

## ***The Case for Marital Agreements***

**Thinking about how marriages end.** State law in every American state sets forth a range of criteria and rules for marriage, including what happens when the marriage ends. Every marriage does end, and it ends in only one of two ways. They both start with “D” – *divorce* and *death*. A third way, annulment, is extremely rare and is available only for a serious impediment existing at the time of the marriage itself, such as fraud going to the very elements of the marriage.

**Spouses can make their own laws about their marriage.** A couple has the right to make some adjustments in the state law that pertains to their marriage, but they seldom do so in advance. When they sign a *marital settlement* agreement that removes their divorce case from litigation, they are passing a law for themselves that mainly, and often completely, supersedes state law. They can also achieve the same result in two other kinds of spousal agreements, namely either in a properly drafted *premarital* or in a *marital* (post-marital) agreement. The most basic limitation on this in all three kinds of agreements described above is that any provisions on the parenting and support of minor children may remain open to future modification if there are material changes in circumstances. Depending on state law, there may be no guarantee that provisions for future children in a premarital agreement will be enforced.

**Premarital and marital agreements compared.** A *premarital agreement* is signed in advance of the marriage. Often this is done at the insistence of one of the parties who desires certain protections that state law would not otherwise provide. Often that party’s objective is often to protect property he or she brought into the marriage, inherited, or received through family gifts. Another frequent goal is to prevent (or redefine) future claims to spousal support. These concerns occur more frequently in second or third marriages, in which estate plans for the children of prior marriages are also a concern.

**The goals of marital agreements.** *Marital agreements* (also called “post-marital agreements”) are intended to adjust the legal consequences in an existing marriage. Frequently these are raised some years after the date of the marriage. Their content may be quite different from pre-marital agreements, since they deal with existing problems in the marriage that were not foreseen years earlier. Indeed, one definition of a marital agreement is that it’s the pre-marital agreement the parties might have signed if they had known then what they know now. The marital agreement can be used to create a new structure designed to put their marriage on a path designed to remedy the marital problems they have experienced.

The obvious difference between a marital agreement and a separation or marital settlement agreement is that the latter agreements are designed to end the marriage, while the former is for marriages that are intended to continue. At times one or both spouses may desire a marital agreement to help them save their marriage. If a marriage has problems, why not have an agreement that seeks to resolve them, as an alternative to divorcing?

Some marriage counselors prefer the term “recreating the marriage” rather than “reconciliation,” because the former term looks to the future while the latter may seem to be still embroiled in the past

**Different goals of marital agreements.** If a marriage counselor drafts a memo for the couple, it will normally address the commitments of each of them to certain changes. The changes usually deal with their relationship and how they interact, as distinguished from provisions about money or property. Any such memo may not be intended as a legal contract, and even if it is (which is unlikely), it may not be the kind of contract that courts are equipped to enforce. Courts are reluctant to intervene in ongoing marriages when the spouses are living together, except where there is demonstrated physical or mental abuse.

**Therapist issues and lawyer issues.** Marriage counselors deal with subjects such as problems with marital arguments and decisions, other communication issues, compatibility, adapting to changes, money matters, marital tasks, career issues, parenting styles, problems with intimacy and sex, and extended family relationships. Lawyers handle issues about financial obligations, property ownership, the structure of family businesses, family estates, and revising premarital agreements. These boundaries are relatively clear. There are some other situations, however, where the borders between law and marriage counseling are less defined.

Consider, for example, a case where the main problems in the marriage are mostly about disagreements over the role of each spouse in a family business. There will likely be strong emotions at play, and at the same time a need to restructure some of the legal aspects of the business. Any written agreement might contain provisions of the type courts could enforce, such those that deal with financial transparency or control of management decisions.

**A sample case.** Hugh and Nora are the joint and equal owners of Fiddles & Pipes, a restaurant specializing in Irish cuisine. Nora's parents turned it over to her 12 years ago and Hugh then financed a substantial renovation. Their ownership is in the form of an LLC in which they are joint and equal partners. Nora has overseen the kitchen and Hugh has been the chief bartender and greeter. Over the years their marriage has deteriorated and each of them had affairs. For the past several years the couple has been working with a marriage counselor, Dr. Fiona O'Malley, and a mediator, Liam McManus, Esq.

They decided in marriage counseling that the best way to save their marriage was mostly to avoid being together in the restaurant every day. Hugh wants to join his brother Seamus in his extended family's Hyundai dealership, and Nora wants to start another restaurant and be the chef in both places. In the mediation with Mr. McManus, they worked out a marital agreement where each of them receives a salary from the restaurant based upon the hours he or she works. The salaries would be at an equal hourly rate, although their hours need not be equal. Hugh's investment in the car dealership and Nora's in the new restaurant would be drawn from marital assets. Each of them would own these investments as his or her separate property. They would continue to share equally in the profits of Fiddles & Pipes. Hugh would still manage the bar and Nora would continue to manage the kitchen. They would share equally the expenses and various tasks of running their house. The couple also made some provisions as to their estates. Their marital agreement was placed in a proper legal form by Mr. McManus. It was signed in three originals, one which was held by the mediator.

With the marriage counselor, Dr. O'Malley, they worked out some ground rules as to how to avoid conflicts in the restaurant and in their house. Each of them would have six weeks of separate time each year to spend as and where he or she decides, no questions asked. They each agreed to treat each other with courtesy and respect and to continue to be intimate with each other during private times together. The couple also pledged to respect each other's area of the restaurant and to avoid any arguments in front of customers. They agreed to continue counseling if any problems arose. Dr. O'Malley put these agreements into a memorandum that both parties signed and dated, and she witnessed. Each party kept one signed original, and Dr. O'Malley kept one.

**Dealing with the "D" words.** There is another and often sensitive perspective on marital agreements. Many premarital agreements deal with both of the "D" words, namely divorce and death. Those two sections of such an agreement can be quite different from each other, because they raise quite separate issues. Divorce assumes that one or both parties decided to end the marriage, while death assumes that they were still together at the end. Both "D" words are also usually dealt with in marital agreements. Hugh and Nora chose not to deal with a potential divorce in their marital agreement because each of them had regular income and separately owned property.

Hugh and Nora's marital agreement covered what happens when one of them dies. They agreed that when one of them predeceased the other, the survivor would become the full owner of their house, the restaurant (including the LLC), and the furnishings of both. The survivor would leave those properties to their two adult children. Hugh and Nora could each decide separately as to what happens with everything else that they each own.

Although Hugh and Nora chose to have their "legal" marital agreement and their "counselor" memorandum in separate documents, nothing prohibits them from putting these somewhat different provisions in the same agreement. Just because a provision may not necessarily be enforceable in court doesn't necessarily mean that it should never be included in a written agreement. After all, every divorce agreement contains a "separate lives" provision, which says that the parties will live separately and not interfere with each other's lives or relationships. When a single document is used, the parties should consider the interrelation of its clauses. If a "legal" provision is violated, a court will enforce it. When a spouse violates a personal clause that a court may not enforce for that reason, one remedy may be for the other spouse to end the marriage.

**Reframing family rules.** Family systems includes the study of family rules, many of which are clearly in effect in the family even though they have never been made explicit. Family therapists are aware that those family rules that are seldom vocalized are often more intractable than ones that are more explicit, and thus the former rules are harder to change. For example, if a spouse has a child from a former marriage or relationship, the present spouse may not object to ongoing contacts with the former spouse or girlfriend over parenting issues. However, there may be an unspoken rule against social media contacts with the same person. Breaking that rule may lead to a serious argument.

**Recreating the marriage.** The primary goal of marriage counseling is to determine not only the changes that each spouse needs to make, but how these fit into a new family structure to recreate a more hopeful and positive marriage relationship.

That's not easy to do. What is even more difficult is to set up a mechanism to keep those changes in effect.

When the issues are sensitive, discussion should be constructed with appropriate professional input. Any written agreement can include legal consequences when a party does not carry out its provisions, provided that the consequences are not contrary to public policy. The incidence of marital agreements appears to be increasing. As divorce professionals interact more frequently than in the past, the opportunity for written agreements that restructure the marriage in both therapeutic and legal ways will likely increase. It's time to consider more fully the potential of this option.