement is effective within two years before or one year after the date of divorce. The agreement must be signed within the prescribed period of time, but the transfer may occur at any time.
 - ii. “Harris Rule” Payments. Under the Harris rule, payments made pursuant to an agreement incorporated into a court decree or under a court order for divorce or support do not have to be made for full and adequate consideration.³⁴
 - iii. Payments Made in Satisfaction of Legal Obligation to Support. Payments made in satisfaction of a legal obligation to support a spouse and minor children are not gifts because the release of such legal obligation is deemed to be adequate consideration.³⁵
 - iv. Annual Exclusion Payments and Qualified Transfers. Annual exclusion payments made pursuant to Section 2503(b) of the Code and qualified transfers made for certain educational and medical expenses under Section 2503(e) of the Code are not treated as gifts.

³⁴ *Harris v. Comm’r*, 340 U.S. 106 (1950).

³⁵ Rev. Rul. 68-379, 1968-2 C.B. 414.

- v. Waivers of Pension Rights. Waivers of pension rights under Section 2503(f) of the Code are not treated as gifts.

- b. Gift Splitting. If the practitioner represents the wealthier spouse, he or she may suggest that the wealthier spouse include language in the nuptial agreement that provides that the other spouse must consent to split gifts under Section 2513 of the Code if the wealthier spouse makes such a request of the other spouse. By requiring such a consent, the wealthier spouse could double the amount of annual exclusion gifts he or she makes during the year. The gift tax annual exclusion amount is the amount an individual can gift per year per donee without using a portion of his or her federal gift tax exemption or incurring gift tax.³⁶ Such amount is currently \$13,000 annually per donee, or \$26,000 annually per married couple per donee. Including such a provision in the nuptial agreement would also enable the wealthier spouse to gift up to \$2 million during the marriage, which is two times the lifetime gift tax exemption amount (currently \$1 million per person).³⁷

- c. Discuss Portability

Attached as Exhibit A is a checklist regarding the drafting of nuptial agreements.

EXHIBIT A

CHECKLIST FOR DRAFTING NUPTIAL AGREEMENTS

1. Obtain full financial information from client, including information regarding assets, liabilities and income, and disclose such information to the other party. Such disclosure includes, but is not limited to the following:
 - a. Previous three years' income tax returns.
 - b. All financial statements from previous three years.
 - c. List of all assets and fair market value of such assets (including support for such values, such as appraisals, if any).

³⁶ I.R.C. § 2503(b).

³⁷ I.R.C. § 2505.

- d. Value of and beneficiary designation information regarding retirement accounts, annuities, life insurance and similar plans.
 - e. Information regarding trusts of which client is a beneficiary.
 - f. Information regarding entities in which client has an interest.
 - g. List of all debts and other liabilities, including contingent liabilities.
2. Provisions to consider for inclusion in the nuptial agreement:
- a. Recital of consideration for the agreement.
 - b. Waiver of marital rights to separate and marital property.
 - c. Waiver of marital rights to active and passive appreciation on separate and marital property.
 - d. Waiver of alimony.
 - e. Waiver of homestead rights.
 - f. Waiver of interest in retirement plans (note that a waiver must be executed after marriage by spouse with regard to qualified plan benefits).
 - g. Waiver of interest in life insurance, annuities and similar plans.
DISCUSS NEW FLORIDA STATUTE
 - h. Waiver of statutory rights upon death.
 - i. Obligation to file joint income tax returns.
 - j. Obligation to consent to gift split.
3. The following are recommendations to prepare the nuptial agreement to avoid attack regarding its validity by the other party:
- a. Avoid overreaching by ensuring that the client does not exert emotional pressure on the other party.
 - b. Avoid coercion and duress by ensuring that the client does not intimidate the other party to execute the nuptial agreement. Note that the other party should obtain separate representation to avoid the charges of coercion and duress. In addition, in the case of a prenuptial agreement, it should not be executed within close proximity to the wedding date.

- c. Avoid fraud and misrepresentation by ensuring that the client fully and fairly discloses all of his or her assets to the other party, as discussed above.
- d. If the nuptial agreement addresses testamentary obligations, it should be executed in the presence of two witnesses who must sign the agreement in the presence of each other.

**SAMPLE FORM LANUGAGE RE: HOMESTEAD WAIVER FOR THIS
PRESENTATION
THE AUTHOR MAKES NO REPRESENTATIONS REGARDING THIS FORM.
EDIT AS NECESSARY FOR YOUR OWN SITUATION,**

Prepared by and return to:

**POST-MARITAL AGREEMENT
(Releasing Homestead Rights)**

THIS AGREEMENT is by and between _____ (“Husband”) and _____ (“Wife”), both of Clearwater Beach, Pinellas County, Florida.

WHEREAS, Husband and Wife each wish to relinquish the spousal homestead right of a deceased spouse as provided under Article X, Section 4 of the Florida Constitution, and instead Husband and Wife each wish to dispose of his or her respective homestead interests as provided under the provisions of his or her Will, Revocable Living Trust or other dispositive estate planning document, each party hereto, for and in consideration of the other party entering into this agreement, and other good and valuable consideration, herein confessed and acknowledged received by each other, hereby agrees as follows:

Financial Disclosure

Husband hereby acknowledges that he has made complete financial disclosure of his assets to Wife, and Wife hereby acknowledges receipt of such disclosure, and acknowledges she has had an opportunity to inquire and investigate as to such financial disclosure and is fully satisfied that a full and complete disclosure has been made by Husband.

Wife hereby acknowledges that she has made complete financial disclosure of her assets to Husband, and Husband hereby acknowledges receipt of such disclosure, and acknowledges he has had an opportunity to inquire and investigate as to such financial disclosure and is fully satisfied that a full and complete disclosure has been made by Wife.

Homestead

The street address of said property is _____(the "Homestead.") As used herein, the Homestead shall also include real property and improvements which subsequently qualifies as the homestead of the Husband and Wife as defined under Article X, Section 4 of the Florida Constitution.

Estate Planning Purposes

The Husband and Wife recently conveyed the homestead property to the Wife's revocable living trust for estate tax planning purposes.

Waiver of Marital Rights

Pursuant to Section 732.702 of the Florida Statutes, each party hereby waives, renounces and relinquishes any and all rights, claims or demand in the Homestead, which, except for this Agreement, the marriage of Husband and Wife would confer upon the survivor of them.

Husband and Wife each acknowledge that the release of the Homestead rights described herein does not result in the release of the Homestead rights that exist during the marriage, but only upon the death of a spouse. As a result of this release, Husband acknowledges that Wife, and Wife acknowledges that Husband, may transfer his or her respective interest in the Homestead at death to such persons or entities as the deceased spouse so elects. While it is anticipated that each spouse will utilize his or her interest in the Homestead to accomplish certain mutual estate planning objectives of both parties, this intention is not binding on either party hereto.

Husband and Wife each acknowledge that by reason of the relinquishment of the spousal homestead rights, his or her spouse can disinherit such party with respect to the Homestead and of being informed of this possibility.

Waiver of Independent Counsel

Husband and Wife each acknowledge that they have been advised that they should seek independent counsel prior to entering into this Agreement. _____ Esquire hereby informs both parties that it is representing neither of them individually, but only the two of them as joint clients, with respect to this planning and to the waiver of homestead rights and both consent to this mutual representation. After having been advised to seek separate legal counsel, each hereby either waive such right, or has, in fact, discussed this situation with separate counsel, and after having done so, makes a knowing and voluntary waiver and release of such homestead rights.

Provisions Binding on Heirs and Assigns

This Agreement shall inure to the benefit of, and shall be binding upon, the heirs, beneficiaries, personal representatives, trustees, and assigns of the Parties.

Acknowledgement of Rights of Minor Children

Article X, Section 4, of the Florida Constitution also protects the interests of surviving minor children. If a property owner is surviving by a spouse and minor children, then an interest in the Homestead shall pass to, by law, to the surviving spouse for life, with a remainder interest to the deceased spouse's lineal descendants. Additional planning may be required if either spouse has a minor child.

Power of Attorney

Pursuant to Florida Statutes Section 709.08, Durable Powers of Attorney, the Husband and Wife each appoint the other to act as attorney-in-fact to execute any and all documents necessary to accomplish this waiver in the Homestead in the future (including, but not limited to, the authority to convey, sell, mortgage, encumber, lease, or otherwise manage and dispose of an interest in the Homestead), should any signature be required. If either spouse dies, resigns, or become incapacitated, or is unable to continue serving for any reason, the Husband and Wife appoint _____ to serve as successor attorney-in-fact. If the said nominated successor attorney-in-fact, dies, resigns, becomes incapacitated, or is unable to continue serving for any reason, the Husband and Wife, appoint _____ to serve as successor attorney-in-fact. An attorney-in-fact serving according to the terms of this agreement shall have the same powers as the first-nominated attorney-in-fact. This power of attorney shall not be affected by my subsequent disability.

Entire Understanding

This Agreement contains the entire understanding of Husband and Wife and may only be amended or terminated in a dated writing signed by Husband and Wife. Any such amendment shall specifically refer to this Agreement. There are no representations, covenants, warranties or promises other than those expressly set forth herein, and all prior understandings between Husband and Wife, whether oral or written, are hereby merged in this Agreement.

Executed this _____ day of _____, 20--.

Signed and delivered as to both in our presence:

Witness Signature

Husband Signature

Witness Signature

Wife Signature

**STATE OF FLORIDA
COUNTY OF PINELLAS**

I HEREBY CERTIFY, that on this day personally appeared before me, _____ and _____, both of whom are personally known to me or whom has produced a Florida driver's license, as identification, whom did not take an oath and whom has acknowledged before me that they executed the same knowingly, willingly, voluntarily and without undue influence for the purposes herein expressed.

WITNESS my hand and official seal this ____ day of _____, 2007.

Notary Public:
Signature: _____
Print Name _____
My Commission Expires:

**SAMPLE LANGUAGE FROM FORM FOR THIS SEMINAR. THE AUTHOR MAKES
NO REPRESENTATIONS REGARDING THIS FORM.
EDIT AS NECESSARY FOR YOUR OWN SITUATION,**

DEATH

8.1 Agreement. The Parties intend and desire to determine and set forth the respective rights of each Party in the estate of the other.

8.2 Waiver By Wife. Wife forever waives, relinquishes, and bars her rights of elective share and dower, and rights to alimony, support, maintenance, and all other statutory rights of any kind, character, or nature whatsoever, as wife or widow of Husband under the laws of the state of Florida or any other state, now in force or hereafter enacted, in and to all property, real or personal, owned by Husband (as set forth in Schedule A), or hereafter acquired by him. Wife relinquishes, quit claims, and grants to Husband, his heirs and assigns forever, all the above-mentioned interests in and to Husband's property so that she, her heirs, personal representative, administrators, and assigns will have no right, title, interest, or claim to any of these interests or property. Wife intends that the provisions of this paragraph 8.2 shall constitute a waiver of Aall rights@ as contemplated by Section 732.702(1), Florida Statutes, 2005, as currently enacted or hereafter amended, including, but not limited to, any and all right of the intestate share, homestead property, family allowance, exempt property, elective share, and pretermitted spouse; provided, however, Wife does not waive any rights to any Social Security benefit. Wife specifically agrees to sign a written waiver of any right to elective share of any charitable trust created by Husband, such waiver to be in compliance with Revenue Procedure 2005-24, 2005-16 I.R.B (4/18/05). Wife will have no claim, will assert no claim, and will bring no court proceeding with respect to the above described rights.

It is further agreed and understood between the Parties that the written waivers under the Revenue Procedure as referred to above shall be executed by Wife subsequent to the Parties= marriage, when Wife shall have achieved the status of Aspouse@.

If Wife has agreed to sign such waiver and thereafter Wife refuses to sign such waiver after the date of marriage, then Wife shall pay damages to Husband, or his estate or trust, in an amount equal to any benefits which are received by Wife as a result of the nonsigning of the waiver. If, however, Wife can prove that Husband intended Wife to be the beneficiary, then no damages will be due.

8.3 Waiver By Husband. Husband forever waives, relinquishes, and bars his rights of elective share and dower, and rights to alimony, support, maintenance, and all other statutory rights of any kind, character, or nature whatsoever, as husband or widower of Wife under the laws of the state of Florida or any other state, now in force or hereafter enacted, in and to all property, real or personal, owned by Wife (as set forth in Schedule B), or hereafter acquired by her. Husband relinquishes, quit claims, and grants to Wife, her heirs and assigns forever, all the above-mentioned interests in and to Wife=s property so that he, his heirs, personal representative, administrators, and assigns will have no right, title, interest, or claim to any of these interests or property. Husband intends that the provisions of this paragraph 8.2 shall constitute a waiver of Aall rights@ as contemplated by Section 732.702(1), Florida Statutes, 2002, as currently enacted or hereafter amended, including, but not limited to, any and all right of the intestate share, homestead property, family allowance, exempt property, elective share, and pretermitted spouse; provided, however, Husband does not waive any rights to any Social Security benefit. Husband specifically agrees to sign a written waiver of any right to elective share of any charitable trust created by Wife, such waiver to be in compliance with Revenue Procedure 2005-24, 2005-16 I.R.B (4/18/05). Husband will have no claim, will assert no claim, and will bring no court proceeding with respect to the above described rights.

It is further agreed and understood between the Parties that the written waiver under the Revenue Procedure as referred to above shall be executed by Husband subsequent to the Parties= marriage, when Husband shall have achieved the status of Aspouse@.

If Husband has agreed to sign such waiver and thereafter Husband refuses to sign such waiver after the date of marriage, then Husband shall pay damages to Wife, or her estate or trust, in an amount equal to any benefits which are received by Husband as a result of the nonsigning of the waiver. If, however, Husband can prove that Wife intended Husband to be the beneficiary, then no damages will be due.

8.4 Disposition of Estate. The respective testamentary estates of each Party will, as if their marriage never existed, descend to their respective devisees in accordance with their respective wills and trusts, whether prepared before or after their marriage, or to their heirs at law in accordance with the laws of descent and distribution, as applicable. Each Party grants to the other the absolute and unrestricted privilege and power to dispose of any and all property that the other Party owns upon his or her death. Each party understands and acknowledges that if the other Party predeceases them, then such Party=s statutory interests in the estate of the other Party would greatly exceed the provisions set forth in this Agreement for the surviving Party. However, each Party has been fully advised regarding the consequences of this Agreement by legal counsel of his or her own selection, and this Agreement accurately reflects their intent. Each Party will refrain from any action or proceeding that may tend to void or nullify, to any extent or in any particular, the terms of any will of the other Party.

8.5 Homestead. Each party releases and waives any claim, demand, right, or interest that such Party may acquire, as a result of the marriage, in any real property of the other pursuant to the homestead property provision of the Florida Constitution or any Florida Statute concerning the descent of property as homestead. In addition to the amounts that Husband or Wife is entitled to under 8.1 he or she shall be entitled to receive from Husband or Wife=s estate or personal representative sole and exclusive title to the marital residence that the parties are residing in at the time of Husband or Wife=s death (together with all of the furnishings and furniture), and nothing in this Prenuptial Agreement will be construed as a waiver by him or her of her or his homestead interest in such residence if Husband or Wife dies. If, for any reason, such interest is not transferred to Husband or Wife then Husband or Wife=s estate shall pay him or her an amount equal to the fair market value of the residence, furnishings and furniture as of the date of Husband or Wife=s death, with such fair market value

determination being made in the same manner as described in Section 3.4 of this Prenuptial Agreement.

OR

If either Husband or Wife is a permanent resident of Florida and owns and reside in a residence in Florida, such residence shall be considered homestead property under Article X, Section 4 of the Florida Constitution and Sections 732.401 and 732.4015 of the Florida Statutes. During the owner=s lifetime, if the owner desires to transfer the homestead, the joinder of his or her spouse would be required. In addition , upon the owner=s death, his or her surviving spouse would be entitled to a life estate in the homestead. Husband and Wife hereby acknowledge that they understand the rights set forth herein regarding homestead property, and they hereby waive such rights, and agree to execute the necessary documentation, if any, to effectuate such waiver.

OR

Husband and Wife had owned real property that they are still using as Homestead located at _____, more specifically described as_(legal description)_____. Husband recently conveyed his entire ownership interest in the Homestead to Wife=s sole name for estate tax planning purposes. Husband and Wife are entering in this Agreement for the primary purpose of facilitating a waiver by Husband of Husband=s right to receive any interest in the Homestead if Wife should die prior to the death of Husband. Moreover, Wife agrees to devise the Homestead at her death, should Wife predecease Husband to a testamentary trust for Husband=s lifetime use and control. Finally , if for any reason Wife should transfer any interest in the Homestead during Wife=s lifetime to Husband, then Wife waives any right Wife would otherwise have to receive any interest in the Homestead if Husband should die prior to the death of Wife. Neither Husband nor Wife, however, intend to waive or release any right that either of them

may have to an equitable distribution of th Homestead if Husband and Wife dissolve their marriage.

ARTICLE IX
FUTURE CONVEYANCES

9.1 **Future Documents.** In the future, to effectuate the terms of this Agreement, each Party shall execute and join as a party in any release, renunciation, quitclaim, discharge, or other instrument when requested to do so by the other Party, or that Party's representative, in order to divest that Party of any right, title or interest in any property of the other Party.

9.2 **Beneficiary Designations.** Each Party consents to the other Party=s selection to waive a qualified joint and survivor annuity form of benefit, and a qualified pre-retirement survivor annuity form of benefit, under any plan of deferred compensation to which Section 4101(a)(11)(B) of the Internal Revenue Code of 1986 (the ACode@) and/or Section 205(b)(1) of the Employee Retirement Income Security Act of 1974 (AERISA@) shall apply and in which each Party is currently, or hereafter, may be deemed a vested participant within the meaning of Section 417(f)(1) of the Code and Section 205(h)(1) of ERISA. Each Party further consents to each other=s current and future designation of beneficiaries, other than each other under any of such plans, (and to any revocation and/or modification of such designations), including any of such plans referred to in Section 401(a)(11)(B)(iii) of the Code or Section 205(b)(1)(C) of ERISA. Each Party acknowledges that they understand the effect of the elections and consent thereto.

It is further agreed and understood between the Parties that the written waivers as hereinabove referred to shall be executed by each Party subsequent to the Parties= marriage, when each Party shall have achieved the statue of Aspouse@ as required under ERISA, for such waivers to be valid and binding.

If either Party has agreed to sign the appropriate waivers in this Agreement and thereafter such Party refuses to sign such waiver after the date of marriage, then such Party shall pay damages to the other Party, or his or her estate or trust, in an amount equal to any benefits which are received by the Party as a result of the nonsigning of the waiver. If, however, the Party receiving the benefits can prove that such Party intended the Party to be the beneficiary, then no damages will be due. Examples of intent are new beneficiary signings after the date of marriage and provisions in wills or trusts naming such Party as beneficiary and signed after the date of marriage.

9.3 Separate Property Conveyance. If either Party desires to mortgage, convey, sell, lease, or in any other manner encumber his or her separate property, then the other Party shall, upon request, promptly join in the execution of any deed, conveyance, lease or other instrument that may be necessary or appropriate for such transaction; provided, however, such Party shall not execute any such instrument or document, unless such Party is first indemnified to their satisfaction against all liabilities, personal indebtedness, and expenses to which such Party, in their judgment, may be subjected as a result of signing such instrument or document.

ARTICLE X

GUARDIANSHIP AND LETTERS OF ADMINISTRATION

10.1 Guardianship. If either Party is adjudged incompetent or is in need of a guardian for any other reason, the other Party shall renounce any rights or decline the opportunity to be appointed guardian of such Party.

10.2 Personal Representative. Upon the death of either Party, the surviving Party waives the right to act as personal representative of the estate of the deceased Party, unless appointed as such by the will of the deceased Party.

ARTICLE XV

TAX RETURNS AND GIFT SPLITTING

Parties shall file joint or separate income tax returns if either party makes such a request of the other party. Husband and Wife agree to consent to split gifts under Section 2513 of the Code.

SAMPLE LANGUAGE FROM FORM FOR THIS PRESENTATION. THE AUTHOR MAKES NO REPRESENTATIONS REGARDING THIS FORM.

EDIT AS NECESSARY FOR YOUR OWN SITUATION,

EFFECT IF MARRIAGE IS TERMINATED BY DEATH

8.1 Husband's and Wife's Obligations. If Husband or Wife dies while either is still obligated to make payments to the other under this Agreement, then Husband's or Wife's estate shall be obligated to pay the other party an amount equal to the amount then owed to Husband or Wife under this Agreement. The payment described above shall be made to Husband or Wife as soon as is reasonably possible giving consideration to the probate laws of the state of Florida. For purposes of this Agreement the phrase "Husband's or Wife's estate" will include Husband's and Wife's total assets and entitlements existing as of the date of his or her death, whether devised, bequeathed or distributed to third parties by any vehicle including will, intestate succession, express, constructive, resulting trust, revocable or irrevocable trust, and/or survivorship or insurance benefits.

Husband or Wife shall also be entitled to receive from Husband or Wife's estate or their personal representative sole and exclusive title to the marital residence that the parties are residing in at the time of Husband or Wife's death, together with the furnishings and furniture, except the furniture and furnishings noted in Wife's Exhibit B, and nothing in this Agreement will be construed as a waiver by him or her of his or her homestead interest in such residence if Husband or Wife dies. If, for any reason, such interest is not transferred from Husband or Wife, or vice versa, then Husband or Wife's estate, as the case may be, shall pay the surviving Husband or Wife the date of death fair market value of the residence, furnishings and furniture excluding the furnishings and furniture noted in Wife's Exhibit B with such fair market value determination being made in accordance with Section 5.2 of this Prenuptial Agreement.

8.2 Rights of Wife.

- a. Except as provided in paragraph 8.1, Wife forever waives, relinquishes, and bars her rights to the homestead, elective share and dower, and rights to alimony, support, maintenance, and all other statutory rights of any kind, character, or nature whatsoever, as wife or widow of Husband under the laws of the state of Florida or any other state, now in force or hereafter enacted, in and to Husband's Separate/Nonmarital Property. Wife specifically agrees to sign a written waiver of any rights of elective share of any charitable trust created by Husband. Such waiver shall be in compliance with Revenue Procedure 2005-24, 2005-16 I.R.B (4/18/05). If Wife refuses to sign such waiver, then Wife shall pay damages to Husband, or his estate or trust, in an amount equal to any benefits which are received by Wife as a result of the nonsigning of the waiver. If, however, Wife can prove that Husband intended Wife to be the beneficiary, then no damages will be due.
- b. Wife relinquishes, quit claims, and grants to Husband, his heirs and assigns forever, all the above-mentioned interests in and to Husband's Separate/Nonmarital Property so that she, her heirs, personal representative, administrators, and assigns will have no right, title, interest, or claim to any of these interests or property.
- c. Wife intends that the provisions of this paragraph 8.2 shall constitute a waiver of "all rights" as contemplated by Section 732.702(1), Florida Statutes, 2005, as currently enacted or hereafter amended, including, but not limited to, any and all rights to the homestead, the intestate share, family allowance, exempt property, elective share, and pretermitted spouse.
- d. Wife does not waive any rights to any Social Security benefit.
- e. Wife will have no claim, will assert no claim, and will bring no court proceeding with respect to the above described rights.

8.3 Rights of Husband.

- a. Except as provided in paragraph 8.1, Husband forever waives, relinquishes, and bars his rights to the homestead, elective share and dower, and rights to alimony, support, maintenance, and all other statutory rights of any kind, character, or nature whatsoever, as husband or widower of Wife under the laws of the state of Florida or any other state, now in force or hereafter enacted, in and to Wife's Separate/Nonmarital Property. After the date of marriage, Husband specifically agrees to sign a written waiver of any rights of elective share of any charitable trust created by Wife. Such waiver shall be in compliance with Revenue Procedure 2005-24, 2005-16 I.R.B (4/18/05). If Husband refuses to sign such waiver, then Husband shall pay damages to Wife, or her estate or trust, in an amount equal to any

benefits which are received by Husband as a result of the nonsigning of the waiver. If, however, Husband can prove that Wife intended Husband to be the beneficiary, then no damages will be due.

- b. Husband relinquishes, quit claims, and grants to Wife, her heirs and assigns forever, all the above-mentioned interests in and to Wife's Separate/Nonmarital Property so that he, his heirs, personal representative, administrators, and assigns will have no right, title, interest, or claim to any of these interests or property.
- c. Husband intends that the provisions of this paragraph 8.3 shall constitute a waiver of "all rights" as contemplated by Section 732.702(1), Florida Statutes, 2005, as currently enacted or hereafter amended, including, but not limited to, any and all rights to the homestead, the intestate share, family allowance, exempt property, elective share, and pretermitted spouse.
- d. Husband does not waive any rights to any Social Security benefit.
- e. Husband will have no claim, will assert no claim, and will bring no court proceeding with respect to the above described rights.

8.4 Last Will and Testament and Revocable Trust. Husband and Wife understand and agree that either party by their Last Will and Testament and Revocable Trust may leave to the other an interest or legacy which shall be a purely voluntary act of either party.

8.5 Claims Against Estate and/or Trust. If either party dies, then neither Husband or Wife shall have or file a claim against the estate of the deceased party to challenge the enforceability in any way of the terms of any revocable or irrevocable trusts created by the deceased party.

GUARDIAN, PERSONAL REPRESENTATIVE AND TRUSTEE

9.1 Guardianship. If either Husband or Wife are adjudged incompetent or are in need of a guardian for any other reason, then the other party shall renounce any rights or decline the opportunity to be appointed guardian of such party.

9.2 Personal Representative and Trustee. Upon the death of either Husband or Wife, the survivor waives the right to act as personal representative of the estate of the deceased party, or trustee of a trust created by the deceased party, unless appointed as such by the will or trust of the deceased party.

12.2 Designation of Beneficiaries. Husband and Wife consent to each other's current and future designation of beneficiaries in any retirement plan including, but not limited to, an individual retirement account, a Simple Plan, a Roth

Plan, a pension plan, a defined benefit plan and a profit-sharing plan. This includes all benefits, including, but not limited to, a qualified joint and survivor annuity form of benefit, and a qualified pre-retirement survivor annuity form of benefit, under any plan of deferred compensation to which Section 401(a)(11)(B) of the Internal Revenue Code of 1986 (the "Code"), and/or Section 205(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA") shall apply, and in which either Husband or Wife is currently, or hereafter, may be deemed a vested participant within the meaning of Section 417(f)(1) of the Code, and Section 205(h)(1) of ERISA. Husband and Wife acknowledge that they understand the effect of the elections and consent thereto, and agree to sign any consents or waivers and such consents and waivers shall also operate as a waiver of any contribution made by either Husband or Wife on either Husband's or Wife's behalf during the marriage.

If either Husband or Wife refuse to sign such waiver, then such party shall pay damages to the other party, or his or her estate or trust, in an amount equal to any benefits which are received by the party as a result of the nonsigning of the waiver. If, however, the party receiving the benefits can prove that such party intended the party to be the beneficiary, then no damages will be due. Examples of intent are new beneficiary signings after the date of marriage and provisions in wills or trusts naming such party as beneficiary and signed after the date of marriage.

