

Family Law Education Reform Project

Problem One – Premarital Agreement

OVERVIEW

This exercise touches on several important areas of family law practice, including interpretation of statutes and case law, professional ethics, document drafting and negotiation. It will also prompt you to consider early in the course what the risks of marital breakdown might be, and how a premarital contract might be utilized to protect a client from those risks.

EXPLANATION AND COMMENTS

This exercise concerns a premarital agreement between two people about to be married. Divorce laws prescribe the remedy for breach of the form contract. In most states, laws on dissolution of marriage provide a needy spouse with post divorce alimony, authorize the courts to equitably divide property acquired during marriage, and set forth rules for child custody and support. A premarital agreement gives the parties some latitude, but less than complete autonomy, to vary the form contract and to alter the remedies for breach.

ABOUT THE AUTHOR

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Problem One

PREMARITAL AGREEMENT EXERCISE

Instructions

This exercise touches on several important areas of family law practice, including interpretation of statutes and case law, professional ethics, document drafting and negotiation. It will also prompt you to consider early in the course what the risks of marital breakdown might be, and how a premarital contract might be utilized to protect a client from those risks. Think of marriage as a form contract to which two people consent when they say "I do". The form contract of the rights and responsibilities of the marital partners during marriage are defined by domestic relations laws and cases. Divorce laws prescribe the remedy for breach of the form contract. In most states, laws on dissolution of marriage provide a needy spouse with post divorce alimony, authorize the courts to equitably divide property acquired during marriage, and set forth rules for child custody and support. A premarital agreement gives the parties some latitude, but less than complete autonomy, to vary the form contract and to alter the remedies for breach. When we study the law of divorce, you will have another chance to analyze the risks of marital breakdown and to explore how the law of divorce has attempted to allocate them.

Controlling Law: You are an attorney in the State of Bliss. The State of Bliss' case law on premarital agreements is identical to the Florida cases you will find on our course materials on TWEN. Bliss's marriage and divorce laws are identical to those of Florida. Last month, the State of Bliss adopted the Uniform Premarital Agreements Act. To the extent that the existing case law is in conflict with the UPAA, then the case law will be superceded by the newly enacted statute. You are not to do any outside research but should rely on the materials in your casebook, the cases that are on TWEN and the links to the UPAA and Florida Statutes on TWEN.

Background: For this exercise, you will work with your team partner. You have been practicing family law for two years. This case was referred to you and your partner by your family law professor, Nancy Dowd. It concerns a premarital agreement between two people about to be married. Les Williams is the son of an old friend of Professor Dowd. He and his bride-to-be, Patty Herrera, are planning to marry. Their friends Chris Miller and Mike Smith gave Les and Patty a copy of their prenup that they had drafted themselves, and Les and Patty asked for advice about whether this would be a good idea for them. Professor Dowd recommended that they have separate representation and she referred them to you at your firm and to other former students at another local firm. When Professor Dowd called you to ask if you would be interested in working with one of them, she gave you some background on the couple.

Client Information: Every team that has an odd number represents Les; every team that has an even number represents Patty. Each team will be assigned to the next team in the negotiation, beginning with 1-2, 3-4, and so on (*see* TWEN tab "Client Representation Assignments"). You will also receive a password that will allow you to access the confidential client information on TWEN. You should regard this information as details confided in you by your client during a previous client interview. The password to access the confidential information will be sent to you one week prior to the negotiation by email.

You should make contact with the team representing the other client prior to the negotiation. You can make contact with anyone in the class through the email function on TWEN.

Sample Pre-Nup Agreement: The Sample Premarital Agreement provided by friends of Patty Herrera and Les Williams is available on TWEN, under “Problems”.

Review Exercise / Quiz: *Before* beginning the negotiation on Thursday, September 18, you must complete the Review Exercise (Quiz) which is available on TWEN. Study the readings and assigned materials before you begin this quiz. Use your own anonymous number and take the quiz as many times as necessary to get 15 out of 20 questions. The purpose of this quiz is to make sure all are prepared and have a good grasp of the law *before* beginning the negotiation.

Pre-Negotiation Preparation (Interests Analysis): Before beginning the negotiation, you and your partner must schedule a time to meet together to complete an interests analysis form (the form is available on TWEN under course materials).

Negotiation: The negotiation will take place during class on Thursday September 18. Everyone must come to Rm. 355C to sign in and then immediately begin the negotiation. You may use the classroom or in another location in the law school that you have previously agreed upon with opposing counsel. At the negotiation, you should propose and negotiate for any changes you wish to make to the Agreement. **After 50 minutes, STOP.** Whatever you have negotiated becomes the new Draft Agreement, subject to the approval of your clients. Be sure to write a brief summary of the agreement and/or draft paragraphs.

Post-Negotiation Discussion: On Tuesday, September 23, we will discuss the negotiation in class.

Professionalism and Confidentiality: You must conduct yourselves as professionals throughout this exercise. All materials are confidential and may be discussed only with your team mate. Patty's and/or Les' attorneys may each have knowledge that is unknown to the other side. Please do not disclose any confidences of your client.

Statement of Facts

Patty Herrera and Les Williams met at her best friend’s wedding in New Jersey, just after Patty, 30, had divorced her husband of nearly five years, and Les, 40, had separated from his wife of 15 years. Les was playing in a jazz band at the wedding, and noticed what a great dancer Patty was, and talked to her when the band was on break. At the time they met, Patty’s daughter Lisa was 5. Les had a daughter Yvonne in high school. They dated for several months while Les went through the process of his divorce, although his marriage had functionally been over for a long time. After six months, as things got more serious, they debated who would relocate, since Les was in Chicago and Patty was in New York. Les came to visit his mother in New Jersey often, so he usually traveled East to visit Patty while they were dating, on the weekends when his daughter would visit with her mother, or his daughter would come with him and stay with her grandmother.

Patty came from a large Puerto Rican family and most of her relatives were in the New Jersey/New York metropolitan area. She had strongly relied on her family since her divorce, particularly to help her with the care of her daughter. She was especially close to her sister, two years younger, who had been a single parent for some time, raising two children on her own. Patty and her sister Martha helped each other, and Martha assured her she could make it as a single parent. She also had three brothers, all of whom lived in the area, and her parents, as well as grandparents, uncles, aunts and cousins. Her ex-husband was a devoted father who remained in the area and they remained on friendly terms. He lived in the school district, so their custody arrangement was very fluid and co-equal.

Les was an only child who was very close to his mother, Ruth Williams, a widow who remained in the family home in New Jersey. He had an equally close extended Jamaican family since his mother was one of nine children, now split between the New York metro area and the State of Bliss. He was a devoted father. His wife had left him after an affair, and he had been the primary parent to his daughter, who had become estranged from her mother during the divorce. Les worked as an engineer for a large oil exploration company, and played music on the side. He had lived in Chicago for his entire marriage.

Patty was a nurse, and worked for a large insurance company. She had excellent experience and a knack for computers, and the combination made her invaluable to her company. An opportunity opened up for Patty to take a position in the Chicago office of her company 9 months after she met Les, and she decided to take it, even though Les had not yet proposed. She sold her house and moved in with him during the summer, when her daughter Lisa spent most of her time with her father. Patty quickly decided that she wanted to live in a house that was “theirs” rather than “his” and was linked to his first marriage. They found a house that was a bit of a financial stretch, and decided to buy it. Patty put the down payment on the house with her profit from selling her home plus her settlement from her divorce, and paid the mortgage for a year until Les was able to sell his home. They split the mortgage payments after that, even though Les made more than Patty made. Patty’s daughter loved the new house, and her sumptuous new room, although she missed her friends and saw her father less frequently than before. Les’ daughter was less happy about selling the house she had grown up in, and a bit resentful of Patty’s place in her father’s life, but she was busy getting ready to go off to college in New York.

Three years after Patty and Les moved into their house, Patty got an offer for a job in Orlandia, in the state of Bliss, a transfer within the company. It was a big promotion and meant a huge salary increase and greater responsibility. The day she came home with her great offer, Les had been told there would be a reduction in force in his company. He had been offered early retirement, plus a lump sum incentive. He had seen two prior reductions and worried that if he did not take the early retirement offer, he might simply be laid off. They figured out that he should have consulting opportunities in Orlandia, and decided that a move would be good for both of them. Patty had always felt like she was battling with “ghosts” in Chicago, since many of his friends knew and still socialized with Les’ ex-wife. And ever since Patty had come into Les’ life, it seemed like his ex-wife had renewed her efforts to win back her daughter, and therefore was a presence in Patty’s and Les’ life as well. It was not always comfortable for Patty.

Les also liked the idea of a move. He would be closer to his Bliss relatives, particularly his cousin Ed that he had played music with for 25 years. They had always talked about forming a band together, and this would give them the chance. While Les intended to use his engineering expertise to run a consulting practice, he also hoped to finally be able to devote more time to his music, and his lifelong dream of being a professional musician.

They moved to Bliss and bought a home together. Their stretch to buy their big Chicago house paid off with a big profit in a booming real estate market, as they were able to sell their Chicago home for \$800,000. Real estate was far more reasonable in Orlandia, so they were able to consider houses that were never before possible, and fell in love with the house of their dreams, with a huge pool and mother in law suite, which listed for \$1 million. They decided to stretch again, and used the proceeds from the house plus cash in some stock options of Patty's, leaving Les' buyout lump sum alone, as he had invested it in stock that recently took a nosedive in the market. The mortgage payments on the new house are the same as the old, and they split the payments. Within a year, his mother moved down as well, into the mother in law suite in the house. With pressure from his mother, they decide to marry, something that Les had been a bit reluctant to do but Patty very much wanted to happen.

Les' and Patty's friends suggested they should have a prenup. One couple provided a copy of theirs, which they have brought to you as an agreement that they think might work for them. This Sample Premarital Agreement is available on TWEN, under "Problems".

Other Financial Information

Patty's New Jersey house: Patty received the marital home in her first divorce in settlement of the property issues. She paid the mortgage from the point of divorce, but the proceeds from the sale were solely hers. Her net proceeds from the sale were \$200,000, plus her husband had paid a lump sum of \$100,000 in lieu of any claim on his pension. Her husband also pays child support for Lisa in the amount of \$1200/month.

Chicago house: Les and Patty purchased the house for \$700,000. Patty made the down payment of \$300,000. The monthly payments on the remaining mortgaged amount plus taxes were \$4000/month. Patty made payments for one year until Les sold his house. After Les sold his house, Patty and Les made equal payments.

Les made little profit from the sale of his Chicago house, since he had borrowed against his equity in the house to settle his divorce. At the sale, his net proceeds were \$50,000, which he put into an investment account. He paid no child support since he was the sole custodial parent of his daughter. His ex-wife remarried and is a homemaker, and paid no child support.

When Patty and Les began living together, they operated almost exclusively as if they were financially independent, simply alternating who paid for expenses, although sometimes Les would pay a bit more. They each contributed equal amounts to household expenses, to a joint account. Cars were individually purchased; vacations were joint expenses. They otherwise have kept separate accounts, and each has purchased items that they want without input from the other. Occasionally one of them thinks the other spends too much money, but neither one is a big spender.

Les' salary when they met was \$225,000 plus bonuses of \$5-10,000 annually; when he took early retirement, the incentive bonus was one year of salary plus a lump sum of \$25,000 which he invested in stock. His one year of salary allowed him to start up the consulting business and do comfortably the first year.

Patty's salary when they met was \$125,000, increased to \$145,000 when she moved to Chicago. When they moved to Bliss, her salary jumped to \$180,000 with bonuses of \$10-20,000 annually. Currently she is provided with a company car.