

PRENUPTIAL AGREEMENTS TO PROTECT YOUR ASSETS IN CASE OF DIVORCE OR DEATH

By Kenneth A. Vercammen, Esq.

Today, many persons may be planning into entering into second or third marriages. They question whether the marriage will work out and if it doesn't will they lose ownership of their property if they get divorced. Most people want to leave substantial portions of their assets to their natural children. Yet, it is not uncommon for individuals to get married several times. If you wish to protect your assets from loss in divorce and permit your children to inherit your entire estate, consider entering into a prenuptial agreement prior to a marriage.

Additionally, you should make advance plans regarding ownership and transfer your assets in the even of death or disability. In addition to having a formal Last Will and Testament individuals are encouraged to plan ahead prior to a second or third marriage. People who are about to marry can fix, limit and determine, by agreement, the interest, rights and claims that will accrue to each of them in their property. To this end, the prenuptial statute requires that each party have the benefit of legal representation.

By signing a Prenuptial Agreement ("Agreement") each party is willing to accept the provisions of this agreement in lieu of any rights which she or he may have in the property and assets of the other. All property owned, whether real or personal, must be fully disclosed and revealed to each of the parties prior to the execution of the agreement. It must be signed in ample time prior to a forthcoming marriage.

The following are some sample clauses used by attorneys in drafting the prenuptial agreements.:

WHEREAS, the parties have known each other for a period of time and desire to marry and each has the utmost respect and consideration for the property and personal rights of the other and each is unwilling, because of marriage, to assert or succeed to any right or privilege whatsoever in certain property of the other during or after the lifetime of either party; and

WHEREAS, both parties also believe that the modern and realistic approach to marriage is to further contemplate the effect of a separation or divorce and to outline the expectations and responsibilities of the parties which, in fact, will promote the stability of their marriage; and

WHEREAS, both parties understand that no marriage would be solemnized between them without this agreement as to their respective rights in the event of the death of either party or separation or divorce; and

WHEREAS, each of the parties represents that his or her attorney, as the case may be, has privately, and without the other being present, read and explained to such party the provision of the following laws of the State of New Jersey, and has had the opportunity to obtain independent legal advice prior to the execution of this Agreement and has been fully advised as to his or her rights hereunder and has been fully advised as to his or her rights in the absence of such Agreement.

WHEREAS, each of the parties hereto recognizes that in the event of the death of the other, providing they shall first marry, the survivor would be entitled to share in such decedent's estate in an amount ranging from one-third of the estate to the entire estate depending upon what other distributes survive such decedent; and

WHEREAS as a condition of marrying, the parties desire to enter into an agreement before marriage, waiving the right of election to take against and Last Will and Testament of the other whatsoever; and

WHEREAS the parties desire by this agreement to mutually restrict the rights which each might otherwise have to take against the terms of the other's Will, as such rights are set forth in the Laws cited above as well as any other law or decision of the State of New Jersey; and

WHEREAS each desires to preserve his or her right to dispose of her excluded assets by Will as though no marriage had even taken place; and

WHEREAS, each party expressly desires to retain the power to have his or her estate vest in his or her legatees or devisees as may be prescribed by his or her Last Will and Testament; and

Full disclosure

Each party hereby acknowledges that she or he has had the opportunity to ascertain, has been fully informed by a full and frank disclosure of, and is fully

acquainted with and aware of, all of the income, debts, net worth, financial circumstances and value of the other and value of their property; and each party acknowledges that she or he is aware of, all pending litigation that may effect each of the parties to the within Agreement; and each has ascertained and weighed all of the facts, conditions and circumstances likely to influence her or his judgment in all matters embodied herein; that each has been given due consideration to all such matters and questions and clearly understands and consents to all of the provisions hereof, and is willing to accept the provisions of this Agreement in lieu of all of the rights in and to the aforementioned described property.

Each Party keeps their own assets

Wife _____ shall during her lifetime keep and retain sole ownership, enjoyment, power, control and disposal of her property, and proceeds of sale thereto, whether by way of gift, devise or other, free and clear of any interest, rights or claims of the other (including rights under community property laws).

Waive, relinquish and release any and all right

Both parties do hereby waive, relinquish and release any and all right, claims or demand of any kind, nature and description which she or he might otherwise acquire or have at any time hereafter in the above-described property of the other, by reason of their marriage to each other (including rights under community property laws) or as surviving spouse, whether by way of intestacy or dower or courtesy, or any other rights which she or he may have as a surviving spouse to share in the estate of the other, or to receive any allowance or exception from the estate of the other or to any right to elect to take against the Will of the other, or the right to act as administrator/administratrix of the estate of the other. However, either party may expressly provide for their spouse in their Will.

Permission to make Will

Nothing contained herein shall be deemed to constitute a waiver of any bequest or devise that one may choose to make to the other by way of Will or Codicil, or by any gift, grant or conveyance that one may choose to make to the other. However, each party to the Agreement agrees that no promise of any kind has been made by the other with respect to any such bequest or devise, or of any gift, grant or conveyance.

No property if divorce

In the event of an annulment, separation, legal or by mutual agreement, or the pending of final divorce between the parties hereto either in the jurisdiction of the State of New Jersey or any other state or territory or foreign country, or in the event that the parties hereto have lived apart for a period in excess of ninety (90) continuous days and one of the parties has no intention of returning, each party agrees that there shall be no property settlement or division of property between them with regard to the aforesaid property of the other or any increment, substitute or proceeds thereof, to any of the properties set forth above, but each shall keep and retain sole ownership, enjoyment, control and power of disposal of all properties set forth in Schedule "A"

Separate Property acquired during marriage

It is understood and agreed by and between the parties hereto that any property acquired during the marriage in the name of one party or under circumstances in which it is clear that such property was intended to be acquired separately by one party or where the source of the funds or assets by which such separate property was acquired is premarital assets, shall remain the separate property of the party acquiring such assets, including but not limited to any property into which the same is converted.

Property acquired by gift

It is understood and agreed by and between the parties hereto that any property acquired during the marriage by either party by way of gift or inheritance from a third party shall be deemed the separate property of the party. Any assets acquired by the parties jointly during the marriage by way of gift or inheritance from a third party shall be deemed joint property acquired during the marriage.

Responsibility for debts

Each party hereto mutually warrants and represents to the other that whatever indebtedness (including, but not limited to, any outstanding tax of any nature due any federal, state or local taxing authority) said party has at, or that has been accrued as of, the time of marriage shall be that party's sole and exclusive responsibility, and said party shall indemnify and hold harmless the other for any indebtedness incurred previous to marriage.

The following are portions of the Probate law which may be avoided if a proper prenuptial agreement is signed:

(a) **N.J.S.A. 3B:8-1** of Administration of Estates wherein it is provided that if a married person dies domiciled in this State, on or after May 28, 1980, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate, subject to the limitations, conditions and exceptions contained therein;

(b) **N.J.S.A. 3B: 8-10** of Administration of Estates wherein it is provided that the right of election and the rights of the surviving spouse may be waived before or after the marriage after May 28, 1980 by a written contract, agreement or waiver signed by the party after fair disclosure, subject to the limitations, conditions and exceptions contained therein;

(c) **N.J.S.A. 37:2-31**, et seq. Particularly **N.J.S.A. 37:2-38C(2)** of the Marriages and Married Persons Law, Article 5, wherein it is provided that a premarital agreement shall not be enforceable if a party proves that the party did not voluntarily and expressly

waive in writing, any right to disclosure of the property and financial obligations of the other party beyond the disclosure provided.

(d) **N.J.S.A. 3B:5-15** of Administration of Estates wherein it is provided that if a testator fails to provide by Will for his surviving spouse who married the testator after execution of the Will that the omitted spouse shall receive the same share of the estate as if the decedent left no Will, subject to the limitations, conditions and exceptions contained therein;

(e) **N.J.S.A. 3B:5-3** of Administration of Estates wherein it provides for the interstate share of a surviving spouse;

(f) **N.J.S.A. 3B:28-3** of Administration of Estates wherein it provides for the right and possession of a spouse in the principal matrimonial residence;

(g) **N.J.S.A. 2A:34-23** et seq. Of Divorce and Nullity of Marriage wherein it provides for alimony, maintenance and equitable distribution; and

Conclusion

The preceding article contains just a few of the possible items to be discussed with your attorney and proposed spouse. The article is by no means exhaustive. A number of these items may not be applicable in your situation, and probably there are many others that are applicable. The important thing is to decide if your assets are protected if a second marriage does not work out.

To schedule a consultation regarding Prenuptial Agreements, Wills, or Estate Planning, call the Law Office of Kenneth Vercammen, Esq. at (732) 572-0500

Kenneth A. Vercammen is a Middlesex County trial attorney who has published 130 articles in national and New Jersey publications on Elder Law and litigation topics. He has spoken on Wills and Elder law on numerous occasions to the Adult Community Schools in Metuchen, Sayreville, Old Bridge, South Brunswick and Edison/Clara Barton Seniors and Perth Amboy Seniors. He often lectures to trial lawyers of the American Bar Association, New Jersey State Bar Association and Middlesex County Bar Association.

In his private practice, he has devoted a substantial portion of his professional time to the preparation and trial of litigated matters. He has appeared in Courts throughout New Jersey several times each week on many personal injury matters, Municipal Court trials, Probate hearings and contested administrative law hearings.

Since 1985, his primary concentration has been on litigation matters. Mr. Vercammen gained other legal experiences as the Confidential Law Clerk to the Court of Appeals of Maryland (Supreme Court), with the Delaware County, PA District Attorney Office handling Probable Cause Hearings, Middlesex County Probation Dept as a Probation Officer, and an Executive Assistant to Scranton District Magistrate, Thomas Hart, in Scranton, PA.