

PRENUP AGREEMENTS: BEST PRACTICES

By: Jersey M. Green, Esq.¹
Preeo Silverman Green & Egle, P.C.
6465 Greenwood Plaza Blvd., Suite 1025
Centennial, CO 80111
303-296-4440
303-296-3330

<http://www.preeosilverman.com>

Jersey@preeosilv.com

*Board Certified Family Law Trial Advocate
By the National Board of Trial Advocacy*

*We needed a bus to get Ivana's lawyers to court. It was a disaster,
but I had a solid prenup, and it held up.*

Donald Trump, *How to Get Rich*

- I. Failure to Calibrate Client Expectations.
 - A. The Client is in Denial.
 - B. Romance Versus the Prenuptial Agreement.
 - C. My Parents Won't Bless the Marriage Without a Prenuptial Agreement.
 - D. My Financial Affairs Aren't Her Business – That's Why I Want a Prenuptial Agreement.
 - E. If You Tell Him He Should Get a Lawyer, Then We'll Never Get This Done.
 - F. She Doesn't Care and Will Sign Whatever I Put in Front of Her.
 - G. We Just Need a Standard Form.
 - H. The Wedding is Next Weekend.
 - I. This Is For My Mail Order Bride.
 - 1. The mail order bride industry is unregulated, feeds on stereotypes, and is exploitive. Kathryn A. Lloyd, "Wives for Sale: The Modern International Mail-Order Bride Industry," *Northwestern Journal of International Law & Business*, Vol. 20, Issue 2, Winter 2000.

¹ The business owner's attorney for divorce and business-related litigation®

2. An immigration attorney should be consulted. Generally, a U.S. citizen may bring his foreign national fiancé living abroad to the United States by filing a K-1 visa (Form I-129F) petition.
3. To qualify for a K-1 visa, the U.S. citizen petitioner and visa applicant must satisfy certain basic requirements. They are as follows:
 - a. The K-1 Petitioner is a U.S. citizen by birth, naturalization, or derived citizenship and must provide proof of his U.S. citizenship, such as a birth certificate, U.S. passport or naturalization certificate; and
 - b. The K-1 Petitioner is able to financially support his fiancé so she is unlikely to become a public charge, i.e. receive government assistance or welfare. U.S. Consulates typically require the K-1 visa applicant to submit a Form I-134, Affidavit of Support. On the Form I-134, the Petitioner must show he earns and/or own assets (e.g. bank accounts, real-estate property, stocks, bonds) that is at least 100% of the minimum income listed for their household size in the federal poverty guidelines. The Petitioner must meet a higher, 125% requirement a few months later, after the marriage and the new wife then applies for a green card.
4. The requirements concerning affidavits of support are found in the Immigration and Nationality Act at 8 U.S.C.A. § 1183a. The provisions are codified in Title 8 of the Code of Federal Regulations at 8 CFR § 213a.1 *et. seq.* The sponsored immigrant, or any Federal, State, or local governmental agency or private entity that provides any means-tested public benefit to the sponsored immigrant after the sponsored immigrant acquires permanent resident status, may seek enforcement of the sponsor's obligations through an appropriate civil action. *See 8 CFR § 213a.2(d)*. An agency may also seek reimbursement from a sponsor for benefits provided to the sponsored immigrant. *8 CFR § 213a.4. See Greg McLawsen, Suing on the I-864 Affidavit of Support, 17 Bender's Immigr. Bull. 1943 (Dec. 15, 2012).*
5. Because of the Petitioner's duty to provide support for the foreign bride, the ability to obtain a valid waiver of maintenance may be compromised.
6. In addition to an immigration attorney, it may be necessary to obtain the services of a translator to translate the prenuptial agreement into the native language of the bride.

II. Top Drafting and Execution Errors Made in Prenuptial Agreements.

A. Failure to Consider Applicable Statutory and Decisional Law.

1. What is the statutory and decisional law concerning prenuptial agreements in the forum jurisdiction and in the jurisdiction where the parties may foreseeably relocate?

2. What do the applicable appellate courts say about prenuptial agreements?
3. Under what circumstances will an applicable court invalidate a prenuptial agreement?

B. Overreaching.

1. By virtue of their betrothal, parties to an antenuptial contract are in a fiduciary relationship to one another. *In re Estate of Wilber*, 165 N.H. 246 (2013); *In re Estate of Kinney*, 733 N.W.2d 118, 2007 WL 1704137 (Minn. 2007); *Gross v. Gross*, 11 Ohio St.3d 99, 464 N.E.2d 500 (1984); *In Re Estate of Lopata*, 641 P.2d 952 (Colo. 1982); *Kosik v. George*, 253 Or. 15, 452 P.2d 560 (1969); *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562, 567 (1968).
2. They, therefore, must act in good faith, with a high degree of fairness and disclosure of all circumstances which materially bear on the antenuptial agreement. *Estate of Stever*, 155 Colo. 1, 392 P.2d 286 (1964); *Moats v. Moats*, 168 Colo. 120, 450 P.2d 64 (1969); *In Re Marriage of Ingels*, 42 Colo. App. 265, 596 P.2d 1211 (1979); *In Re Estate of Lewin*, 42 Colo.App. 129, 595 P.2d 1055 (1979); *Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975); *Clark, Antenuptial Contracts*, 50 U.Colo.L.Rev. 141, 144 (1979).

C. Uniform Premarital and Marital Agreements Act (UPMAA).

1. The Uniform Law Commission articulates the utility of enacting the UPMAA, as follows:

While most states have laws addressing the creation and enforcement of divorce-focused premarital agreements, the standards for regulating those agreements vary greatly from state to state. States' laws regarding the enforcement of marital agreements have been far less settled and consistent; some states have neither case-law nor legislation addressing the creation or enforceability of marital agreements, while others have enacted varied approaches to guide courts in enforcing such agreements. The discordant standards for both premarital and marital agreements have created conflicts within the law and uncertainty about enforcement as couples move from state to state.

In today's mobile society, it is particularly important that the rules governing the enforceability of premarital and marital agreements be standardized. The UPMAA clarifies and modernizes largely divergent state laws and creates a harmonized and uniform approach to premarital and marital agreements.

2. Under the UPMAA, a premarital agreement is unenforceable if the party against whom enforcement is sought proves:
 - a. The party's consent to the agreement was involuntary or the result of duress;
 - b. The party did not have access of independent legal representation;
 - c. Unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or
 - d. Before signing the agreement, the party did not receive adequate financial disclosure.
3. A party has access to independent legal representation under the UPMAA if:
 - a. Before signing the premarital agreement, the party has a reasonable time to:
 - i. Decide whether to retain a lawyer to provide independent legal representation;
 - ii. Locate a lawyer to provide independent legal representation, obtain the lawyer's advice, and consider the advice provided; and
 - iii. The other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.
4. A party has adequate financial disclosure under the UPMAA if the party:
 - a. Receives a reasonably accurate description and good-faith estimate of the value of the property, liabilities, and income of the other party;
 - b. Expressly waives, in a separate signed record, the right to financial disclosures beyond the disclosure provided; or
 - c. Has adequate knowledge or a reasonable basis for having adequate knowledge of the other's property, liabilities, and income.
5. Under the UPMAA, a notice of waiver of rights requires language, conspicuously displayed, substantially similar to the following:

“If you sign this agreement, you may be:

Giving up your right to be supported by the person you are marrying.

Giving up your right to ownership or control of money and property.

Agreeing to pay bills and debts of the person you are marrying.

Giving up your right to money and property if your marriage ends.

Giving up your right to have your legal fees paid.

D. Inadequate Financial Disclosures

1. Uniform Premarital Agreement Act (UPAA) does not require actual disclosure for a premarital agreement to be enforceable. *In re Estate of Martin*, 2008 ME 7, 938 A.2d 812. The party seeking to avoid enforcement of premarital agreement under Uniform Premarital Agreement Act (UPAA) must show that the agreement was unconscionable, she did not waive in writing any right to such a disclosure, and she did not have and could not have reasonably obtained adequate knowledge of the other's financial situation. *Id.* Probate Court did not clearly err in concluding that wife possessed actual or constructive knowledge of husband's finances and that wife failed to prove that she lacked "fair disclosure" before signing the premarital agreement, such that agreement would be enforced; wife had access to husband's detailed financial records, husband routinely left his financial statements in plain sight on kitchen counter, premarital agreement stated that each of the parties had made a full disclosure to the other party of all of his or her property and assets, and wife declared to the notary public that she had read the premarital agreement and had no questions. *Id.*
2. A similar result was obtained in *Marriage of Rahn*, 914 P.2d 463 (Colo. App. 1995), which was concerned a prenuptial agreement entered into between the parties prior to Colorado's enactment of the Uniform Premarital Agreement Act. In *Rahn*, the Colorado Supreme Court defined "full and fair disclosure" as requiring parties to disclose the general and approximate value of their assets and debts. However, the Court stated that parties are not required to produce detailed written financial statements. In *Rahn*, there were no written financial disclosures, but the Court determined there was full and fair disclosure where the husband orally disclosed his assets to his wife and she had knowledge of them. *Id.*
3. Phrase "fair and reasonable disclosure" refers to the nature, extent and accuracy of the information to be disclosed, and not to extraneous factors such as the timing of the disclosure, as that phrase is used in statute providing that premarital agreement or amendment shall not be enforceable if the party against whom enforcement is sought proves that, before execution of the agreement, such party was not provided a fair and reasonable disclosure of the amount, character, and value of property, financial obligations, and income of the other party. *Beyor v. Beyor*, 158 Conn. App. 752, 121 A.3d 734 (2015). Financial disclosures by parties to a prenuptial agreement are not required to be exact or precise, but, rather, a fair and reasonable

financial disclosure requires each contracting party to provide the other with a general approximation of their income, assets and liabilities; written schedule appended to the agreement itself, although not absolutely necessary, is the most effective method of satisfying the statutory obligation of financial disclosure in most circumstances. *Id.*

4. One way for the proponent of a prenuptial agreement to establish its validity is to show that the agreement documents a full, frank, and truthful disclosure of the worth of the property, real and personal, as to which there is a waiver of rights in whole or in part, so that he or she who waives can know what it is he or she is waiving. *Stewart v. Stewart*, 214 Md. App. 458, 76 A.3d 1221 (2013).

E. Duress/Involuntariness

1. Prenuptial agreement is presumed valid unless the party seeking the invalidation of the agreement proves that: (1) the agreement was obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of a material fact; (2) the agreement is unconscionable; or (3) the facts and circumstances have so changed since the agreement was executed as to make the agreement unenforceable. *Matter of Nizhnikov*, 132 A.3d 412 (N.H. 2016). To establish duress in connection with prenuptial agreement, a party must ordinarily show that he or she involuntarily accepted the other party's terms, that the coercive circumstances were the result of the other party's acts, that the other party exerted pressure wrongfully, and that, under the circumstances, the party had no alternative but to accept the terms set out by the other party. *Id.*
2. Proof of duress or undue influence is required to establish a premarital agreement was involuntarily executed. *In re Marriage of Shanks*, 758 N.W.2d 506 (Iowa 2008). There are two essential elements to a claim of duress in the execution of a contract: (1) one party issues a wrongful or unlawful threat and (2) the other party had no reasonable alternative to entering the contract. *Id.*
3. In order to establish that a premarital agreement was procured through duress, three things must be proved: (1) coercion; (2) putting a person in such fear that he is bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind. *Holler v. Holler*, 364 S.C. 256, 612 S.E.2d 469 (Ct. App. 2005). If one of the parties to a premarital agreement is in a position to dictate its terms to such an extent as to substitute his will for the will of the other party thereto, it is not a mutual, voluntary agreement, but becomes an agreement emanating entirely from his own mind. *Id.* If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the premarital agreement is voidable by the victim. *Id.*
4. A prenuptial agreement is presumed valid unless the party seeking the invalidation of the agreement proves that: (1) the agreement was obtained through fraud, duress

or mistake, or through misrepresentation or nondisclosure of a material fact; (2) the agreement is unconscionable; or (3) the facts and circumstances have so changed since the agreement was executed as to make the agreement unenforceable. *In re Estate of Hollett*, 150 N.H. 39, 834 A.2d 348 (2003). To establish duress, a party must ordinarily show that it involuntarily accepted the other party's terms to the prenuptial agreement, that the coercive circumstances were the result of the other party's acts, that the other party exerted pressure wrongfully, and that under the circumstances the party had no alternative but to accept the terms set out by the other party. *Id.*

F. Failure to Anticipate Litigation Scenarios.

1. Acrimonious negotiations may ripen into a claim of duress.
2. The values given were “bogus.”
3. I never would have married her, much less signed a prenuptial agreement, if I had known (a) she was such a cheapskate; how little he really had and the low standard of living to which I was committing myself; the financial risks he took.
4. Wife adequately disclosed her financial standing prior to execution of prenuptial agreement, and thus parties' prenuptial agreement was properly executed and enforceable, even though wife left spaces providing for the amount of stock that she held in each of her family businesses blank, where husband was aware when signing the agreement that it did not set forth the number of wife's shares in the family businesses but was not concerned by that omission, wife's financial status had made no difference to husband before the marriage, wife's disclosure of her financial status would not have changed husband's decision to sign the agreement, husband otherwise had an extensive knowledge of wife's finances before signing the agreement, and husband had entered the agreement with the assistance and advice of his own attorney. *Pulver v. Pulver*, 40 A.D.3d 1315, 837 N.Y.S.2d 369 (2007).
5. To determine whether a party's obligation of fair disclosure was satisfied with respect to a prenuptial agreement, the focus of a court's inquiry is whether the disclosure was such that a decision by the opposing party may reasonably be made as to whether the agreement should go forward. *Rostanzo v. Rostanzo*, 73 Mass. App. Ct. 588, 900 N.E.2d 101 (2009).
6. Courts require full disclosure for an antenuptial agreement so as to ensure one party has the ability to make an informed decision about the other party's financial state prior to signing away any rights he or she may have in that property. *In re Marriage of Thomas*, 199 S.W.3d 847 (Mo. Ct. App. 2006).

7. The fairness to the attacking party in failing to disclose extent or value of property owned as ground for avoiding a premarital contract may not matter. 3 A.L.R. 5th 384, § 2.

8. The translation into the future spouse's native language.

G. Failure to Have a "Closing."

1. Have the parties come to your office for a signing.

2. Control the documentation.

H. Failure to Effectively Manifest Acknowledgements.

1. Have the agreement notarized in your office.

2. Did you get a certificate from the translator to include as an attachment?

Under Colorado law, a party generally cannot avoid contractual obligations by claiming that he or she did not read the agreement. *Weller v. HSBC Mortg. Services, Inc.*, 971 F.Supp.2d 1072 (D. Colo. 2013). *See also Vernon v. Qwest Communications Intern., Inc.*, 857 F.Supp.2d 1135 (D. Colo. 2012). A party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a document on the ground that he or she did not read it or know its contents. *Anderson v. Dinkes & Schwitzer, P.C.*, 150 A.D.3d 805 (N.Y. App. 2017). Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains. *Nicholas v. Hofmann*, 158 A.3d 675 (Pa. 2017)("Once a person enters into a written agreement, he builds around himself a stone wall, from which he cannot escape by merely asserting he had not understood what he was signing"). Absent fraud, misrepresentation, or deceit, a party is bound by the terms of the contract he signed, regardless of whether he read it or thought it had different terms. *In re McKinney*, 167 S.W.3d 833 (Tex. 2005). A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing. *Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc.*, 89 Cal.App.4th 1042 (2001). Unless one can show facts and circumstances to demonstrate that he was prevented from reading the contract, or that he was induced by statement of the other party to refrain from reading the contract, the contract is binding. *Allied Van Lines, Inc. v. Bratton*, 351 So.2d 344 (Fla. 1977)("No party to a written contract can defend against its enforcement on the sole ground that he signed it without reading it.") When a person with the capacity of reading and understanding an instrument signs it, he is generally, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding. *Jefferson v. California Dept. of Youth Authority*, 28 Cal.4th 299 (2002). In the absence of fraud, duress or some other wrongful act by a party to a contract, a signer of an agreement is deemed to be conclusively bound by its terms whether or not he or she read it. *Maines*

Paper and Food Service Inc. v. Adel, 256 A.D.2d 760 (N.Y. App. 1998)(“Inability to understand the English language, without more, is insufficient to avoid the general rule of enforceability of contracts that are not induced by fraud, duress or some other wrongful act.”) Persons insufficiently proficient in the English language must prove reasonable efforts to have a document read and explained or account for why this was not done if they would avoid the presumption of knowledge of the contents of an executed instrument and its correlate, which binds a contract's signor whether or not the contract was read or understood. *Advanta Business Services Corp. v. Colon*, 4 Misc.3d 117 (N.Y. App. 2004). In the absence of fraud, a party may not avoid a contract which he voluntarily executes, on the ground that he could not read the language in which it was written, and that it was different from what he supposed. In such circumstances it is his duty to obtain a reading and explanation of it before signing. *Erickson v. Knights of the Maccabees of the World*, 71 Colo. 9 (Colo. 1922). Under Colorado law, absent fraud or concealment, a person who signs a document is presumed to have knowledge of the document's contents, independent of whether that person has read the document. *Breaux v. American Family Mut. Ins. Co.*, 387 F.Supp.2d 1154 (D. Colo. 2005).

3. Are the lawyers signing off on a certification?

I. Inadequate Documentation/Insufficient Archiving.

1. Serial number the backup documents that were exchanged, attach them, and reference them by serial number range in the agreement.
2. Were all property, interests, liabilities, contingent liabilities, and income documented?
3. Were credit reports included?
4. Each party leaves with an originally signed agreement with each page initialed and sets of all of the backup documentation.
5. Archival copies for the lawyers – advise the client concerning the importance of his or her safekeeping of agreement and backup documentation.
6. Manifest in writing with the client how long the attorney will retain the archival copy. In Colorado, an attorney may destroy a client’s file without notice to the client 10 years after the termination of the representation in the matter if she knows of no pending or threatened legal proceedings and the lawyer has not agreed to the contrary. Rule 1.16A, Colorado Rules of Professional Responsibility.
7. Never videotape or otherwise record the closing.

J. Failure to Provide Sufficient Opportunity and Resources to Obtain Independent Professional Advice and for Investigation.

1. The wedding guests are already in town.
 2. The game of chicken in the road.
 3. Best practices:
 - a. It's better if the wedding date is not yet set.
 - b. Give enough description so they know the nature of the property and its reasonable estimate of value.
 - c. Document delivery of the prenuptial agreement and backup documentation well in advance.
 - d. Document offer of delivery or delivery of funds for independent counsel and investigation.
- K. Failure to Draft in Anticipation of How the Couple Will Likely Live Out Their Marriage.

Oral Modification

1. Does the applicable jurisdiction(s) permit oral modifications of contracts notwithstanding a provision stating that a modification may only be made in a writing signed by both parties? These are some of the states that permit such modifications: *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 2003 FED App. 0244P (6th Cir. 2003); *Much v. Pacific Mut. Life Ins. Co.*, 266 F.3d 637 (7th Cir. 2001) (applying Illinois law); *Haynes Trane Service Agency, Inc. v. American Standard, Inc.*, 51 Fed. Appx. 786, 49 U.C.C. Rep. Serv. 2d 65 (10th Cir. 2002) (applying Wisconsin law); *Teer v. George A. Fuller Co.*, 30 F.2d 30 (C.C.A. 4th Cir. 1929); *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187 (Colo. 2001), as modified on denial of reh'g, (July 2, 2001); *Barile Excavating & Pipeline Co., Inc. v. Vacuum Under Drain, Inc.*, 362 So. 2d 117 (Fla. Dist. Ct. App. 1st Dist. 1978) (written contracts, not under seal, can be modified by subsequent oral agreement of the parties, even though the written contract purports to prohibit such modification); *Whalen v. Connelly*, 545 N.W.2d 284 (Iowa 1996); *Illinois Cent. R. Co. v. Manion*, 113 Ky. 7, 23 Ky. L. Rptr. 2267, 67 S.W. 40 (1902); *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938 (Miss. 1992); *Prime Financial Group, Inc. v. Masters*, 141 N.H. 33, 676 A.2d 528, 32 U.C.C. Rep. Serv. 2d 1068 (1996); *Son-Shine Grading, Inc. v. ADC Const. Co.*, 68 N.C. App. 417, 315 S.E.2d 346 (1984); *Bennett v. Farmers Ins. Co. of Oregon*, 332 Or. 138, 26 P.3d 785 (2001); *Com. ex rel. DiValerio v. DiValerio*, 169 Pa. Super. 477, 82 A.2d 687 (1951); *Fondedile, S.A. v. C.E. Maguire, Inc.*, 610 A.2d 87 (R.I. 1992); *King v. PYA/Monarch, Inc.*, 317 S.C. 385, 453 S.E.2d 885 (1995); *Robbins v. Warren*, 782 S.W.2d 509 (Tex. App. Houston 1st Dist. 1989); *Lindsay v. McEneaney Associates, Inc.*, 260 Va. 48, 531 S.E.2d 573 (2000).

Abandonment

1. Antenuptial agreements are to be considered, construed, and treated as are contracts in general and thus, are subject to termination by mutual consent of the parties. *In re Marriage of Young*, 682 P.2d 1233 (Colo. App. 1984). Husband and wife who, from outset of their marriage, pooled whatever income they had and used it to pay family expenses and debts, owned their homes and checking account in joint tenancy, and who filed joint income tax returns throughout their marriage, rescinded or abandoned their antenuptial agreement, which provided that there would be no community property. *Id.*
 2. As with any contract, party to antenuptial agreement may abandon such agreement. *In re Marriage of Pillard*, 448 N.W.2d 714 (Iowa Ct. App. 1989). Actions of divorcing parties established abandonment of antenuptial agreement which provided that their separate properties were theirs to do with as they wished and were free from all claims by other party; parties commingled their respective properties, paid farm contract from commingled funds, and wife contributed her earnings to farm operation and its debt. *Id.*
 3. As with any contract, party may rescind antenuptial agreement by engaging in course of conduct which clearly evidences intent to abandon its terms. *In re Marriage of Burgess*, 123 Ill. App. 3d 487, 462 N.E.2d 203 (1984). This might occur by a commingling of marital or non-marital property or by conduct which shows an intent to ignore the agreement and treat non-marital property as marital property. *Id. at 490.*
 4. Antenuptial agreements are contractual in nature and should be construed as other types of contracts. *McMullen v. McMullen*, 185 So. 2d 191 (Fla. Dist. Ct. App. 1966). Abandonment of a contract may be effected by acts of one of the parties thereto where acts of that party are inconsistent with existence of contract and are acquiesced in by the other party. *Id.* Where antenuptial agreement provided in effect that both parties would execute necessary conveyances so that all property would be held by them as tenants by entireties, but shortly after marriage wife insisted upon reconveyance to her of her husband's interest in her residential property which was subsequently sold with wife receiving all proceeds of sale and wife's timber land was subsequently sold with wife receiving all benefits of sale, and husband acquiesced in wife's actions, there was mutual abandonment of antenuptial agreement. *Id.*
 5. Keep the prenuptial agreement's mechanisms flexible!
- L. Failure to Properly Address Income Considerations.
1. Under the Uniform Dissolution of Marriage Act, all property coming into the marriage is marital property, except for that which is received by gift, bequest,

devise, descent, property acquired by exchange of separate property, and property excluded by a valid agreement of the parties.

Presumption: Everything received during the marriage is marital property unless it meets one of the statutory exceptions.

2. It is not enough to protect separate property and the appreciation in value of that property – income generated from separate property should also be protected.
3. We note that a majority of courts from other jurisdictions have held that, absent statutory provisions to the contrary, income derived during the marriage from separate property is marital property. *Marriage of Footitt*, 903 P.2d 1209, 1212 (Colo. App. 1995) *citing* *Macdonald v. Macdonald*, 532 A.2d 1046 (Me.1987); *Swick v. Swick*, 467 N.W.2d 328 (Minn.App.1991); *In re Marriage of Schatz*, 768 S.W.2d 607 (Mo.App.1989). *See also* 2 H. Clark, *Law of Domestic Relations* 189 (2d ed. 1987) (“The policy of the marital property statutes would seem best vindicated by holding such income to be marital property, particularly in view of the presumption that property acquired during the marriage is marital”); 1 J. McCahey, *Valuation & Distribution of Marital Property* § 3.03[2][i] (1995); Andrews, *Income from Separate Property: Towards a Theoretical Foundation*, 56 *Law & Contemp.Probs.* 171 (Spring 1993).
4. Use of marital income to discharge maintenance and/or child support obligations of a prior marriage or for other separate obligations should be addressed.
5. What about the use of separate property for marital purposes?
6. Where a spouse's premarital property has been commingled with marital property so that it is not possible to trace existing property to the spouse's separate property, the premarital property does not retain its separate character. *In re Marriage of Goldin*, 923 P.2d 376, 381–82 (Colo.App.1996).

M. Failure to Properly Address All Rights and Interests.

1. Waiver of rights upon death.
 - a. Rights of election of surviving spouse.
 - b. Rights of surviving spouse to exempt property.
 - c. Family allowance.
 - d. Deceased homestead exemption.
2. Know your client’s business and his future sources of property.

3. Addressing the deal in play/work in progress.
4. What about ideas in the making?
5. What are the considerations for the inventor or artist?
6. Incorporeal interests such as choses in action/proceeds from the fiancé's personal injury lawsuit. The presumption of marital property is overcome only by establishing that the property was acquired by a method listed in the statute. As a result, if a husband and wife have assets which do not fall within the specific definition of separate property, those assets are deemed to be marital property and are thus subject to an equitable distribution by the court, including personal injury proceeds. *Marriage of Fields*, 779 P.2d 1371, 1373 (Colo. App. 1989).
7. Stock options, restricted stock units, stock warrants.

[W]e conclude that to the extent an employee stock option is granted in consideration of past services, the option may constitute marital property when granted.⁸ *See Grubb*, 745 P.2d at 665; *see also In re Marriage of Short*, 125 Wash.2d 865, 890 P.2d 12, 16 (1995). On the other hand, an employee stock option granted in consideration of future services does not constitute marital property until the employee has performed those future services. *See Short*, 890 P.2d at 16. *In re Marriage of Miller*, 915 P.2d 1314 (Colo. 1996)(*en banc*).

The *Miller* Court's decision is consistent with other Colorado precedent that property acquired post-decree is not marital property. *See, e.g., In re Marriage of Haupel*, 936 P.2d 561, 572 (Colo. 1997)(*en banc*)("Post-decree assets are not considered marital property and, thus, are not distributable. Similarly, the Colorado Supreme Court's decision known as *In re Marriage of Hunt*, 909 P.2d 525, 532 (Colo. 1995) states:

Post-divorce earnings are indisputably separate property. *See J. Thomas Oldham, Divorce, Separation and the Distribution of Property* § 7-10 [5] (1987 & 1995 Supp.) . . . Similarly, property acquired by a party after the dissolution is immunized from division. § 14-10-113(2)(c).²

The Colorado Supreme Court has consistently applied the *Miller* test with respect to stock options:

[I]f the contract granting the options indicates that they were granted in exchange for present or past services, in the situation for instance, where an employer offers stock options as a form of incentive compensation for joining a company, the employee, by having accepted employment, has earned a contractually enforceable right to those options when granted, even if the options are not yet exercisable. [Footnote omitted]. *See Miller*, 915 P.2d at 1318–19. On the other hand, if the options were

²The one exception noted in *Hunt* relates to post-decree enhancements to pensions. *Id.* at 532.

granted in consideration for future services, the employee “does not have enforceable rights under the option agreement until such time as the future services have been performed.” *Id.* at 1318.

In re Marriage of Balanson, 25 P.3d 28, 39 (Colo. 2001)(*en banc*). Similarly, in 2014 the Colorado Supreme Court in *In Re Marriage of Cardona and Cortez*, 316 P.3d 626, 633 (Colo. 2014) held that:

[O]ur cases establish that whether a spouse's stock options constitute property for purposes of the UDMA turns on whether the spouse has an enforceable right to those options. *Balanson*, 25 P.3d at 39. An enforceable right to stock options exists where the stock option contract indicates that the options were granted in exchange for past or present services. *Id.* (citing *Miller*, 915 P.2d at 1318–19). Where the contract indicates that the options were granted in consideration for future services, a spouse does not have an enforceable right to those options until the future services have been performed. *Id.* at 40 (citing *Miller*, 915 P.2d at 1318). In short, where a spouse has an enforceable right to the options, such a right constitutes a property interest rather than a mere expectancy, whether or not the options are presently exercisable. *Balanson*, 25 P.3d at 39.

N. Failure to Properly Address Retirement Benefits and Investments

1. The Employee Retirement Income Security Act of 1974 (ERISA) regulates most private retirement plans, including those under 401(a), 403(b), 408, 401k, Keoghs, SEPs, and employer sponsored IRAs. ERISA overrides state laws regulating such plans. 29 U.S.C. § 1144(a) (1988).
2. Some commentators have suggested that it may be impossible to effect a valid waiver of any ERISA-qualified pension benefits by means of a prenuptial agreement. *Marriage of Rahn*, 914 P.2d 463, 468 (Colo. App. 1995) citing D.Mills, *Beware of the Trap—Marital Agreements and ERISA Benefits*, 23 Colo.Law. 577 (March 1994); K. Vetrano, *Spousal Waiver of Pension Premaritally and Upon Divorce*, 13 FairShare No. 9, 10 (September 1993); J. Dam, *Most Prenuptial Agreements Invalid under Federal Law*, Lawyers Weekly USA 1 (August 16, 1993).
3. However, the more correct answer is that a premarital agreement cannot serve as a valid waiver of ERISA’s surviving-spouse rights. *Hagwood v. Newton*, 282 F.3d 285 (4th Cir. 2002); *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992); *Howard v. Branham & Baker Coal Co.*, 968 F.2d 1214 (6th Cir. 1992); *Pedro Enterprises, Inc. v. Perdue*, 998 F.2d 491 (7th Cir. 1993); *Nat'l Auto. Dealers & Associates Ret. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996); *Nellis v. Boeing Co.*, No. 91-1011-K, 1992 WL 122773 (D. Kan. May 8, 1992); *Zinn v. Donaldson Co.*, 799 F. Supp. 69 (D. Minn. 1992).

4. ERISA provides explicit requirements for the waiver of surviving-spouse rights, which are the “qualified joint and survivor annuity” and the “qualified preretirement survivor annuity” in a qualified plan. The terms “qualified joint and survivor annuity” and the “qualified preretirement survivor annuity” are terms defined by the statute which refer to a person who was the spouse of the participant at the time of the participant's death. 29 U.S.C. §§ 1055(d) & (e) (1988). *Marriage of Rahn*, 914 P.2d 463, 465 (Colo. App. 1995).
5. The waiver of a surviving spouse's rights to benefits is not valid unless: 1) it is in writing; 2) it either recites the alternative beneficiary or expressly permits the employee to designate an alternate without further consent of the spouse; and 3) it “acknowledges the effect” of the waiver and is notarized or witnessed by a plan representative. 29 U.S.C. § 1055(c)(2)(A) (1988). In addition, the waiver must be made within the “applicable election period.” 29 U.S.C. § 1055(c)(1)(A) (1988); *see also* 26 U.S.C. § 417(a)(2) (1988) (similar IRS requirements). Treas.Reg. § 1.401(a)-20 Q & A 28 (1988) states that “An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.”
6. Although a prenuptial agreement will not constitute an effective waiver of spousal survivorship benefits mandated by the Employee Retirement Income Security Act (ERISA) unless it conforms to the waiver requirements set forth in the Retirement Equity Act (REA), ERISA does not preempt or preclude the recognition, implementation, or enforcement of an otherwise valid prenuptial agreement with regard to a divorce proceeding. *Strong v. Dubin*, 75 A.D.3d 66, 901 N.Y.S.2d 214 (2010). Under parties' antenuptial agreement, former husband waived his right to equitable distribution of former wife's ERISA-qualified stock option plan; ERISA did not preclude waiver of future rights to spouse's pension plan so long as participant's survivor benefits were not at issue, wife did not die during marriage, and thus agreement did not result in loss to husband of ERISA survivor benefits. *Savage-Keough v. Keough*, 373 N.J. Super. 198, 861 A.2d 131 (App. Div. 2004). Antenuptial agreement represented an effective waiver of right to equitable distribution of the marital portion of spouses' pension plans that were subject to ERISA; husband and wife signed and had notarized the agreement, it purported to waive any interest either party would ordinarily acquire in the other's property by virtue of the marriage, unambiguously kept their property separate, and gave to them an absolute and unrestricted right to dispose of their separate property, and the waiver included rights to pension benefits that could eventually be considered marital property. *Sabad v. Fessenden*, 2003 PA Super 202, 825 A.2d 682 (2003).
7. The ERISA spousal waiver restrictions apply to waivers of survivor benefits, but do not apply to waivers, in premarital agreements, of an interest in a spouse's retirement accounts. Employee Retirement Income Security Act of 1974. *Stewart v. Stewart*, 141 N.C. App. 236, 541 S.E.2d 209 (2000). ERISA does not preempt state dissolution of marriage law with respect to the waiver of all interests in an

ERISA-qualified retirement plan in a dissolution of marriage proceeding; although a waiver of spousal death benefits in a prenuptial agreement is not effective when the spouse later dies while the parties are still married. *Marriage of Rahn*, 914 P.2d 463, 468 (Colo. App. 1995).

O. Failure to Properly Address Trusts and Economic Circumstance Issues.

1. A revocable trust does not constitute an asset or property of a spouse in dissolution of marriage action. *Marriage of Balanson*, 107 P.3d 1037, 1046 (Colo. App. 2005); *In re Marriage of Centioli*, 335 Ill.App.3d 650, 269 Ill.Dec. 814, 781 N.E.2d 611 (2002)(wife's status as beneficiary of husband's inter vivos revocable trust was mere expectancy and could not be characterized as a vested property interest); *In re Marriage of Beadle*, 291 Mont. 1, 968 P.2d 698 (1998)(because spouse's interest in revocable trust was contingent and could not be ascertained until settlor's death, it should not be included in marital estate).
2. A remainder interest in an irrevocable trust represents a present fixed right to future enjoyment that gives rise to a vested property interest in the trust even if that interest is subject to complete divestment or defeasance. *Marriage of Balanson*, 25 P.3d 28, 32 (Colo.2001)
3. Will the spouse's interest in a trust, whether revocable or irrevocable, be an economic circumstance to be considered in the fair division of marital property?

P. Failure to Properly Address Intellectual Property.

1. Consult an intellectual properties lawyer.
2. Not just patents and trademarks.
3. "Know how."
4. "Rights in get up."
5. "Moral rights."

Q. Failure to Properly Address Future Educational Attainments.

1. Is an educational degree attained during the marriage "property" subject to division or an economic circumstance to be taken into account in the division of marital property?
2. An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of

many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term. *Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978); *see also Nelson v. Nelson*, 736 P.2d 1145 (Alaska 1987); *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (App.1981); *In re Marriage of Sullivan*, 134 Cal.App.3d 634, 184 Cal.Rptr. 796 (1982); *vacated*, 37 Cal.3d 762, 209 Cal.Rptr. 354, 691 P.2d 1020 (1984) (statute amended to provide for the community to be reimbursed for community contributions to education of a party); *Hughes v. Hughes*, 438 So.2d 146 (Fla.App.1983); *In re Marriage of Weinstein*, 128 Ill.App.3d 234, 83 Ill.Dec. 425, 470 N.E.2d 551 (1984); *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985); *Drapek v. Drapek*, 399 Mass. 240, 503 N.E.2d 946 (1987); *Ruben v. Ruben*, 123 N.H. 358, 461 A.2d 733 (1983); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982); *Hodge v. Hodge*, 513 Pa. 264, 520 A.2d 15 (1986); *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264 (S.D.1984); *Petersen v. Petersen*, 737 P.2d 237 (Utah App.1987). *Contra*, *O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 (1985).

3. Although an educational degree is not property subject to division, a spouse who provides financial support while the other acquires an education is not without a remedy. *Marriage of Olar*, 747 P.2d 676, 680 (Colo. 1987); *Marriage of Graham*, 574 P.2d 75, 78 (Colo. 1978). The contribution of one spouse to the education of the other spouse may be taken into consideration when marital property is divided or in the award of maintenance. *Id.*

R. Failure to Include Definitions.

1. “Separate” property means what?
2. Does “separate” property include mutations, exchanges, replacement, substitutions, appreciation, and income related to that property?
3. Discerning marital income from separate income.

S. Failure to Engage Other Appropriate Professionals or Technicians at the Drafting Stage.

1. Do you need a consultation with an immigration attorney?
2. Do you need a translator?

T. Failure to Provide a Choice of Law Provision.

1. Well drafted premarital or marital agreements often contain a governing law provision designating the law which will control issues of interpretation

enforcement or sometimes other issues relating to the agreement. By statute the validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement will be determined by the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party at the time the agreement was signed and the designated law is not contrary to section 14-2-309 or to a fundamental public policy of this state. In the absence of an effective designation of governing law the agreement will be governed by the law of Colorado, including the choice-of-law rules of this state. *20 Colo. Prac., Family Law & Practice* § 39:5. *See also* § 14-2-304, C.R.S.

2. If there is no choice of law clause the court will look to its normal choice of law rules.
 - a. Place of execution
 - i. In most states choice of law means that the law of the place of execution will govern procedural fairness and the law of the forum, i.e. the law of place of enforcement will govern substantive fairness. Marguerite Smith, *Marital Agreements in the U.S.A.*
 - ii. Law of the state in which a prenuptial agreement is made governs the validity and interpretation of the agreement. *Gamache v. Smurro*, 2006 VT 67, 180 Vt. 113, 904 A.2d 91 (2006).
 - iii. Under Virginia choice-of-law rules, the validity of a prenuptial agreement must be tested by the laws of the place where it is made, unless: (1) the parties have expressly manifested their intent to apply the law of another jurisdiction; (2) the parties sign the prenuptial agreement in one jurisdiction but, at the time the contract was executed, intend to fully perform the agreement in a different, specific jurisdiction; or (3) the applicable substantive law of the foreign jurisdiction is contrary to Virginia public policy. *Black v. Powers*, 48 Va. App. 113, 628 S.E.2d 546 (2006).
 - iv. Law of Florida, rather than that of Arizona, would be applied to determine whether alleged prenuptial agreement met formality requirements for enforceability, where document was executed in that state. *Victor v. Victor*, 177 Ariz. 231, 866 P.2d 899 (Ct. App. 1993).
 - b. Most significant relationship
 - i. Florida law, rather than New Jersey law, applied in determining validity of prenuptial agreement which was signed in New Jersey and, accordingly, agreement was valid regardless of nature or extent of premarital disclosure of assets. *Gordon v. Russell*, 561 So. 2d 603 (Fla. Dist. Ct. App. 1990).

- ii. Enforceability of premarital agreement is governed by law of state with most significant relationship to parties in subject matter; primary emphasis is placed on deciding which state has strongest interest in seeing its laws applied to the particular case. *Lewis v. Lewis*, 69 Haw. 497, 748 P.2d 1362 (1988)

- iii. In determination whether to apply law of Missouri or of sister state in interpreting premarital contract, if parties' agreement does not make an express choice as to which state's law governs interpretation of contract and dissolution of marriage occurs in a state other than sister state, the contractual contacts to be considered are: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties; contacts are to be evaluated according to their relative importance with respect to the particular issue. *Rivers v. Rivers*, 21 S.W.3d 117 (Mo. Ct. App. 2000). Missouri's contacts with parties' premarital agreement outweighed sister state's contacts, and, thus, law of Missouri would be applied in determining whether premarital agreement was valid and enforceable. *Id.*