

**Premarital, Postnuptial, and Cohabitation Agreements:**

**The Good, The Not-As-Good, and the Complicated**

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# Premarital Agreements

# Before the Initial Consultation

## Referral Sources. The typical client varies from former divorce clients, to children of current high net worth clients, to outside referrals. The one common denominator is that each has concluded – or someone has told them – that a premarital agreement is needed before getting married.

## Client Knowledge. The typical client usually knows very little about premarital agreements, so the first step of the representation (after clearing conflicts) is primarily educational:

### Broad Marital Property Definition. Many clients are surprised to learn that, without a premarital agreement, Indiana’s broad definition of “marital property” includes premarital property and inherited/gifted property.

### Estate Planning Tool. Most do not realize that a premarital agreement can be not just a “divorce planning” tool, but also an estate planning tool.

## Initial Letter. In the past, the initial contact with the client was at the consultation. Substantial time was spent on education. In 2005, we started sending an “initial letter” to the client ahead of the initial consultation. See sample, attached.

### Background on Law. Goal is to give the new client some background on Indiana law in the absence of a premarital agreement, whether a marriage ends by divorce or death.

### What a Premarital Agreement Can Do. And to provide some general background on a how premarital can (and cannot) modify those statutory frameworks

### Flexibility. And to underscore that a premarital agreement is not a “one size fits all” document. It is a contract, and like any other contract, it can and will be tailored to fit a specific couple’s circumstances and sense of fairness

## In our experience, the initial consultation with the client is much more productive if they have received and reviewed an initial letter.

# The Initial Consultation

## Review the Initial Letter. The initial consultation is typically started by reviewing the concepts set forth in the initial letter to ensure the client understands them.

## Develop Facts and Details. Then the current situation of both parties is discussed. The most common facts that need to be determined include:

### Wedding Date. If a wedding date has been set – be sure the wedding date gets put *onto your calendar* *with* *appropriate ticklers* until an agreement has been fully executed.

### Net Worth / Income. Approximate net worth and income of each party

### Net Worth Composition. Any notable factors about the composition of each party’s net worth (*e.g.*, names of businesses or other dominant assets)

### Prior Children / Relationships. Whether either party, but especially the client, has any children from a previous relationship and any legal obligations outstanding from that relationship (child support, property settlement payments, *etc*.)

### Future Children. Whether it is likely that the parties will have children in this marriage

### Anticipated Inheritances/Gifts. Either party’s anticipated future inheritances/gifts, including estimates on approximate size to the extent ascertainable

### Current and Future Domicile. Whether both parties are currently domiciled in Indiana and intend to remain in Indiana indefinitely; if the parties have reasonably definite plans to move out of state after the marriage, having the agreement drafted/reviewed by counsel in the other state should be considered and discussed

### Previously Discussed? Has the concept of a premarital agreement already been discussed between the client and the other party? If so, in what level of detail? Or, will the agreement come as a surprise to the other party?

### Opposing Counsel. Does the client expect the other party to retain counsel and, if so, whom? (Clients often find it counterintuitive that I prefer the other party have counsel, even if my client has to pay that expense – it ultimately makes for a stronger agreement.)

## Options for Type of Agreement. Once this background information is discussed, the client is usually presented with the two most common general types of premarital agreements that we draft:

### the “Title-Based” premarital agreement; and,

### the “Defined Marital Property” premarital agreement.

Each is discussed more, below.

## “Title-Based” Premarital Agreement

### Description. In a Title-Based premarital agreement, the document is drafted to provide that, upon the termination of the marriage, all property falls into one of three classifications – Husband’s Separate Property, Wife’s Separate Property, or Marital Property – based simply and solely on how the asset is titled at the time of termination. For example, no matter how or when acquired, a car that is titled in the Husband’s name will be Husband’s Separate Property, a bank account title in Wife’s name will be Wife’s Separate Property, and any jointly-titled property – say, a jointly-titled principle residence – will be Marital Property.

### Advantages.

#### Simplicity. Very simple and straightforward to implement. Determining which property goes to which spouse is merely an exercise of examining title.

#### No Asset Tracing. Requires no asset tracing; by contrast, a premarital agreement that is not Title-Based may define each of the parties’ respective premarital assets, including changes in form during the marriage, to be Separate Property. However, upon divorce, this can require the often complicated, sometimes expensive, and frequently impossible task of tracing what was owned at the date of marriage to assets that each party owns now.

### Disadvantages.

#### Conflict with Client Preferences. Can be inconsistent with the client’s planning preferences.

#### Potentially Unfair. Can be perceived by the client, or the other party, as unfair because it does not view the parties’ marriage as a joint financial venture. However, fairness concerns can be addressed through provisions that provide the less-propertied spouse to receive additional, supplemental transfers.

#### Care During Marriage. Requires care by the client during the marriage to comport financial affairs carefully: any Separate Property placed into joint title will immediately become Marital Property

#### Title-Based premarital agreements are typically encouraged, unless it is incompatible with planning intentions and client’s sense of fairness.

## “Defined Marital Property” Premarital Agreement

### Description. Basically a catch-all term to describe any premarital agreement that is not “title-based.” Which property shall be Husband’s Separate Property, Wife’s Separate Property, and Marital Property is carefully defined based upon a description other than title (*e.g.*, it was premarital, it was inherited/gifted, *etc*.)

### Advantages.

#### Flexibility. If drafted properly, can be extremely flexible

#### Fairness. Can address parties’ shared sense of fairness

### Disadvantages.

#### Requires Care in Drafting. Drafting the definitions of Separate Property and Marital Property requires great detail attention to detail and care.

#### Asset Tracing. Upon termination of the marriage, can require difficult, expensive, and sometimes impossible asset tracing (e.g., to trace premarital property forward to the property in existence at divorce).

#### Unintended Ambiguity in Definitions. Application of the terms of the document can be subject to unintended ambiguities or vagueness compared to the simplicity of a Title-Based agreement.

## Strategic Considerations for Substantive Terms

### Negotiating Tool. During the consultation, the client is advised that, in 95% of cases, a premarital agreement is more *a tool for negotiating leverage* than it is a literal recitation of each party’s expected rights.

### Expect Upward Negotiated Revisions. The client can expect that any terms in the original draft will be negotiated upward before it is signed. (Revisions based upon negotiation are a positive in terms of ending up with a stronger, more enforceable agreement.)

### Presume Agreement Will Be Challenged. Further, the client can expect, particularly in the event of a divorce, that the agreement will be challenged by the other party.

### Example. Therefore, suppose it is the client’s ultimate intention to pay his spouse $50,000 in the event of a divorce. In that case, one might recommend that the initial draft provide for a payment of only $10,000. This allows for the other side to negotiate that amount up to, say, $25,000 before the agreement is signed. Then, in the event of a divorce, the client can agree to give his spouse $50,000 as compromise on a challenge to the agreement – and the client’s original objective is cleverly accomplished.

### Don’t Draft Overly Lopsided Agreements. Avoid drafting any agreement that could leave one party with essentially all of the property and the other with little or none, particularly if they contemplate having a family. By providing for even a modest transfer of property to the less-propertied spouse, one achieves a stronger agreement by establishing additional consideration, perhaps removing the risk that a judge could find the agreement to be unconscionably lopsided.

### Consider Added Consideration. Another encouraged technique is that the agreement can provide, either upon marriage or shortly thereafter, that the client completes a transfer (*e.g*., $25,000) from the client’s Separate Property that becomes the spouse’s Separate Property. Once the transfer is completed, it is difficult for the spouse to later attack the validity and enforceability of the agreement (say, upon subsequent divorce), having accepted this benefit of the bargain – “you can’t have it both ways.”

### Be Mindful of Inflation. If an agreement provides for a sum certain in any of its term (*e.g*., property settlement, temporary spousal maintenance, *etc*.), that amount may be worth substantially less after, say, 20 years of marriage than it is at drafting. If this causes concern, consider some type of elevation provision to adjust the sum over time.

## Conclusion of the Initial Consultation

### Decide Upon Type of Agreement. By the end of the consultation, it is usually decided, even if tentatively, whether the client is better-suited with a Title-Based, or a Defined Marital Property agreement.

### Fee and Fee Agreement. The client is charged for time on the initial consultation at the customary hourly rate, and then leaves with a fee agreement if they decide to retain and move forward with an agreement.

### Retainer. Retainers vary from $1,500 to $3,500, depending upon the anticipated complexity of the case, client’s history with the firm, *etc*. Future work on the matter will be billed hourly, not on a flat fee.

## Initial Consultation Homework. At the end of the consultation, and if the client wishes to proceed, the client and I each have homework to do before we talk again:

### Client Homework: Unless the client already has a current financial declaration available, I provide blank form to complete, along with acquiring the last two years of tax returns. (If the client prefers and in the right cases, I will offer to work directly with the client’s accountant and financial advisor to acquire this information.) Once completed, these will all be tendered to opposing counsel with the initial draft.

### My Homework: I have enough information to assemble an initial draft premarital agreement.

# Drafting the Premarital Agreement

## “Title-Based” Premarital Agreement. Drafted to provide that, upon the termination of the marriage, property falls into each of the three classifications – Husband’s Separate Property, Wife’s Separate Property, or Marital Property – based simply and solely on how the asset is titled.

## Sample operative clauses are:

### Assets or Liabilities Titled in Wife’s Name. Notwithstanding any other provision of this Section, and except as expressly provided elsewhere in this Agreement, any and all assets or liabilities that are titled in Wife’s name, irrespective of how or when such asset or liability is or was acquired, shall be Wife’s Separate Property.

### With a mirror-image, corresponding provision for Husband:

### Assets or Liabilities Titled in Husband’s Name. Notwithstanding any other provision of this Section, and except as expressly provided elsewhere in this Agreement, any and all assets or liabilities that are titled in Husband’s name, irrespective of how or when such asset or liability is or was acquired, shall be Husband’s Separate Property.

### And, finally, to address what will constitute Marital Property:

#### Jointly-Titled Property Not Otherwise Defined as Separate Property. Property (or liabilities) not falling under the definition of either Wife’s Separate Property or Husband’s Separate Property and which is owned by the parties after said contemplated marriage as joint tenants, tenants by the entireties, or jointly and to the survivor of them shall be Marital Property.

#### Note: For a belts-and-suspenders drafting approach, Title-Based agreements include additional (and essentially redundant) provisions that various other descriptions of property are also Separate Property (*e.g*., specific business or other property listed by name, premarital property; inherited/gifted property; growth, income, and change of form on Separate Property, *etc*.)

## “Defined Marital Property” Premarital Agreement. Drafted to define which property shall be Husband’s Separate Property, Wife’s Separate Property, and Marital Property based upon a description other than title (e.g., it was premarital, it was inherited/gifted, etc.)

### Common operative clauses include:

### Husband’s Separate Property. For purposes of this Agreement, “Husband’s Separate Property” means all of the following:

### Premarital Property. Any and all assets (and liabilities) Husband currently owns (and is obligated for) on the date of marriage, including those set forth in Exhibit "A"; and

### *[Here, Exhibit “A” is the Husband’s financial disclosure that is attached to the agreement. Note that the test for whether property is Separate Property is whether Husband owned the property on the date of marriage, not whether it was listed on the financial disclosure. While inadvertent omission of property from the financial disclosure should be avoided, this language helps to avoid a problem in the event omission occurs.]*

### Income During the Marriage. Any and all present and future earnings and income (whether earned, unearned, or otherwise) arising from Husband’s employment, business endeavors, or otherwise, including all future employment and business endeavors to occur *during the marriage*; and

### *[This is an optional provision, and one that is frequently not included because of a client’s wish that all income after the date of marriage will be Marital Property.]*

### Gifts and Inheritances. Any and all property received by Husband (including *during the marriage*) as a gift or inheritance, or as a result of any interest by Husband in any trust, and any income, dividends, increase or decrease in value (including any increases as the result of the pay down of any liability associated with any asset), accumulations, additions, accretions, acquisitions, purchases, contributions, or distributions of any kind arising as a result of his receipt of such gift, inheritance, or interest in any trust; provided, however, that for purposes of this subsection, no property received by Husband from Wife shall be considered a “gift” absent both: (a) clear and convincing evidence that an *inter vivos* gift from Wife to Husband occurred; and (b) the gifted property became legally titled in Husband’s name, and free of any title with Wife; and

### *[Technically, this provision is also optional, but it is included in nearly all of my agreements because of the common planning desire to make certain that future gifts/inheritances that are received during the marriage become Separate Property.]*

### Liabilities. Any and all debts, liabilities, taxes or other obligations owed or incurred by Husband individually prior to the marriage (whether they become payable prior to or after the contemplated marriage of the parties) and debts, liabilities, taxes or other obligations owed or incurred by Husband individually *during the marriage* of the parties; and

### *[A provision that addresses liabilities incurred during the marriage is frequently overlooked by practitioners. I have seen many premarital agreements that carefully defined all of the assets as Separate Property, but then are silent as to liabilities, leading to a potential interpretation that all liabilities are Marital Property. This could lead to a very undesirable unintended consequence if the client’s spouse takes on substantial credit card or other debt during the marriage, leaving the client responsible for a portion of it in the event of a later divorce.]*

### Professional Licenses, Practices, and Degrees. Any and all rights or ownership in a professional license or practice, educational degrees or designations (whether acquired before or after the date of marriage); and

### *[Indiana law does not view licenses and degrees as marital property. However, for avoidance of doubt, I typically include this provision, especially if the client is a physician or other professional. When drafting a premarital agreement, it is inadvisable to approach the task as based upon an assumption that the client will be getting divorced (a) in Indiana; and (2) pursuant to the laws as they exist presently. The client could relocate in the future to a state that considers a professional degree to be a marital asset, or Indiana could change the law on this point. Good drafting requires attention to potential changes in circumstances.]*

### Retirement Plans and Savings. Any and all interest in any employee benefits plans, pension plans (whether defined benefit, defined contribution, or otherwise), retirement plans, deferred compensation plans, individual retirement accounts, stock plans, stock option plans, profit sharing plans or other such benefits or rights he currently owns or which he acquires *during the marriage*; and

### *[Please note that the underlined language in the above can be included, or omitted, depending upon the wishes of the client and whether he wants his retirement interests that accrue during the marriage to be his Separate Property, or to be Marital Property. If the client wants retirement interests that accrue after the date of marriage to be considered Marital Property, this presents a new challenge in that the client’s, say, 401(k) account could end up having both Separate Property that accrued prior to marriage, and Marital Property that accrued after the date of marriage. In that instance, it is advisable to also include additional language such as: “so as to require, if necessary, an accounting to determine that portion of a particular retirement account that is attributable to premarital acquisition (and growth thereon, including during the marriage) versus that portion of a particular retirement account that is attributable to acquisition during the marriage (and growth thereon).” This can present such a complex and expensive analysis in the event of a divorce, particularly for a defined benefit pension, that I strongly encourage clients – even those who want the finances that are acquired during the marriage to be considered Marital Property as part of the parties’ joint venture – to make an exception for retirement interests.]*

### Trust Property. Any and all property that is Husband’s Separate Property and that is placed in any revocable trust created by Husband shall continue to be Husband’s Separate Property, and transfers of the property to any such trust along with property distributed from any such trust of any kind, whether income or principal, shall continue to be Husband’s Separate Property; and

### *[The purpose of this provision is, for avoidance of doubt, to clarify that Separate Property will not lose its classification merely from being placed into a revocable trust.]*

### Growth of and Income on Husband’s Separate Property. Any and all income, dividends, increase or decrease in value (including any increases as the result of the pay down of a liability associated with any asset), accumulations, additions, accretions, acquisitions, purchases, contributions, or distributions of any kind arising as a result of his ownership of any of Husband’s Separate Property; and

### *[It is remarkable how frequently I review otherwise well-drafted premarital agreements which neglect to include this provision. A premarital agreement may carefully and unambiguously classify a client’s premarital business as Husband’s Separate Property. However, suppose that during the marriage, the client’s business appreciates from being worth $200,000 at marriage (that was the amount assigned to it on Husband’s financial disclosure) to $3,000,000 at divorce five years later. In the absence of the growth provision above, Wife’s counsel will have a sobering argument that the premarital agreement protected only $200,000 of value, and the $2.8M of marital appreciation is Marital Property -- subject to division. Similarly, suppose this hypothetical business also generated $1,000,000 of unearned revenue for Husband during the marriage; in the absence of this provision, Wife’s counsel again has a compelling argument that the premarital agreement protected only Husband’s ownership interest in the business as his Separate Property, and that the income thrown off by the business during the marriage is Marital Property subject to division at divorce.]*

### Change of Form of Husband’s Separate Property. Any and all proceeds from the sale, trade, or leveraging of Husband’s Separate Property, any property purchased with such proceeds, and any property purchased with money that is Husband’s Separate Property shall be Husband’s Separate Property, irrespective of whether such transactions occur before or after the date of the parties’ marriage.

### *[This is similar provision, designed to address not growth and income, but change of form. Our clients do not generally lead static financial lives, and over the course of years of marriage, property will be sold and new property purchased with the proceeds, perhaps many times over. Keeping with the above example, suppose that during the marriage Husband sold his Separate Property business for $3,000,000 and used the proceeds to buy a $500,000 condo in Florida, and put the remaining after-tax proceeds into a brokerage account. In the absence of a change-of-form provision, Wife’s counsel has an argument that only Husband’s business was protected as his Separate Property, and once there was a change of form caused by the sale, the resulting proceeds and property acquired with those proceeds became Marital Property. I do not mean to suggest that, in the absence of this provision, Wife has a slam-dunk argument on this point; however, Wife’s posture on this point will warrant the attention of Husband’s divorce counsel, and may well lead Husband to pay out more as a compromise.]*

## Corresponding Separate Property Provisions for Other Spouse. Once the client’s Separate Property definition section is completed, we generate a corresponding section for the opposing party, using language that usually – but not always – mirrors the Separate Property section of my client

## Marital Property Definition. Finally, it is good practice to complete the process by developing a third and final section that defines Marital Property.

### Commonly Seen Provision. Many premarital agreements will define Marital Property with simple language that essentially says “any property not defined as Husband’s Separate Property or Wife’s Separate Property shall be considered Marital Property.” While this may be perfectly acceptable, the disadvantage of this approach is that it arguably creates a presumption that all property interests are Marital Property, unless clearly defined to be one of the parties’ Separate Property.

### Better Option. For this reason, it is preferable to create a separate definition section for Marital Property, such as the following:

### Marital Property. For purposes of this Agreement, “Marital Property” shall mean:

### Jointly-Titled Property Not Otherwise Defined as Separate Property. Property (or liabilities) not falling under the definition of either Husband’s Separate Property or Wife’s Separate Property and which is owned by the parties after said contemplated marriage as joint tenants, tenants by the entireties, or jointly and to the survivor of them; and

### *[Note that this definition leaves open the possibility that property could be jointly-titled, yet not necessarily Marital Property. I have used this provision most commonly, for example, when the parties purchase a residence and place it into joint title, yet they made unequal contributions to the purchase. In that case, the Separate Property sections of the agreement can be developed to reflect that, even though the residence is jointly titled, the equity in the property is each party’s respective Separate Property, pro rata based upon his/her contribution to the purchase.]*

### Income During the Marriage. Any and all income (other than unearned income, whether capital gains, dividends, distributions from retirement assets, or otherwise, that is attributable to the ownership of Wife’s Separate Property or Husband’s Separate Property) received by Wife or Husband *during the marriage*; and

### *[This is an optional provision that is included when the client wants to protect income generated by Separate Property investments, but wants to consider earned income during the marriage as Marital Property. This is a common provision in cases where the client is employed and earns a wage, yet anticipates a substantial inheritance from family at some point; this language allows the wage income to become Marital Property, while still protecting the income that the future inheritance may generate.]*

### Retirement Savings During the Marriage. Any and all interest in any employee benefits plans, pension plans (whether defined benefit, defined contribution, or otherwise), retirement plans, deferred compensation plans, individual retirement accounts, stock plans, stock option plans, profit sharing plans or other such benefits or rights acquired by either party *during the marriage*, the parties acknowledging that this provision shall be harmonized with [subsection (f), above, defining retirement savings as of the date of marriage to be Separate Property] so as to require, if necessary, an accounting to determine that portion of a particular retirement account that is attributable to premarital acquisition (and growth thereon, including *during the marriage*) versus that portion of a particular retirement account that is attributable to acquisition *during the marriage* (and growth thereon).

### *[Again, my practice is to encourage the client that, for simplicity, all retirement interests should be considered Separate Property. However, if the client insists, this provision can be used to define how retirement interests acquired during the marriage can be Marital Property, distinct from the retirement interests accrued through the date of marriage that will remain Separate Property.]*

### Presumption. All property (and debts) owned by the parties individually shall be presumed to be Husband’s Separate Property or Wife’s Separate Property, absent clear and convincing evidence that the property is Marital Property.

### *[The intention with this language is to reverse the burden of proof that exists in typical premarital agreement litigation, whereby property is presumed to be Marital Property, unless and until one of the parties demonstrates otherwise.]*

### Thus, all three property classifications contemplated under a premarital agreement – Husband’s Separate Property, Wife’s Separate Property, and Marital Property – is complete.

## Application Language. Having defined Separate Property and Marital Property, the next major sections address the parties’ respective rights in the event the marriage terminates by either death, or otherwise.

### “At Death.” I do not always include a “Termination by Death” section in my premarital agreements. Though I always recommend it, some clients – especially clients with no prior children – will prefer that their premarital agreement apply only in the event of divorce. In most cases, however, language is included for the death contingency, as follows:

## Wife’s Rights Upon Husband’s Death. If Husband shall die leaving Bride as his surviving spouse, Bride agrees that she will make no claim to any part of his estate as such surviving spouse other than as Husband may have provided for in his Last Will and Testament or other estate planning documents. Bride waives her rights, if any, to serve as guardian of Husband or his estate in the event of Husband’s death or physical or mental incapacitation. By signing this Agreement, Bride waives and relinquishes all statutory rights to real estate to which Husband may hold title in his sole name at the date of his death, and all claims and legal rights to share in his personal estate as surviving spouse, heir at law, or otherwise, including, but not limited to, the survivor's allowance, homestead rights, the surviving spouse's distributable share in the event of Husband's intestacy, the right to contest the will, the right of election to take against the will, and the right to serve as personal representative, and excepting from such waiver and relinquishment only those rights to which she may be entitled as a beneficiary under Husband's Last Will and Testament or other estate planning documents, if she be so designated, and rights she may have to receive social security benefits and related payments as Husband's surviving widow. This paragraph shall not affect the right of either party to succeed to the sole ownership of any asset held by the parties together as joint tenants, tenants by the entirety, or joint tenants with rights of survivorship.

## A corresponding provision for Husband’s rights upon Wife’s death is also included.

### “At Death” Tempering Language. Frequently, either the client, the other party, or the other party’s counsel, will want to ensure that there is some minimum property to which the other party is entitled in the event the marriage terminates as a result of my client’s death. In such instances, the following provision is included:

## Husband’s Estate Planning. Notwithstanding Wife’s waivers herein, Husband shall establish and maintain an estate plan that provides that, in the event the parties’ marriage is terminated as a result of Husband’s death, Wife shall receive upon Husband’s death: (i) all of the parties’ Marital Property; and (ii) additional property and/or cash, which Husband may satisfy in whole or in part through life insurance, with an aggregate fair market value of not less than $\_\_\_\_\_\_\_\_\_\_\_\_\_\_. If for any reason Husband fails to have such an estate plan in place at the time of his death, Wife shall have the right to claim from Husband’s estate the amount that Wife would have received had Husband complied with this provision. This estate planning requirement shall be terminated once either party files an action to dissolve the marriage or for legal separation and will only be revived upon the completed, joint dismissal of that action and the continuation of the marriage.

### ERISA Waiver. Finally, the following ERISA waiver language is included:

## Employee Plans and Employee Benefit Rights. Each party hereto understands that the other party may want to dispose of their respective retirement benefits to a person or entity (specifically including charity) other than the other party hereto but each also understands that, at least with respect to qualified retirement plan benefits, each will be entitled to the other’s retirement benefits to some extent pursuant to federal law. The parties hereto agree to execute any and all documents required by the laws applicable to these plans and, if applicable, by the plan administrators (a) to relinquish any rights each might have in the retirement benefits of the other, including, but not limited to, the right to receive a survivor annuity in the event of the death of the other party, and (b) to permit the other party hereto to name a person or persons of his or her choice as the recipient or recipients of these benefits.

* + 1. Waiver and Release of Benefits. Except as may be otherwise provided herein, each party (as “Releasee”) hereby elects, and the other party (as “Releasor”) hereby consents to, a waiver and release of any and all benefits of the Releasor, including, without limitation, the qualified joint and survivor annuity benefit form of benefit and the qualified pre‑retirement survivor annuity form of benefit under all pension, retirement, death benefit, stock bonus, or profit‑sharing plans, systems, or trusts (hereinafter collectively called “Employee Plans”) of which the Releasee is, or may become, a participant, beneficiary, or member. This waiver and release is meant, without limitation, as a waiver pursuant to Internal Revenue Code Section 417(a). If requested, the Releasor shall consent in writing, in any form requested by the Releasee, to any such election. The spousal consent of the Releasor set forth herein is irrevocable. Each party acknowledges that he or she has received an explanation of a qualified pre‑retirement survivor annuity in accordance with the Internal Revenue Section 417(a)(3)(b) and that the effect of this consent to the Releasee’s election is to deny Releasor any right, interest, or annuity in or from the Releasee’s benefits under any employee benefit plan, now or in the future. Except as otherwise provided herein, the Releasor acknowledges and hereby consents to the Releasee’s election that upon the Releasee’s death all death benefits under any employee plan of the Releasee will be paid to such person as the Releasee may have designated at any time before the execution of this Agreement or may designate from time to time hereafter, in Releasee’s sole and unfettered discretion. If the Releasor shall receive any part of or benefits from the Releasee’s account or accrued benefit in any employee plan, other than pursuant to a beneficiary designation executed after the date hereof by the Releasee which designation expressly names the Releasor as a beneficiary, the Releasor shall promptly turn same over to the Releasee (or if the Releasee is not then living, to his or her designated beneficiaries under said employee plan, if any, or if there is no designated beneficiary, to the Releasee’s estate).
    2. Spousal Consent. The parties intend that this Agreement be accepted as a spousal consent by each of them as Releasor to a waiver of a qualified pre‑retirement survivor annuity pursuant to Internal Revenue Code Section 417(a). The parties understand that certain laws and regulations [Internal Revenue Code § 417(a) and Treasury Regulation § 1.401(a)‑20] require that, in order to be considered effective, the waivers and releases contained in this Article must:

(1) Be consented to by a spouse;

(2) Designate a beneficiary other than the spouse; and,

1. Acknowledge the effect of the waiver for the spouse.

In order to make the waivers and releases contained in this Article effective, the parties agree that, within a reasonable period of time after their marriage ceremony (and no later than thirty (30) days after the later of their marriage or, with respect to any plan in which they commence to participate after their marriage, the date on which they commence to participate in such plan), they will sign a separate document which contains the waivers, releases, and acknowledgments set forth in this Article but, in any event, such waivers shall be signed upon request, even if subsequently thereto, including after a petition for dissolution of marriage is on file.

### Termination of the Marriage “Other Than By Death.” To define the parties’ respective rights, including to property, the following sections are used. See comments in brackets.

## Husband’s Rights.

## Property Division. If the intended marriage shall be terminated by a decree of dissolution, divorce, or there is a legal separation or annulment, Husband agrees in the division and disposition of the matter not to seek, demand or accept any portion or share of Wife’s Separate Property. Husband shall be entitled to Husband’s Separate Property and one-half (1/2) of the net Marital Property.

## [I am frequently surprised that even many excellent attorneys draft agreements that are technically silent about how Marital Property should be divided. I think it is important to include a specific provision that each party is to receive ½ of the Marital Property. If this term is left silent, the party who receives less Separate Property is poised to go to the divorce court and argue that he or she should receive more than half of the Marital Property in light of the superior economic circumstances of the other party.]

## Legal Obligation of Support or Maintenance.

## Preliminary/Temporary Spousal Support, Attorneys’ Fees, and Litigation Related Expenses. Husband hereby waives any right to receive any temporary spousal maintenance or support, alimony, preliminary attorneys’ fees, litigation expenses, or the fees of any expert, including but not limited to, appraisers, accountants, or child custody evaluators.

## Final Spousal Support, Attorneys’ Fees and Expenses. Husband hereby waives any right to receive any permanent spousal maintenance or support, alimony, final attorneys’ fees, litigation expenses, appraisers’ fees, accountants’ fees, child custody evaluators’ fees, fees related to any appeal, incapacity-based maintenance, and all other types of alimony, maintenance, and spousal support from Wife, unless expressly provided under this Agreement. The parties, however, do not intend this Agreement to limit the Court's authority to order child support payments for the parties' child(ren) in the event of a dissolution of their marriage or legal separation

## [These waivers are largely optional, but I encourage including them. Or, they can be revised to work as caps (e.g., temporary spousal maintenance of up to $2,000 per month for up to 6 months, or up to $5,000 towards attorney fees, etc.). Some attorneys contend that these waivers are unenforceable as against public policy, but there is no current case law to support that proposition, provided the spouse is not left destitute or on public assistance.]

## I then include corresponding provisions for the Wife’s rights in the event of divorce, which may or may not be identical depending upon the client’s wishes.

### “Other Than Death” Tempering Language. However an agreement defines Separate Property and Marital Property, many clients conclude that leaving each of the parties their respective Separate Property, and dividing Marital Property equally, will produce an unfair result. This lopsided division can be tempered in various ways, but my preference is a with a “laddered property settlement” provision, such as:

Supplemental Property Payment.

(i) Amount. In the event of a dissolution of the parties’ marriage, Husband shall pay to Wife, subject to the prospective caps and payment terms herein, as property settlement and not as alimony, the following cash sum, based upon the applicable length of the marriage (“Supplemental Property Payment”):

(a) Less than or equal to two (2) years: No payment due.

(b) More than two (2) years, but less than or equal to five (5) years: One Hundred Thousand Dollars ($100,000).

(c) More than five (5) years, but less than or equal to ten (10) years: Two Hundred Thousand Dollars ($200,000).

(d) More than ten (10) years, but less than or equal to twenty (20) years: Five Hundred Thousand Dollars ($500,000).

(e) More than twenty (20) years: One Million Dollars ($1,000,000).

For purposes of the above calculation, the duration of the parties’ marriage shall be measured from the date of marriage through until the date that either party files a petition for dissolution of marriage that subsequently results the termination of the parties’ marriage. For avoidance of doubt, the above amounts are not intended to be cumulative (that is, for example, if there were a dissolution of the parties’ marriage after seven years, Husband would owe Wife a total of $200,000 under subsection (c)).

(ii) Cap/Limitations. Notwithstanding the foregoing, Husband’s obligation to make the above Supplemental Property Payment to Wife shall be subject to the following caps and/or limitations:

(A) No Supplemental Property Payment shall be due from Husband to Wife in the event that, at the time a petition for dissolution of marriage is filed by either party, the net value of Wife’s Separate Property exceeds the net value of Husband’s Separate Property.

(B) The amount of the Supplemental Property Payment from Husband to Wife shall be the lesser of: (a) the amount of the payment set forth in the schedule in Section (i); and (b) an amount equal to forty percent (40%) of the net value of Husband’s Separate Property at the time a petition for dissolution of marriage is filed by either party.

These terms can be adjusted in infinite variations for amount, length, etc., to increase the sense of fairness.

## Miscellaneous Good (But Uncommon) Provisions

### Cohabitation Waiver. Many clients (and attorneys) are surprised to learn that, despite being a relatively conservative state, Indiana case law is quite receptive to civil claims for cohabitation. Since many couples cohabitate prior to marriage, consider including a cohabitation waiver in the premarital agreement to extinguish any related claims:

### Waiver of Claims. Wife and Husband, in entering into this Agreement, each forever and expressly waives any claim that he or she may have, or may have had, against the other by virtue of any period of cohabitation, or contributions or efforts that each might have made for the benefit of the other, prior to the date of their intended marriage.

### The Quick Marriage. I have had clients, usually embarking upon a second marriage, who do not plan any formal wedding, and simply intend on going to the courthouse to wed as soon as the premarital agreement is executed. Viewed later, these circumstances could appear on paper as though the wedding date had been planned in advance, and the premarital agreement was signed only a day or two before the wedding. To avoid that appearance, consider the following provision:

### Timing of Marriage. As of the date of execution of this Agreement, Husband and Wife have not yet made final plans for the particulars of their intended marriage, including the intended date thereof, pending completion of execution of this Agreement. However, following the execution of this Agreement, Husband and Wife may elect to marry immediately thereafter; if so, the parties agree and acknowledge that, since the particulars of their intended marriage were not yet decided as of execution of this Agreement, the fact that there may have been close proximity in the timing of the execution of this Agreement and the parties' subsequent marriage does not give rise to an inference of any pressure on either party to sign this Agreement; each of them is entering into this Agreement freely, voluntarily, and without any pressure on him or her to do so.

# Execution of the Premarital Agreement

## Avoid Any Argument of Pressure. Premarital agreements, like contracts generally, can be collaterally attacked because of duress or other unconscionable circumstances surrounding execution.

## Where to Sign? My preference is that when the other party is signing the agreement, that she do so at her counsel’s office and without my client present. Even when the other party is unrepresented, execution of the document by the other party at my office is strongly discouraged.

## Notary. Notary is not required under Indiana law, but it is a prudent safeguard

## Videotape. If there are serious concerns about the circumstances of execution, consider videotaping.

## Multiple Originals. Execute a sufficient number of originals so that the client, you, the spouse, and the spouse’s counsel each receive an original to keep.

# After the Premarital Agreement is Signed

## Requirements of Effective Premarital Agreement Planning. Solid premarital agreement planning involves two distinct components:

### Executing a valid and enforceable premarital agreement, and

### Less frequently considered, though no less important: the client needs to comport his financial affairs *after the marriage* in a manner that is consistent with the terms of the premarital agreement.

## Closing Letter. We send a closing letter to premarital agreement clients, basically to serve as a reminder not to commingle property – unless they intend it to become Marital Property – to be sure the client’s estate planning counsel, financial advisor, accountant, etc., are all aware of the premarital agreement so that they do not make any planning recommendations that undercut the intent of the premarital agreement. See sample closing letter, enclosed.

## Save All Ancillary Documents. When premarital agreements are litigated, they typically present without any other (potentially helpful) documentation that arose from its negotiation and execution. To address this, we take all related correspondence, prior drafts, e-mails, or other file materials and burn them onto a CD-ROM for the client and for internal retention.

## Checklist. Internally, we work from a checklist as we close the file. See sample checklist, enclosed.

## File Retention. Finally, most legal files do not need to be retained for more than a few years after the file is closed. However, given the inherent nature of premarital agreements – they may be called upon and litigated decades after the file is closed, and you as the drafter may be called as a witness – the prudent practice is to keep premarital agreement files for as long as possible.

## Postnuptial Agreements

1. Statutory and Case Law Distinction from Premarital Agreements. In Indiana, a postnuptial agreement – that is, a contract to determine property rights upon the termination of a marriage that is entered into after the date of marriage – is not specifically contemplated by statute.
   1. Supporting Case Law. In Indiana, the only meaningful legal authority on the validity of postnuptial agreements is the *Flansburg* case (*see Flansburg v. Flansburg*, 581 N.E.2d 430 (Ind. Ct. App. 1991)). *Flansburg* stands for the narrow proposition that a postnuptial agreement is generally valid and enforceable *if entered into as part of the dismissal of a then-pending divorce matter*. Quite rationally, the Indiana Court of Appeals reasoned that the decision to dismiss a pending divorce and remain married is similar to a decision to marry in the first place.
   2. Risky Area of Practice. Outside of a *Flansburg*-type situation, drafting a postnuptial agreement for a client is a risky proposition, and should be undertaken only thoughtfully and with extensive discussion and concurrence with the client about the risks of invalidity or unenforceability of the agreement.
   3. CYA Letter. Because of the risks associated with postnuptial agreements, a letter to the client memorializing your concerns about risk is a best practice. This is particularly true if the client is deliberating between getting a divorce, or continuing the marriage with a postnuptial agreement. If the client elects the postnuptial agreement, has a substantial improvement in finances thereafter, but the postnuptial agreement later proves ineffective and protecting that increase in wealth, the client is in a position to argue that he should have sought a divorce and your counsel in the direction of a postnuptial agreement was misguided.
   4. Best Used in “No Downside” Cases. Typically, we will prepare postnuptial agreements only in cases where the client does not presently consider divorce to be an option (e.g., unhappy marriage, but intent on staying together for the children). In these cases, there is no material downside risk presented from a postnuptial agreement, because the client is no worse off with a postnuptial agreement that later proves invalid or unenforceable than if the client had not entered into the postnuptial agreement and stayed married.
2. Drafting and Execution Procedures. Once it is determined that drafting a postnuptial agreement is appropriate, the practices and procedures for drafting essentially mirror those of a premarital agreement. (Since there are no statutory guidelines for the requirements of a valid postnuptial agreement, following the best practices for a premarital agreement seems the obvious choice.)
   1. Be Careful of Inadvertently Drafting a “*Pond* Agreement.” Both premarital agreements and postnuptial agreements are premised upon the parties’ mutual expectation that the marriage will continue indefinitely thereafter, and that neither party considers a divorce to be imminent or unavoidable. However, if this is not true in a given case, and/or if the agreement entered into the parties fails to recite as much, the agreement could be construed in a subsequent divorce action as being a divorce settlement agreement, and not a postnuptial agreement. This distinction is significant because, in general, valid premarital and postnuptial agreements must be enforced precisely as written, whereas a divorce court has the authority – indeed, the duty – to disregard or reform provisions of a divorce settlement agreement that are inequitable, an area of law that has grown in abundance since *Pond* was decided. In *Pond*, the parties sign an agreement while Husband’s petition for legal separation was pending. The agreement outlined the division of assets, which the parties began immediately dividing. Husband’s attorney began preparing a QDRO. Wife subsequently filed to convert the matter to a dissolution. The agreement also contained a fee-shifting provision, so at issue in the divorce action was whether the agreement was a *Flansburg-*type postnuptial agreement that must be enforced by the divorce court as written, or whether the agreement was a divorce settlement agreement that the Court could accept or reject, in whole or in part, pursuant to statute. Ultimately, the Indiana Supreme Court concluded that the agreement was a divorce settlement agreement, but that the fee-shifting provision nevertheless did not arise from fraud, duress, or other inequity that warranted the divorce Court’s decision to set it aside. *See* *Pond v. Pond*, 700 N.E.2d 1130 (Ind. 1998).
   2. Consider Drafting the Agreement to Operate Prospectively Only. This is a purely speculative observation, but a Court might be more receptive to the enforcement of a postnuptial agreement if its framework operates to consider all of the parties’ property interests that exist at the date the postnuptial agreement is signed to be Marital Property – subject to future equal division in the event of divorce – and then creates carve-outs for Separate Property only as to certain property acquired by each party after the postnuptial agreement is executed. Arguably, this is a very fair agreement because both spouses are left in a very similar situation as of the date of execution had they simply divorced at that time, and the postnuptial agreement only alters property rights that accrue thereafter. This type of framework is not always practical (e.g., in a case where one party had substantial premarital property), but this framework should be considered and discussed with the client.
   3. Consider Added and Immediate Consideration. As noted above as to premarital agreements, it is advantageous that an agreement provide, either upon execution or shortly thereafter, that the client completes a transfer (*e.g*., $25,000) from the client’s Separate Property that becomes the spouse’s Separate Property. Once the transfer is completed, it is difficult for the spouse to later attack the validity and enforceability of the agreement (say, upon subsequent divorce), having accepted this benefit of the bargain – “you can’t have it both ways.” This type of added consideration provision may prove especially useful in the postnuptial agreement context, since a postnuptial agreement inherently lacks the consideration that may be considered essential in a premarital agreement: the decision to marry.

***Cohabitation Agreements***

## A. Introduction

Increasingly, adults are entering into informal "living together" arrangements. According to the U.S. census information from 2000 there were 5.5 million couples living together but not married. This number is an increase from 3.2 million in 1990. These people were defined as unmarried, living together and having a close personal relationship. Of the 5.5 million, 4.9 million were opposite sex relationships and the balance was same sex relationships. Unmarried cohabitant relationships are typically more concentrated in metropolitan areas. However, Alaska, Maine, Vermont, District of Columbia, and Nevada have the highest percentage of unmarried partner households. Utah has the lowest. The Midwest generally has a low percentage but Indiana has a high percentage for the Midwest (9.1 percent).

Live-in companions can incur legal obligations or attain entitlements not contemplated by the parties. Many people, even many attorneys, are surprised to learn that Indiana has relatively well-developed case law that supports potential causes of actions between parties when their cohabitation concludes.

1. **Legal Background**

In 1958 common law marriage was abolished in Indiana by I.C.§31-11-8-5 for any relationship started after January 1, 1958. This change may have been implemented to avoid the probate issues that were presented when a cohabitant claimed a marriage existed because the parties had held themselves out to be married, and then sued for part of an estate from the children of his or her deceased “spouse.”

More recently the Supreme Court of Indiana has addressed the issue of oral cohabitation agreements. See *Brown v. Branch* 758 N.E.2d 48 (Ind. 2001). This case applies the Statute of Frauds to oral cohabitation agreements and appears to disapprove of oral cohabitation contracts, with limited exceptions. The Supreme Court appears to be informing the legal community and public that these contracts need to be in writing. Cohabitants should be made aware that there is not a statute governing cohabitation, and that individuals need to address their property rights in writing. The *Brown* case may be a call to the legislature to address Indiana’s lack of legislation in this area. It is quite possible that the legislature will not deal with it in an attempt to promote marriage or to not insinuate that Indiana promotes cohabitation, whether or not it is a same or different sex relationship.

1. **Breach of Contract/Unjust Enrichment**

Contractual obligations are being applied with increasing frequency to couples who have decided not to enter into formal marriage, but nevertheless conduct themselves in a fashion similar to that of married persons. Indiana cases indicate formerly cohabitating parties may recover under legal theories such as breach of contract and/or equitable theories such as unjust enrichment.

In *Bright v. Kuehl*, 650 N.E.2d 311 (Ind. Ct. App. 1995), the Indiana Court of Appeals addressed a case involving a dispute arising between a formerly cohabiting unmarried couple. The Court of Appeals held, as a matter of first impression, that a party can seek relief based upon contributions during cohabitation without subsequent marriage based on a showing of an express contract or viable equitable theory such as implied contract or unjust enrichment. Id. The court stated that one who cohabitates with another without a subsequent marriage is entitled to relief based upon contributions during cohabitation upon a showing of express contract or viable equitable theory such as implied contract or unjust enrichment. Id. The court stated that to recover under a theory of implied contract, a plaintiff is usually required to establish that the defendant impliedly or expressly requested the benefits conferred. Id. The court further noted that to prevail on a claim for unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on a defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust. Id.

In *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. Ct. App. 1980), a former wife sued her former husband for one-half of the assets that accumulated during their period of cohabitation after the divorce. The trial court awarded the former wife a share of the property acquired by the parties during their cohabitation. On appeal, the former husband argued that the cause of action presented an unenforceable claim in Indiana. He contended that claims by non-married cohabitants were against public policy in Indiana because common law marriages were prohibited by statute. The Indiana Court of Appeals disagreed. The court expressly stated that granting the petitioner relief was not against the public policy of Indiana and did not in any way impinge upon the legislature's prohibition of common law marriages. The Glasgo court concluded:

To apply the traditional rationale denying recovery to one party in cases where contracts are held to be void simply because illegal sexual relations are posited as consideration for the bargain is unfair, unjust, and unduly harsh. Such unnecessary results probably do more to discredit the legal system in the eyes of those who learn of the facts of the case than to strengthen the institution of marriage or the moral fiber of our society. To deny recovery to one party in such a relationship is in essence to unjustly enrich the other.

Id. at 1327. The *Glasgo* court noted that cohabitation does not automatically give rise to the presumed intention of shared property rights between the parties and recovery for parties seeking relief would be based only upon legally viable, contractual and/or equitable grounds which the parties could establish according to their own particular circumstances. Id. at 1331-32.

In *Chestnut v. Chestnut*, 499 N.E.2d 783 (Ind. Ct. App. 1986), the Indiana Court of Appeals approved the rationale in *Glasgo*, affirming the trial court's decision to include the wife's contributions during premarital cohabitation – before they later wed -- in the distribution of marital property upon marriage dissolution. The court noted that it would be against public policy to ignore the wife's contributions during the period prior to marriage since she and her partner eventually married. Id. at 787.

*Turner v. Freed* 792 N.E.2d 947 (Ind. Ct. App. 2003). The parties were in a cohabitation. Freed became pregnant and moved out. Paternity was established and Turner paid support. About a year later the parties reconciled and moved back in together. They lived together for about eight years. Freed did almost all of the cooking, cleaning and laundry. She also cared for Turner’s child from a prior marriage. She made some money delivering newspapers and used some of that money to buy groceries, cleaning supplies and clothes. Turner had purchased a home in which the parties lived but it was titled solely in his name.

Freed filed a “Petition for Palimony” which was consolidated with the original paternity action. Turner was ordered to pay for a business evaluation. The trial court found that $108,000 in assets were accumulated during the cohabitation. Freed was awarded $18,000 based upon Turner receiving substantial benefit from Freed’s homemaking and housekeeping responsibilities. Freed did benefit from Turner’s economic contribution to the relationship, but he would have been unjustly enriched if he was allowed to retain all of the assets in his name. Freed’s services provided were sufficient to support an award to her. The Court of Appeals reversed the award of the cost of the business appraisal. The dissolution statute does not apply and there is no provision in the paternity statute for such an award.

*Putz v. Allie,* 785 N.E2d 577 (Ind. Ct. App. 2003). After an eleven year cohabitation the parties ended their relationship. They parted ways by entering into a “Settlement Agreement” that provided for $40,000 in installment payments to Allie, provided her health insurance and car payments for one year, and paid off three charge accounts in her name. The agreement stated that the parties had commingled funds and contributed financially and emotionally to the betterment of the parties. Allie also contributed time, effort and funds to the business, real estate and asset acquisition. Putz made payments until he was told the agreement was not enforceable. Allie sued to enforce the contract. Putz claimed the contract was invalid as being against public policy. The trial court enforced the contract and Putz appealed.

The Court of Appeals affirmed the trial court. Unmarried persons are free to contract just as married persons do with pre or postnuptial agreements. Allie provided benefits to Putz by working in his jewelry store without compensation and providing cash flow for the business to operate. Their agreement to reimburse her was a valid, enforceable contract under Indiana law.

*Brown v. Branch,* 758 N.E.2d 48 (Ind.2001). In *Brown,* Brown and Branch lived together in a 10 year on-again, off-again relationship. Brown owned the home in which they lived (“the 135 house”). At one point they were “off” and Branch moved to Missouri, found a job, and enrolled in a business program to further her education. Brown telephoned Branch after she moved, asking her to move back. He told her she would “always have the 135 house,” that she “would not be stuck on the street” and that she would “have a roof over [her] head.” Brown also proposed marriage. Branch quit her job, dropped out of school after finishing the semester and moved back in with Brown. They lived together for two brief periods before the relationship ended.

Branch sued Brown for his failure to convey the 135 house. The trial court awarded the house to Branch. The Court of Appeals affirmed holding that the Statute of Frauds did not apply (it was not a “sale”) and that the oral promise was enforceable under the doctrine of promissory estoppel. The Indiana Supreme Court disagreed and reversed.

The Supreme Court held that the Statute of Frauds applies to oral promises and that promissory estoppel was not available based upon the facts of the case. Any promise to convey real estate is subject to the Statute of Frauds. The oral agreement between the parties was unenforceable. The purpose of the Statute of Frauds is to prevent “he said” “she said” oral agreements from being enforceable. Agreements between cohabitants must be in writing if they deal with real estate, or they cannot be completed within one year. Promissory estoppel was not available because the infliction of an unjust and unconscionable injury and loss must be shown. The loss of the benefit of the bargain, inconvenience and incidental expenses will not be sufficient to remove the claim from the Statute of Frauds. Branch quit her job, dropped out of college at the end of the semester, and moved back to Indiana from Missouri. She was inconvenienced and denied the benefit of the promise. This was still inadequate to remove the promise from the operation of the Statute of Frauds.

*Estate of Hann v Hann,* 614 N.E.2d 973 (Ind. Ct. App. 1993). Jim Hann continued to live with his sister in law, Ellen Hann, after his brother’s death. Jim supplied the residence and some income. Jim was paralyzed so Ellen provided him with assistance in doing tasks he could not do. After Ellen’s death, Jim sued the estate for one-half of the bank account alleging he had an agreement with Ellen to establish a joint account. Jim deposited $100 a month of his funds in the account for over thirteen years. At the time of Ellen’s death Jim learned the account was only in Ellen’s name. Jim also filed a claim for services he provided Ellen during her lifetime.

The estate inadvertently waived the Dead Man’s statute and evidence was entered into the record that established Jim’s claims that he may not otherwise have been able to establish. Jim established that the account should have been titled jointly and he was awarded half of the account. The Court of Appeals affirmed.

The estate argued that the quantum meruit claim was barred by the statute of limitations. The Court of Appeals rejected this argument, holding that the statute of limitations does not begin to run until the time the services cease. However, the Court of Appeals rejected his implied contract and request for services. Services rendered in a family context do not imply a promise to pay for services provided. There is a presumption, in this context, that the services are gratuitously provided. Services provided out of love, kindness or mutual support cannot support a quantum meruit claim.

This case will likely have a strong impact against claims for services in cohabitation cases. Cohabitation that is based upon a serious, committed relationship will likely rise to the same level as a family relationship and cause the presumption to arise that the services were gratuitously provided. This will negate any claim services provided without and express contract or strong evidence suggesting compensation was agreed to be paid.

*Cunningham v. Hastings,* 556 N.E.2d 12 (Ind. Ct. App. 1990). Cunningham and Hastings lived together. Hastings acquired a home with $45,000 down payment. Hastings had the home titled as joint tenants with rights of survivorship. They also acquired a vehicle jointly. Cunningham initiated a partition action. The trial court divided the net proceeds from the sale of the home after giving back Hastings his initial contribution of $45,000. Cunningham appealed. The Court of Appeals held that real estate held as joint tenants must be divided equally between the parties regardless of contribution. Equitable adjustments that are available in partition actions of property held as tenants in common are not available when a property is held as a joint tenancy. Each person of a joint tenancy owns an equal share in the property.

The Court of Appeals noted that Hastings could have filed a counter-claim for reimbursement of expenses or his initial contribution but he failed to do so.

*Willett v. Clark,* 542 N.E.2d 1354 (Ind. Ct. App. 1989). Judith Willett and Betty Clark began living together in Clark’s home. A year into the relationship Willet deeded the property as tenants in common between them. During the course of the relationship each contributed to the living expenses and to the acquisition of various real and personal property. Willett moved out and filed suit requesting one-half of the jointly owned property and partition of it. Clark answered and counterclaimed to set aside the deed due to undue influence exerted over her by Willett to convey the property jointly. Clark filed for her share of the rental value of the property over the time Willett occupied it, less the improvements Willett made to the property.

The trial court divided up the property between the parties but failed to explain why it divided the property the way it did. The trial court’s order resembled a marital property division not a partition action. The Court of Appeals reversed the trial court’s order for lack of sufficient findings.

The Court of Appeals held that a court has authority to partition personal property and real estate, in the same action, as long as there is common ownership between the parties. The trial court was required to divide the tenant in common property interests based upon equitable factors available in a partition action. A co-tenant may seek compensation for improvements and repairs made to common property and proportionate reimbursement for payment or assumption of liens or encumbrances. A trial court is given wide latitude in fashioning equitable relief between the parties. The court’s findings should specifically address the allocation of the property between the parties and the basis for the division. The trial court also failed to issue findings supporting its judgment denying Clark’s counterclaim alleging undue influence.

## D. Key Take-Away Points on Cohabitation in Indiana

### Indiana law provides various theories for one party to seek some type of recovery from the other when a cohabitation concludes. As more and more Hoosiers are cohabitating, it is important to consider entering into a well-drafted cohabitation agreement. Optimally, this would occur prior to cohabitation but, less preferably, during the cohabitation.

### A written cohabitation agreement should be carefully drawn to include all necessary legal elements of a contract so as to be enforceable. The agreement must clearly outline the scope and limits of the client's relationship. It must be unambiguous; there should be no room for dual interpretation of the intent of the parties in entering into the agreement. The agreement must be written in clear, concise and intelligent language. Such an agreement should meet the stringent requirements of any other legal contract that is normally made in the field of commerce.

### The agreement may contain an expressed disclaimer of future support or property division, or the exact sums to be paid or property divided if such obligations are part of the agreement.

### Caution should be exercised to negate any inference that a promise of support has been made by an oral representation.

### Clients should be counseled to keep their financial dealings separate (separate bank accounts, credit cards, etc.).

### Be careful to clearly define each party’s expectations for what property each will receive if/when the period of cohabitation concludes.

### If parties with a cohabitation agreement decide to marry, then prior to the marriage, they need to enter into a well-drafted premarital agreement, retaining whatever terms from the cohabitation agreement the parties agree upon and/or adding new terms.

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James A. Reed

*Partner*

Fellow, American Academy

of Matrimonial Lawyers

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E-mail jreed@bgdlegal.com

Date

Name

#### *Re:* *Prenuptial Agreement*

Dear ---Name--:

It is my understanding that you are considering, at this time, whether a prenuptial agreement would be in your interest, and if so, the specifics of such an agreement, in light of your plans to get married later this year. I appreciate the opportunity to be of assistance in this regard.

To assist you in your decision making, I wanted to provide you with some information I expect you will find useful. This letter will provide you with an outline some key concepts concerning the use and application of prenuptial agreements, as well as a preliminary recommendation for the terms of a draft agreement. I hope that this background information will better equip you to understand the legal effects that a prenuptial agreement can have, and cannot have, under Indiana law and, in turn, how a prenuptial agreement can (or cannot) be applied to your situation. We can discuss these concepts in greater detail when we meet in the morning.

Prenuptial agreements are widely misunderstood to have only one application: to determine various property rights between spouses in the event that a marriage is later dissolved. It is very true that this is an important role of most prenuptial agreements. However, prenuptial agreements can apply to other scenarios as well, which may or may not relate to divorce. For example, prenuptial agreements can determine issues of spousal maintenance or payment of legal fees in the event of divorce. A prenuptial agreement can also apply to situations that do not pertain to divorce at all. For example, many people do not know that, under Indiana law, in the event of your death, your spouse is entitled to a certain percentage of your estate, even if your Will directs that all of your property should be given to a third party. However, a prenuptial agreement can include a waiver of each party’s “right to take against the Will,” thereby increasing your estate planning flexibility. (Keep in mind, such a waiver in a prenuptial agreement does not mean that you must disinherit your spouse, it simply broadens your option of leaving your spouse with all of your property, none of your property, or anywhere in between.)

The most important thing to remember is that a prenuptial agreement is treated much like any other written contract. Therefore, its terms are flexible so that they may be tailored to fit your particular needs.

*A. Effect of Prenuptial Agreement Upon Dissolution of Marriage*

Under Indiana law, when two people marry *without* a prenuptial agreement, all of their property interests are considered to be “marital property.” This is true whether that property was owned by one of the parties before the marriage, or even if the property was inherited by or gifted to that spouse before or during the marriage. Indiana law has an extremely broad concept of “marital property,” and it essentially includes any and all property interests owned by either of the parties on the date a petition for dissolution of marriage is filed.

Additionally, Indiana law presumes that, upon a dissolution of the marriage, all marital property should be divided *equally* between the parties. However, this presumption may be rebutted based upon a number of factors, most common of which include premarital contributions by each party to the marital estate, gifts and inheritance, or unequal economic circumstances of the parties at the time of dissolution. But a deviation based upon these circumstances is never certain, or even predictable.

Applying these concepts to your upcoming marriage, upon your marriage, all of your respective property interests (and debts), including any interests in trusts, future inheritances, etc., would become marital property in the absence of a prenuptial agreement. As noted above, there would be a rebuttable presumption that all of this marital property would be divided equally between you and your spouse in the event of a later dissolution.

If, instead, you were to marry with a prenuptial agreement, you could include language in the agreement that made all of your premarital property and family property (e.g., trusts, gifts, and inheritances), along with any growth, appreciation, and/or income thereon, as your “separate property” that would never become part of the marital estate, unless you were to commingle that property (e.g., transfer it into joint name with your spouse). As a corresponding provision, your spouse’s comparable property would also be considered as your spouse’s “separate property,” to which you would have no claim in the event of a dissolution. This is probably the most common provision of a prenuptial agreement, rooted in the ubiquitous desire to protect premarital and family property from becoming marital property.

Additionally, Indiana law contains other ancillary provisions in the event of dissolution. In the event of dissolution, Indiana law allows one party to request of the Court that the other party be responsible for that party’s attorney’s fees or other litigation costs. A right to do so can be waived in the prenuptial agreement, if that is your wish. Or, the obligation can be capped. For example, “In the event of a dissolution of the parties’ marriage, \_\_\_\_\_\_’s obligation to contribute to \_\_\_\_\_\_\_\_\_’s legal fees shall be limited to $X.”

Indiana law also provides for spousal maintenance in certain circumstances. Normally, spousal maintenance is limited to three (3) years. However, in can be indefinite when based upon the requesting party’s incapacity to support him or herself (usually based upon poor health). Again, this can be waived either in part, or in whole. For example, maintenance can be waived categorically. Or it can be waived generally, unless the request is based upon some disability or incapacity. Again, a cap can also be used here, if desired.

*B. Effect of Premarriage Agreement Upon Death*

Frequently, when a marriage is terminated by death, the deceased party has crafted an estate plan that gives most, if not all, of his/her property to the surviving spouse. However, a spouse can execute a Will that seeks to give all of his/her property to a third party (*e.g.,* children from a previous marriage, a charity, *etc*.). Indiana law provides certain statutory rights for a surviving spouse in the event that a deceased spouse attempts to “disinherit” the surviving spouse. The law currently provides that, in such a situation, irrespective of the terms of the Will, the surviving spouse would have the right to receive, at a minimum: (a) an amount equal to one-

Quarter (1/4) of the fair market value of real estate owned by the deceased spouse at his death and a one-third (1/3) or a one-half (1/2) interest in the net personal estate of deceased spouse, depending upon whether the parties had children together, with the larger share for a spouse with

Children by the decedent. The formula is slightly different, but similar, for a party that dies without a Will.

If included in the prenuptial agreement, the parties can mutually waive the rights outlined above, essentially allowing each party to create an estate plan, if desired, that completely disinherits the other party. (Please remember that it does not follow that either of you *must* disinherit the other, it simply affords that option where none otherwise exists due to the survivor’s share statute.)

Prenuptial agreements also frequently contain a waiver of retirement benefits. Under peculiarities of federal law, waiver of retirement benefits must be explicit. Under an applicable provision, any funds that either you, or your spouse, set aside in most retirement funds (such as 401(k)’s, pensions, and so forth) will not become marital property and, further, each spouse must sign any documents necessary to complete this waiver.

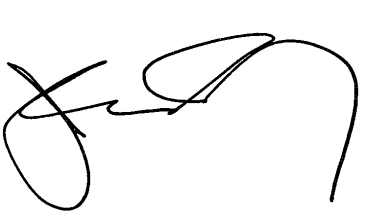
*C. Children’s Issues*

A prenuptial agreement is effectively inapplicable to most children’s issues. For example, a prenuptial agreement cannot determine which party will have custody in the event of a dissolution, nor the amount of child support that will be paid in that event. Any provision that attempts to do so will be considered void.

I know that these legal concepts can be quite complicated and confusing. The most important thing to remember is that prenuptial agreements are not homogenous documents; they can be tailored to accomplish different objectives, however you and your future spouse may agree.

Thank you again for the opportunity to be of assistance. I look forward to meeting with you **DATE**, at **TIME**, at the Bingham Greenebaum Doll downtown Indianapolis office.

Sincerely,



James A. Reed

JAR/

James A. Reed

*Partner*

Fellow, American Academy

of Matrimonial Lawyers

Direct 317.968.5405 | Fax 317.236.9907

E-mail [jreed@bgdlegal.com](mailto:jreed@bgdlegal.com)

DATE

##### VIA CERTIFIED MAIL

Name of client

Address

Re: *Premarital Agreement*

Dear ---Name---:

It is my understanding that you are in receipt of your original premarital agreement. Please be certain to retain that document, and do so in a location of the utmost safety and security. In the unlikely event that your premarital agreement is ever needed, it will be necessary that a copy can be produced at such time, otherwise its mere existence – not to mention its specific terms – can be impossible to prove. My recommendation is to store the document in a bank lock box, or similarly secure location.

I am also enclosing a CD that contains copies of the various e-mail correspondence and draft revisions that produced the final version of your premarital agreement that was executed. These documents could be useful, so please keep the CD with your premarital agreement.

Please also know that I am retaining a separate original in the Bingham Greenebaum Doll vault. Should you ever misplace your copy, please feel free to contact me to request a copy of mine. While we will retain an executed original of the premarital agreement in our records, firm document retention policies preclude us from being able to guarantee its future availability; please be sure to retain your copy in a safe place.

Please understand that the security of your property interests under the premarital agreement arises from a two-part process. The first part, the drafting and execution of the document, has now been completed successfully. The second part requires that, throughout your marriage, you comport your financial affairs consistently with the terms of the premarital agreement. **This step is critical, as your failure to act consistently with the terms of the premarital agreement can substantially or entirely undermine its legal effect!**

Simply speaking, your premarital agreement relies on a protected asset being kept titled in your own name in order to keep it out of the marital estate. Therefore, **it is critical that you never transfer any assets into either –other party’s name--- name, or into your name jointly with ---other party’s name---, unless you intend for that property to lose its separate property classification and, thus, among other things, potentially be subject to division in the event of a dissolution of marriage.** You must not take any steps with your property interests that could be construed as “commingling” your assets with those of your spouse, or into the name of your spouse. Therefore, be sure to leave all of your current assets titled solely in your own name.

By way of example, and not by limitation, I recommend that you:

* Maintain a separate checking and savings account in your name only. If you elect to have a joint bank account with your spouse, understand that any money transferred from your separate property accounts to the joint account – even if only temporarily – may be construed as commingling and, thus, lose its separate property protections. Therefore, transfer into the joint account only funds that you intend to lose their separate property classification.
* Maintain brokerage accounts, other securities, and vehicles solely in your own, again, subject to the same admonitions set forth above as to bank accounts.
* Prior to transferring or acquiring any real estate in joint name, consider whether you want the real estate to become marital property and lose or not acquire its potential separate property classification. If you do not wish that result, be sure to retain or acquire the real estate solely in your own name.

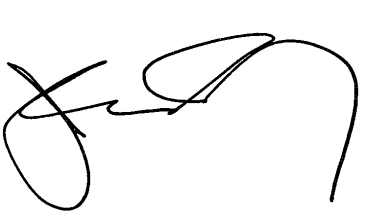
This obviously is only a partial list. In short, you need to be very sensitive as to how assets are titled during the marriage. If you have any specific questions, or if any arise in the course of a contemplated transaction during the marriage, please feel free to contact me for additional, transaction-specific advice.

Next, please also know that some financial planners or estate planning counsel, not aware of your premarital agreement and its terms, may encourage you to transfer assets into joint name for estate planning, tax, or other purposes. Please be sure to alert your financial planner or estate planning counsel to the existence of your premarital agreement, and encourage him/her to contact me with any questions about the implications your premarital agreement has upon your financial and/or estate planning needs.

Obviously, the best way to ensure a coordinated effort between your premarital agreement and your estate planning is to use the services of estate planning counsel within this same firm. Please consider contacting me about your estate planning, and I can coordinate those efforts with a member of our estate planning department.

I wish you well. Please do not hesitate to contact me with any questions or concerns as to the above, or any other issues.

Sincerely,



James A. Reed

JAR/



**PREMARITAL AGREEMENT FILE-CLOSING CHECKLIST**

* Executed original of agreement provided to client for client’s records.
* Premarital agreement “closing letter” sent to client.
* Executed original of agreement saved in Bingham Greenebaum Doll safe.
* PDFs of the following documents burned to client’s “Premarital Agreement CD”:
  + The final and completed, executed Premarital Agreement and all attachments;
  + All correspondence/e-mail (if any) between counsel concerning the drafting, negotiation, and execution of the Premarital Agreement, along with any enclosures;
  + All working drafts of the Premarital Agreement that were actually exchanged between counsel (along with their cover letters or cover e-mails) – Note: internal drafts, or drafts developed with the client can be omitted from the CD;
  + The closing letter to the client; and
  + Check with JAR/MRK to confirm if any additional materials need to be burned to the CD (*e.g.*., client CYA letters, correspondence with the client, internal drafts, *etc*.).
* Once the Premarital Agreement CD is compiled and burned, make two additional copies. Distribute the three CDs as follows: one to the client for the client’s records; one to the BGD vault to be clipped to and stored with the executed original; one mailed to MRK

**Premarital Agreement**

**of**

**BRIDE and GROOM**

THIS AGREEMENT (“hereafter referred to as the “Agreement”) is made in quadruplicate triplicate, in Indianapolis, Indiana on this \_\_\_\_ day of , by and between Bride(hereafter referred to as “Bride”) andGroom(hereafter referred to as “Groom”).

1. **: REASONS FOR AGREEMENT AND CONSIDERATION**
   1. **Reasons for Agreement.** BrideandGroomintend to marry in the future, and in anticipation of their contemplated marriage, they desire to fix and determine, now and forever, the respective and mutual rights of each in, and to, the property, estate and income of the other (past, present and future), and to accept irrevocably the provisions of this Agreement in lieu thereof and as full discharge and satisfaction of all property and other rights that would arise, or have arisen, as a result of any living arrangements prior to and during the contemplated marriage, by operation of law, statute, or otherwise. BrideandGroom each expressly acknowledges that this Agreement is not entered into for the purpose of facilitating a separation or dissolution of their marriage to each other, but is entered into for the purpose of preventing strife, settling questions of marital rights and property, and enhancing the prospects of marital harmony.
      1. To Determine Rights in Event of Termination by Death. One of the parties’ express intentions in entering this covenant is to allow each of them the greatest flexibility in their respective estate planning so that each of them has the freedom and flexibility, except as expressly provided herein, to create – and, if the marriage is terminated by death, to have implemented – an estate plan in which each of them may leave for the other all of his/her property, none of his/her property, or any amount of property in between those extremes, irrespective of statutory rights to elective shares, taking against the will, and the like, that would be otherwise applicable but for this Agreement. Each party acknowledges that the other party has, or likely will have, estate planning beneficiaries besides the other party.
      2. To Determine Rights in Event of Termination Other Than by Death. Another express intention of the parties in entering into this covenant is to determine by their own freedom to contract the manner in which their respective and collective property interests shall be divided between them in the event that their marriage is terminated by reason other than death (including by dissolution, annulment, divorce, or otherwise). The parties understand and acknowledge that the State of Indiana, through statute and related case law, has created a framework for resolving issues of property division, spousal maintenance, support, payments of fees and expenses, and other matters in the event of a termination of marriage other than by death. By this contract, the parties are expressing their mutual desire not to have this legal framework apply to them (except where expressly indicated, if at all), and instead to have all such rights and matters determined as set forth herein. Each understands and acknowledges that this Agreement may leave him or her less well off, financially and otherwise.
   2. **Consideration.** The consideration for this Agreement between BrideandGroom is:
      1. The mutual promises of marriage and the marriage of BrideandGroomto each other; and,
      2. The mutual promises set forth in this Agreement; and,
      3. Each act done pursuant to the provisions of this Agreement.

However, Brideand Groom each expressly acknowledges a desire to enter into this Agreement even in the absence of such consideration.

1. : **DISCLOSURE**
   1. **Disclosure.**
      1. Full Disclosure by Bride. Briderepresents to Groom that **Exhibit "A,"** attached hereto and made a part hereof, sets forth a description of the character and amount of substantially all of her assets and liabilities as of , excluding common household goods and miscellaneous personal effects. While Bride has attempted in **Exhibit “A”** to identify as completely as possible all of her assets and liabilities as of , Groom understands, acknowledges, and agrees that the intent of this Agreement is to exclude from the Marital Property certain property and liabilities, including all of Bride’s assets and liabilities existing at the date of the contemplated marriage (except as expressly set forth herein), even if those assets or liabilities are omitted from **Exhibit “A.”** Groom expressly states and acknowledges that he is not relying on the attached **Exhibit “A”** as being precisely correct, but instead that the information is a substantially accurate reflection of Bride’s financial condition. Without limitation on the foregoing, Groom recognizes that Bride’s property interests include assets the value of which could be a matter of dispute, since the process of valuation has an inherently subjective component; any valuation performed at this time by Groom – cooperation with which Bride has extended as part of the negotiation of this document, but which undertaking of valuation Groom has declined – could arrive at a different conclusion of value. Groom acknowledges that many or all of the values assigned by Bride to her property interests represent nothing more than a good faith estimate by Bride, and Groom is agreeable with proceeding with this Agreement based upon that information, waiving the opportunity extended to him by Bride for formal, present valuation.
      2. Full Disclosure by Groom.Groomrepresents to Bride that **Exhibit "B,"** attached hereto and made a part hereof, sets forth a description of the character and amount of substantially all of his property and assets and liabilities as of , excluding common household goods and miscellaneous personal effects. While Groom has attempted in **Exhibit “B”** to identify as completely as possible all of his assets and liabilities as of , Bride understands, acknowledges, and agrees that the intent of this Agreement is to exclude from the Marital Property certain property and liabilities, including all of Groom’s assets and liabilities existing at the date of the contemplated marriage (except as expressly set forth herein), even if those assets or liabilities are omitted from **Exhibit “B.”** Bride expressly states and acknowledges that she is not relying on the attached **Exhibit “B”** as being precisely correct, but instead that the information is a substantially accurate reflection of Groom’s financial condition. Without limitation on the foregoing, Bride recognizes that Groom’s property interests include assets the value of which could be a matter of dispute, since the process of valuation has an inherently subjective component; any valuation performed at this time by Bride – cooperation with which Groom has extended as part of the negotiation of this document, but which undertaking of valuation Bride has declined – could arrive at a different conclusion of value. Bride acknowledges that many or all of the values assigned by Groom to his property interests represent nothing more than a good faith estimate by Groom, and Bride is agreeable with proceeding with this Agreement based upon that information, waiving the opportunity extended to her by Groom for formal, present valuation.
      3. Waiver of Disclosure. **Bride** has offered to provide a full financial disclosure to **Groom**. However, **Groom** states that he has sufficient independent knowledge and understanding of **Bride**’s finances that **Groom** is comfortable entering this Agreement in the absence of formal financial disclosure by **Bride**, that **Groom** wishes to enter into this Agreement without a financial disclosure from **Bride**, and that **Groom** waives **Bride**’s offer to provide same to him. **Groom** further forever waives any future opportunity to set aside or otherwise alter the effect of this Agreement based upon any claim by **Groom** arising from Bride’s financial disclosure, or lack thereof, **Groom** having waived same.
   2. **Acknowledgment of Financial Disclosure.**
      1. BrideandGroom each represents and warrants to the other that his or her respective financial disclosure statement is true and correct and fairly states a substantially accurate summary of his or her assets and liabilities as of the dates indicated herein. BrideandGroom each acknowledges and accepts the attached financial disclosure statement of the other as a financial disclosure concerning the assets and liabilities of the other. Further, BrideandGroom each acknowledges the receipt and review of copies of the other's most recent two (2) years of Federal income tax returns for examination and has received a full opportunity to have any questions caused by such review answered satisfactorily.
      2. BrideandGroom each acknowledges that he or she has been given full opportunity to acquire complete knowledge and information concerning the property, assets, liabilities and income of the other, as well as to consult with legal counsel, accountants, valuation experts, or any other professional or advisor, to assist his or her understanding of the financial condition of the other.
      3. Bride and Groom each expressly waives any right and all opportunity to receive any financial disclosure beyond that disclosure which has been provided in the course of discussing, negotiating, and executing this Agreement.
   3. **Confidentiality.** Given the financial disclosure provided in conjunction with this Agreement, Bride and Groom have furnished each other with confidential information concerning their respective assets. Bride and Groom each acknowledges that disclosure and/or use of any information obtained by reason of such financial disclosure could cause the other irreparable harm in certain instances. Without the prior written consent of Groom, which consent may be withheld, Bride shall not disclose any information pertaining to Groom's past, present, or future assets obtained as the result of the financial disclosure under this Agreement (or information obtained subsequent to the execution of this Agreement), whether received from Groom or his agents or representatives, except pursuant to Court Order in any proceeding or in the course of any subsequent proceedings between the parties arising from their relationship and/or related to this Agreement. Bride further agrees not to use any information furnished pursuant to this Agreement for any purpose other than in connection with complying with the terms of this Agreement. Without the prior written consent of Bride, which consent may be withheld, Groom shall not disclose any information pertaining to Bride's current and future assets obtained as the result of the financial disclosure under this Agreement (or information obtained subsequent to the execution of this Agreement), whether received from Bride or her agents or representatives, except pursuant to Court Order in any proceeding or in the course of any subsequent proceedings between the parties arising from their relationship and/or related to this Agreement. Groom further agrees not to use any information furnished pursuant to this Agreement for any purpose other than in connection with complying with the terms of this Agreement.
2. : **RIGHTS IN ABSENCE OF THIS AGREEMENT AND LEGAL REPRESENTATION**
   1. **Rights in Absence of This Agreement in Event of Termination of the Marriage by Death.** Before signing this Agreement, Bride and Groom each has had an opportunity to consult with an attorney of her and his respective choice with respect to the meaning and advisability of entering into this Agreement. Each of them acknowledges that she or he has a sufficient understanding of the rights of allowance, of inheritance, or election, and any and all other rights that each of them has, may have, or might claim as a surviving spouse in the event of the death of the other of them.
   2. **Rights in Absence of This Agreement in the Event of Termination of the Marriage Other Than by Death.** Before signing this Agreement, Bride and Groom also each acknowledges that she or he has been advised as to the rules governing the division of marital property as applied in a *dissolution of marriage* under Indiana law, of the duty of spousal maintenance during the pendency of a marital dissolution proceeding or thereafter in the absence of a valid waiver of spousal maintenance, and of the power and discretion of a court as part of its final decree of dissolution to provide for maintenance of a spouse, including maintenance for a physically or mentally incapacitated spouse.
   3. **Potential Changes of Law.** Brideand Groom further affirm that each understands that the laws of the State of Indiana, and of other states in which the parties might establish residence, are subject to change and/or may differ, with respect to the rights of a spouse to the property, assets and estate of the other spouse on the termination or dissolution of a marriage by death or otherwise. BrideandGroom each further affirms that she and he have been informed of and understands the possible changes and progressions with respect to the rights of a spouse, including by virtue of a move to another state, to property, assets, and estate of the other spouse on the termination or dissolution of a marriage by death or otherwise which might result in each receiving property of other in excess of, or less than, that provided for in this Agreement.
   4. **Representation by Counsel.** Bride and Groom each acknowledges entering freely and voluntarily into this Agreement, each having been separately represented and advised by independent counsel of his or her own choosing in the negotiation for and preparation of this Agreement. \_\_\_\_\_\_\_\_\_\_ is represented by James A. Reed of Bingham Greenebaum Doll, LLP, who has furnished an attorney’s certificate attached as **Exhibit “C.”** \_\_\_\_\_\_\_\_\_ is represented by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, who has furnished an attorney’s certificate attached as **Exhibit “D.”** Each party has had this Agreement fully explained to him or her by counsel, each is fully aware of the Agreement’s contents and legal effects, and each agrees with the statements set forth in the attorney’s certificate of his and her respective counsel.
   5. **Representation by Counsel. \_\_\_\_\_\_\_\_\_\_ is represented with respect to this Agreement by James A. Reed of the law firm of Bingham Greenebaum Doll, LLP. \_\_\_\_\_\_ understands that \_\_\_\_\_ has the right to be represented by an attorney with respect to the negotiation and execution of this Agreement, and that such representation likely would be in \_\_\_\_\_’s best interest. \_\_\_\_\_\_\_\_\_\_ acknowledges receiving no legal advice whatsoever from Bingham Greenebaum Doll, LLP, its attorneys, or its staff, other than being advised to retain separate counsel. \_\_\_\_\_\_\_\_\_ affirms that \_\_\_\_ has had the opportunity to retain and confer with separate counsel, but has elected not to do so. \_\_\_\_\_\_\_\_ expressly waives the right to contest or have any portion of this Agreement later set aside or invalidated based upon a lack of representation by counsel.**
3. **: DEFINITIONS**
   1. **Bride's Separate Property**. For purposes of this Agreement, “Bride’s Separate Property” means all of the following:
      1. Premarital Property. Any and all assets (and liabilities) Bride currently owns (and is obligated for), including those set forth in **Exhibit "A"**; and
      2. Income During the Marriage. Any and all present and future earnings and income (whether earned, unearned, or otherwise) arising from Bride’s employment, business endeavors, or otherwise, including all future employment and business endeavors to occur *during the marriage*; and
      3. Gifts and Inheritances. Any and all property received by Bride (including *during the marriage*) as a gift or inheritance, or as a result of any interest by Bridein any trust, and any income, dividends, increase or decrease in value (including any increases as the result of the pay down of any liability associated with any asset), accumulations, additions, accretions, acquisitions, purchases, contributions, or distributions of any kind arising as a result of her receipt of such gift, inheritance, or interest in any trust; provided, however, that for purposes of this subsection, no property received by Bride from Groom shall be considered a “gift” absent both: (a) clear and convincing evidence that an *inter vivos* gift from Groom to Bride occurred; and (b) the gifted property became legally titled in Bride’s name, and free of any title with Groom; and
      4. Liabilities. Any and all debts, liabilities, taxes or other obligations owed or incurred by Bride individually prior to the marriage (whether they become payable prior to or after the contemplated marriage of the parties) and debts, liabilities, taxes or other obligations owed or incurred by Bride individually *during the marriage* of the parties; and
      5. Professional Licenses, Practices, and Degrees. Any and all rights or ownership in a professional license or practice, educational degrees or designations (whether acquired before or after the date of marriage); and
      6. Retirement Plans and Savings. Any and all interest in any employee benefits plans, pension plans (whether defined benefit, defined contribution, or otherwise), retirement plans, deferred compensation plans, individual retirement accounts, stock plans, stock option plans, profit sharing plans or other such benefits or rights she currently owns or which she acquires *during the marriage*; and
      7. Former Marital Property by Agreement. Any and all assets or liabilities that are Marital Property, as defined herein, and which are transferred to Bride, provided such transfer and reclassification from Marital Property to Bride’s Separate Property is agreed by the parties, in writing; and
      8. Trust Property.Any and all property that is Bride’s Separate Property and that is placed in any revocable trust created by Bride shall continue to be Bride’s Separate Property, and transfers of the property to any such trust along with property distributed from any such trust of any kind, whether income or principal, shall continue to be Bride’s Separate Property; and
      9. Assets or Liabilities Titled in Bride’s Name. Notwithstanding any other provision of this Section, and except as expressly provided elsewhere in this Agreement, any and all assets or liabilities that are titled in Bride’s name, irrespective of how or when such asset or liability is or was acquired, shall be Bride’s Separate Property; and
      10. Growth of Bride’s Separate Property. Any and all income, dividends, increase or decrease in value (including any increases as the result of the pay down of a liability associated with any asset), accumulations, additions, accretions, acquisitions, purchases, contributions, or distributions of any kind arising as a result of her ownership of any of Bride’s Separate Property; and
      11. Change of Form of Bride’s Separate Property. Any and all proceeds from the sale, trade, or leveraging of Bride’s Separate Property, any property purchased with such proceeds, and any property purchased with money that is Bride’s Separate Property shall be Bride’s Separate Property, irrespective of whether such transactions occur before or after the date of the parties’ marriage.
   2. **Groom’s Separate Property**. For purposes of this Agreement, “Groom’s Separate Property” means all of the following:
      1. Premarital Property. Any and all assets (and liabilities) Groom currently owns (and is obligated for), including those set forth in **Exhibit "B"**; and
      2. Income During the Marriage. Any and all present and future earnings and income (whether earned, unearned, or otherwise) arising from Groom’s employment, business endeavors, or otherwise, including all future employment and business endeavors to occur *during the marriage*; and
      3. Gifts and Inheritances. Any and all property received by Groom (including *during the marriage*) as a gift or inheritance, or as a result of any interest by Groom in any trust, and any income, dividends, increase or decrease in value (including any increases as the result of the pay down of any liability associated with any asset), accumulations, additions, accretions, acquisitions, purchases, contributions, or distributions of any kind arising as a result of his receipt of such gift, inheritance, or interest in any trust; provided, however, that for purposes of this subsection, no property received by Groom from Bride shall be considered a “gift” absent both: (a) clear and convincing evidence that an *inter vivos* gift from Bride to Groom occurred; and (b) the gifted property became legally titled in Groom’s name, and free of any title with Bride; and
      4. Liabilities. Any and all debts, liabilities, taxes or other obligations owed or incurred by Groom individually prior to the marriage (whether they become payable prior to or after the contemplated marriage of the parties) and debts, liabilities, taxes or other obligations owed or incurred by Groom individually *during the marriage* of the parties; and
      5. Professional Licenses, Practices, and Degrees. Any and all rights or ownership in a professional license or practice, educational degrees or designations (whether acquired before or after the date of marriage); and
      6. Retirement Plans and Savings. Any and all interest in any employee benefits plans, pension plans (whether defined benefit, defined contribution, or otherwise), retirement plans, deferred compensation plans, individual retirement accounts, stock plans, stock option plans, profit sharing plans or other such benefits or rights he currently owns or which he acquires *during the marriage*; and
      7. Former Marital Property by Agreement. Any and all assets or liabilities that are Marital Property, as defined herein, and which are transferred to Groom, provided such transfer and reclassification from Marital Property to Groom’s Separate Property is agreed by the parties, in writing; and
      8. Trust Property.Any and all property that is Groom’s Separate Property and that is placed in any revocable trust created by Groom shall continue to be Groom’s Separate Property, and transfers of the property to any such trust along with property distributed from any such trust of any kind, whether income or principal, shall continue to be Groom’s Separate Property; and
      9. Assets or Liabilities Titled in Groom’s Name. Notwithstanding any other provision of this Section, and except as expressly provided elsewhere in this Agreement, any and all assets or liabilities that are titled in Groom’s name, irrespective of how or when such asset or liability is or was acquired, shall be Groom’s Separate Property; and
      10. Growth of Groom’s Separate Property. Any and all income, dividends, increase or decrease in value (including any increases as the result of the pay down of a liability associated with any asset), accumulations, additions, accretions, acquisitions, purchases, contributions, or distributions of any kind arising as a result of his ownership of any of Groom’s Separate Property; and
      11. Change of Form of Groom’s Separate Property. Any and all proceeds from the sale, trade, or leveraging of Groom’s Separate Property, any property purchased with such proceeds, and any property purchased with money that is Groom’s Separate Property shall be Groom’s Separate Property, irrespective of whether such transactions occur before or after the date of the parties’ marriage.
   3. **Marital Property.** For purposes of this Agreement, “Marital Property” shall mean any assets and liabilities not otherwise falling under the definition of Bride'sSeparate Property or Groom'sSeparate Property. Marital Property shall specifically include:
      1. Jointly-Titled Property Not Otherwise Defined as Separate Property. Property (or liabilities) not falling under the definition of either Bride'sSeparate Property or Groom'sSeparate Property and which is owned by the parties after said contemplated marriage as joint tenants, tenants by the entireties, or jointly and to the survivor of them; and
      2. Gifts Made to the Parties Jointly. Any gifts made to the parties jointly shall be Marital Property, provided that there is clear and convincing evidence of the intent of the party making the gift that the gift is made to both of the parties jointly, and not to either of them separately or individually; and
      3. Income During the Marriage. Any and all income (other than unearned income, whether capital gains, dividends, distributions from retirement assets, or otherwise, that is attributable to the ownership of Bride’s Separate Property or Groom’s Separate Property) received by Bride or Groom *during the marriage*; and
      4. Retirement Savings During the Marriage. Any and all interest in any employee benefits plans, pension plans (whether defined benefit, defined contribution, or otherwise), retirement plans, deferred compensation plans, individual retirement accounts, stock plans, stock option plans, profit sharing plans or other such benefits or rights acquired by either party *during the marriage*, the parties acknowledging that this provision shall be harmonized with and so as to require, if necessary, an accounting to determine that portion of a particular retirement account that is attributable to premarital acquisition (and growth thereon, including *during the marriage*) versus that portion of a particular retirement account that is attributable to acquisition *during the marriage* (and growth thereon).

All property (and debts) owned by the parties individually shall be presumed to be Bride’s Separate Property or Groom'sSeparate Property, absent clear and convincing evidence that the property is Marital Property.

* 1. **Marital Debts**. For purposes of this Agreement, “Marital Debts” shall mean liabilities not under the definition of either Bride’s Separate Property or Groom’s Separate Property, and which are owed by the parties as a joint obligation.
  2. **Net Marital Estate**. For purposes of this Agreement, “Net Marital Estate” shall be defined as and calculated by subtracting the debts and liabilities that are Marital Property from the fair market value of the assets that are Marital Property.
  3. **Commingling.** For purposes of this Agreement, “Commingling” shall mean an asset or liability, or the proceeds thereof, previously classified as Bride’s Separate Property or Groom’s Separate Property, but which is voluntarily and deliberately transformed into Marital Property because it was:
     1. Placed into joint title of Bride and Groom;
     2. An untitled asset which was acquired with Contributions, as defined in this Agreement, by both Bride and Groom;
     3. Contributions, as defined in this Agreement, that were made into an account jointly titled in the names of Bride and Groom;
     4. Contributions, as defined in this Agreement, that were applied to the purchase of an asset, including but not limited to real estate, that is jointly titled in the names of Bride and Groom; or
     5. Contributions, as defined in this Agreement, that were applied to the payment of a loan that is either in the joint names of the Bride and Groom, or is secured by property that is jointly titled in the names of Bride and Groom.

Either party’s respective Separate Property shall not be deemed to have been transformed into Marital Property by Commingling under any circumstances, except for those set forth in this section.

* 1. **Contributions.** For purposes of this Agreement, “Contributions” shall mean only the monies, property, credit or assets invested in jointly acquired assets and shall not mean a representative value for either party's non-financial efforts. It is the expectation of BrideandGroomthat during the intended marriage, each of them will make non-financial contributions or investments in Marital Property, his or her own respective Separate Property, as well as the Separate Property of the other. These non-financial efforts, including time, labor, support of the other party, and other similar non-financial contributions, shall not be construed as a revocation or nullification of any of the terms or provisions of this Agreement, and neither Bride nor Groom shall be entitled to any value, compensation, right, or interest as a result of such efforts, including under any contractual or quasi-contractual theory.
  2. **Dissolution of Marriage.** For purposes of this Agreement, and except as otherwise indicated, *dissolution of marriage* shall include within its meaning “dissolution of marriage,” “divorce,” “annulment,” or any other legal termination of the status of the parties as married individuals.
  3. **During the Marriage.** For purposes of this Agreement, *during the marriage* shall mean from the date of the parties’ marriage through the date of the first to occur of (1) the death of one of the parties; and (2) either party filing with any court of competent jurisdiction appropriate pleadings, not subsequently dismissed, which subsequently results in a *dissolution of marriage* of the parties.

1. **: RIGHTS IN EVENT OF TERMINATION OF MARRIAGE BY DEATH**
   1. **Groom's Rights Upon Bride's Death**. If Bride shall die leaving Groomas her surviving spouse, Groom agrees that he will make no claim to any part of her estate as such surviving spouse other than as Bride may have provided for in her Last Will and Testament or other estate planning documents. Groom waives his rights, if any, to serve as guardian of Bride or her estate in the event of Bride’s death or physical or mental incapacitation. By signing this Agreement, Groomwaives and relinquishes all statutory rights to real estate to which Bride may hold title in her sole name at the date of her death and all claims and legal rights to share in her personal estate as surviving spouse, heir at law, or otherwise, including, but not limited to, the survivor's allowance, homestead rights, the surviving spouse's distributable share in the event of Bride'sintestacy, the right to contest the will, the right of election to take against the will, and the right to serve as personal representative, and excepting from such waiver and relinquishment only those rights to which he may be entitled as a beneficiary under Bride'sLast Will and Testament or other estate planning documents, if he be so designated, and rights he may have to receive social security benefits and related payments as Bride'ssurviving widower. This paragraph shall not affect the right of either party to succeed to the sole ownership of any asset held by the parties together as joint tenants, tenants by the entirety, or joint tenants with rights of survivorship.
   2. **Bride's Rights Upon Groom's Death.** If Groomshall die leaving Brideas his surviving spouse, Bride agrees that she will make no claim to any part of his estate as such surviving spouse other than as Groom may have provided for in his Last Will and Testament or other estate planning documents. Bridewaives her rights, if any, to serve as guardian of Groom or his estate in the event of Groom’sdeath or physical or mental incapacitation. By signing this Agreement, Bridewaives and relinquishes all statutory rights to real estate to which Groom may hold title in his sole name at the date of his death, and all claims and legal rights to share in his personal estate as surviving spouse, heir at law, or otherwise, including, but not limited to, the survivor's allowance, homestead rights, the surviving spouse's distributable share in the event of Groom'sintestacy, the right to contest the will, the right of election to take against the will, and the right to serve as personal representative, and excepting from such waiver and relinquishment only those rights to which she may be entitled as a beneficiary under Groom'sLast Will and Testament or other estate planning documents, if she be so designated, and rights she may have to receive social security benefits and related payments as Groom'ssurviving widow. This paragraph shall not affect the right of either party to succeed to the sole ownership of any asset held by the parties together as joint tenants, tenants by the entirety, or joint tenants with rights of survivorship.
   3. **Life Insurance.** Groom shall maintain life insurance on his life with a death benefit of not less than \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ naming Bride as the sole beneficiary. If for any reason Groom fails to have such life insurance proceeds available at the time of his death, Bride shall have the right to claim such amount in Groom’s estate notwithstanding any other provision herein. Bride shall have the right to receive proof of the existence of the insurance and beneficiary designation at least annually upon written request. This requirement shall be terminated once either party files an action to dissolve the marriage or for legal separation and will only be revived upon the completed, joint dismissal of that action and the continuation of the marriage.
   4. **Personal Property and Household Goods.** All tangible personal property for which there is no legal title, such as common household goods and furnishings (excluding art work, collectibles, and any property or assets listed on Bride’sorGroom’s respective financial disclosures as set forth in **Exhibits “A” and “B,”** respectively), shall be presumed to be held by BrideandGroom as joint tenants with rights of survivorship for purposes of distributing such property upon the death of either BrideorGroom, unless otherwise provided in a written statement signed by both BrideandGroom. If there are items of personal property which both parties desire to go to others, then both parties shall sign a document indicating that intent, including to whom that property should be distributed and when such distribution should be made. Artwork, collectibles, and any property or assets listed on Bride’s or Groom’s respective financial declaration shall be determined to be either: (a) one of the party’s Separate Property pursuant to or ; or (b) Marital Property pursuant to .
   5. **Employee Plans and Employee Benefit Rights.** Under the Retirement Equity Act of 1984 (REA), the spouse of a participant in certain qualified pension, profit sharing, or similar employer plans is entitled to receive certain (i) joint and survivor annuity benefits when the participant starts receiving retirement benefits from the plan, and/or (ii) surviving spouse annuity benefits if the participant dies before retirement benefits begin to be paid. These spousal benefits are required by REA to be provided by the plan unless the spouse gives formal written consent to the participant’s election of some other (i) retirement benefit payment arrangement (such as a single life annuity, installment, or lump sum to the participant alone) and/or (ii) death benefit payment arrangement (such as an annuity, installment, or lump-sum form of payment to a trust and/or to one or more other family members). Bride and Groom understand (after an opportunity to consult with counsel) that the spousal annuity benefits that REA requires in the absence of spousal consent to the participant’s election of other benefit payment arrangements are often disadvantageous to one degree or another to all concerned.Bride and Groom each intend that the other shall have sole and absolute discretion in making elections under any plans in which they are or may become a participant, including the naming of beneficiaries and the selection of payment methods. To that end, each hereby acknowledges that the other is waiving any and all rights that he or she may have as to any plan in which the other is a participant and that both are now formally consenting to any elections, waivers, loans, etc., with respect to such plans, unless designated by the other in writing, as a beneficiary. After marriage, each party agrees to sign any forms or documents provided by the other, which fulfill the intent of this Section.
2. : **RIGHTS IN EVENT OF TERMINATION OF MARRIAGE OTHER THAN BY DEATH**
   1. **Groom's Rights.**
      1. Property Division. If the intended marriage shall be terminated by a decree of dissolution, divorce, or there is a legal separation or annulment, Groom agrees in the division and disposition of the matter not to seek, demand or accept any portion or share of Bride'sSeparate Property. Groom shall be entitled to Groom’s Separate Property and one-half of the Net Marital Estate.
      2. Legal Obligation of Support or Maintenance.
         1. Preliminary/Temporary Spousal Support, Attorneys’ Fees, and Litigation Related Expenses. Groom hereby waives any right to receive any temporary spousal maintenance or support, alimony, preliminary attorneys’ fees, litigation expenses, or the fees of any expert, including but not limited to, appraisers, accountants, or child custody evaluators.
         2. Final Spousal Support, Attorneys’ Fees and Expenses. Groom hereby waives any right to receive any permanent spousal maintenance or support, alimony, final attorneys’ fees, litigation expenses, appraisers’ fees, accountants’ fees, child custody evaluators’ fees, fees related to any appeal, incapacity-based maintenance, and all other types of alimony, maintenance, and spousal support from Bride, unless expressly provided under this Agreement. The parties, however, do not intend this Agreement to limit the Court's authority to order child support payments for the parties' child(ren) in the event of a dissolution of their marriage or legal separation.
   2. **Bride's Rights.**
      1. Property Division. If the intended marriage shall be terminated by a decree of dissolution, divorce or there is a legal separation or annulment, Bride agrees in the division and disposition of the matter not to seek, demand or accept any portion or share of Groom'sSeparate Property. Bride shall be entitled to Bride’s Separate Property and one-half (1/2) of the Net Marital Estate.
      2. Legal Obligation of Support or Maintenance.
         1. Preliminary/Temporary Spousal Support, Attorneys’ Fees, and Litigation Related Expenses. Bride hereby waives any right to receive any temporary spousal maintenance or support, alimony, preliminary attorneys’ fees, litigation expenses, or the fees of any expert, including but not limited to, appraisers, accountants, or child custody evaluators.
         2. Final Spousal Support, Attorneys’ Fees and Expenses. Bride hereby waives any right to receive any permanent spousal maintenance or support, alimony, final attorneys’ fees, litigation expenses, appraisers’ fees, accountants’ fees, child custody evaluators’ fees, fees related to any appeal, incapacity-based maintenance, and all other types of alimony, maintenance, and spousal support from Groom, unless expressly provided under this Agreement. The parties, however, do not intend this Agreement to limit the Court's authority to order child support payments for the parties' child(ren) in the event of a dissolution of their marriage or legal separation.
      3. Post-Decree Alimony Payments.
         1. Amount and Terms of Payment, If Applicable. If the parties have been married for less than three (3) years, Bride shall not be entitled to any post-decree alimony payments for any reason. If the parties have been married for three (3) years or more, Bride shall be entitled, subject to the conditions set forth hereinafter, to total post-decree alimony in a sum calculated as $\_\_\_\_\_\_\_\_\_ multiplied by the number of full years that Brideand Groom were married, including the first three (3) years of marriage. The total post-decree alimony shall be payable in equal quarterly installments (four times per year), beginning thirty (30) days after the dissolution decree is entered, and continuing thereafter, for the same number of years as the duration of the marriage. Such payments may be accelerated, solely at Groom’s option. For the purposes of determining the duration of the marriage under this Section, the marriage shall be considered to have concluded on the date of filing for dissolution of marriage, legal separation, or annulment, by either party, unless such petition is voluntarily dismissed, with agreement of both parties, prior to the Court's entry of a decree or order of dissolution, legal separation, or annulment.
         2. Termination of Payments. Groom’s alimony obligation under this Section shall terminate upon the first to occur of: (1) Groom’s payment to Bride of alimony payments totaling $\_\_\_\_\_\_; or (2) Bride’s death.
         3. Non-Modifiable. The alimony obligation shall be non-modifiable for any reason, including but not limited to a change in financial circumstances of either Bride or Groom.
         4. Tax Treatment of Alimony. Bride and Groom expressly agree that these alimony payments shall be declared by Bride as taxable income, and shall be tax-deductible for Groom. In the event that a change in the tax laws precludes this intended tax deductible treatment for Groom, then Groom’s alimony obligation to Bride shall be reduced by Forty Percent (40%) from the amount set forth above.
   3. **Marital Residence.** Irrespective of how the property is titled, within thirty (30) days of either party filing a petition calculated to terminate the parties’ marriage, Bride shall vacate the residence that is being used by Groom as a primary residence, and Groom shall have permanent and exclusive use and occupancy thereof. This provision shall in no way operate to invalidate claims that Bride may have, if applicable, that the subject residence is Marital Property and, thus, its equity is subject to allocation and division between the parties.
3. **: MISCELLANEOUS**
   1. **Effective Date.** This Agreement shall be effective upon Bride and Groom’s legally valid marriage. If, for any reason, Bride and Groom fully execute this Agreement but never subsequently marry each other, then this Agreement shall be null, void, and of no effect.
   2. **Gift Splitting and Cooperative Estate Planning**
      1. **General Rule.** Except as provided in Section 7.02(b), below, and unless the Parties otherwise later agree in writing, during the marriage each Party shall be solely responsible and liable for his or her respective gift taxes and gift tax return filings. Subject to Section 7.02(b), below, during the marriage the Parties may determine at some point to elect “gift splitting” or to “split gifts” under Section 2513 of the Code (or other applicable law), but nothing herein (other than Section 7.02(b), below) requires Bride or Groom to consent or agree to split any of their respective gifts or to elect gift splitting at any time.
      2. **Required Gift Splitting.** With respect to gifts made by Groom during the marriage and in any particular "calendar period" [as defined in § 25.2502-1(c)(1)] to a party other than Bride and which are otherwise eligible (with the consent of the Parties or of their respective legal representatives) under Section 2513 of the Code and attendant Regulations to be treated as made one-half by Groom and one-half by Bride, the Parties agree that upon written demand of Groom (or, if applicable, Groom’s legal representative) Bride (or, if applicable, Bride’s legal representative) shall cooperate with Groom (or, if applicable, Groom’s legal representative) and shall timely take all actions necessary under the Code and attendant Regulations to effect and signify Bride’s consent to "split" such gifts with Groom under Section 2513 of the Code. In any such case, as between the Parties, the generally applicable tax consequences and effects of such gift-splitting under the Code and Regulations shall apply, and unless otherwise agreed to by the Parties in writing Bride shall not be entitled to receive from Groom (or from Groom’s probate estate) any further or added compensation or reimbursement of any kind for any of the generally applicable tax effects of split-gift treatment under the Code or the Regulations, including, without limitation, any use or consumption of (i) the credit amount granted Bride under Section 2505(a) of the Code with respect to the federal gift tax; (ii) the "applicable credit amount" granted Bride’s estate under Section 2010(a) of the Code with respect to the federal estate tax; or the "GST exemption amount" granted Bride under Section 2631(a) of the Code with respect to the federal generation-skipping transfer tax.
      3. **Restraint on Bride’s Lifetime Gifting.** Except for transfers of property that may be required of Bride under the terms and provisions of another section of this Agreement, and except as is required to split gifts with Groom under Section 7.02(b), above, Bride shall not make, during the marriage, any taxable gifts that reduce, expend or consume any of the credit amount granted Bride under Section 2505(a) of the Code with respect to federal gift tax, unless Bride first obtains the written consent thereto of Groom or Groom’s legal representative.
      4. **Portability of Bride’s Applicable Exclusion Amount.** Not later than sixty (60) consecutive days after the effective date of this Agreement, Bride shall implement (and shall thereafter maintain in effect at all times during the marriage) estate planning instruments necessary and sufficient under applicable state and federal law (including, without limitation, the Code) to ensure that, if Bride predeceases Groom, Groom (or, if applicable, Groom’s estate) shall receive and obtain the full benefit under the Code of the "porting" of Bride’s remaining and unused (as of the death of Bride) applicable exclusion amount (the "deceased spousal unused exclusion amount" under Section 2010(c)(4) of the Code), if any.
   3. **Appraisals.** BrideandGroom agree that no appraisals of Separate Property shall be required for any reason relating to the termination of their marriage.
   4. **Tax Returns.** Each party shall be solely responsible for their respective individual income taxes and return filings and shall assume no liability for the other’s taxes that were due and owing prior to the marriage. After the marriage, if the parties file joint federal and state income tax returns for any year, each party shall pay that portion of the tax shown on these joint returns, as finally determined for federal and state income tax purposes, that is equal to the proportion of the total of the separate taxes they would have separately paid if they had filed separate returns for the year. No reimbursement or payment right shall arise in the event that one party would have no income tax liability on a separate return and the other party benefits by using the parties’ deductions and credits on a joint return. Each party shall be entitled to credit against his/her respective final income tax liability for any prepayment of income taxes (including withholding and/or estimated tax payments) made by the party on account of the income taxes for any year in which a joint return is filed, and any refund shall be made to the party who made the prepayment in excess of their respective final tax liability. The parties shall cooperate with each other fully with respect to the preparing and filing of joint returns; provided, however, that nothing herein shall be interpreted to require either party to file a joint return with the other. Each agrees fully to indemnify and hold the other harmless of and from any and all liability, loss, damage, claims, suits and costs, or expenses which may arise from the filing of a joint return, and which is attributable to the failure to properly report their respective income, exemptions, exclusions or deductions, whether resulting from an omission or misstatement of any such items or from a challenged tax assumption or for any other reason.
   5. **Waiver of Claims.**  Bride and Groom, in entering into this Agreement, each forever and expressly waives any claim that he or she may have, or may have had, against the other by virtue of any period of cohabitation, or contributions or efforts that each might have made for the benefit of the other, prior to the date of their intended marriage.
   6. **Enforcement of this Agreement.** This Agreement is made and executed in the State of Indiana and shall be governed and construed at all times according to the laws of the State of Indiana even though the parties may later reside or be domiciled outside of the State of Indiana.
   7. **Disclosure to Court.** The parties understand and agree that if either of them shall pursue legal action regarding their intended marriage, he or she shall fully disclose this Agreement to the court having jurisdiction over such action and all recitals contained in this Agreement are to be treated as admissions.
   8. **Modification/Waiver.** No modification or waiver of any of the terms of this Agreement shall be valid unless done so in writing, and executed by the parties with a notary witness. Consideration for any modification (to whatever extent required by Indiana statute), waiver, or revocation of this Agreement shall be the initial consideration herein stated. No waiver of any breach or default under this Agreement shall be deemed a waiver of any subsequent breach or default of the same or similar nature.
   9. **Binding.** The covenants, promises, agreements and provisions in this Agreement shall apply to and bind the heirs, executors, administrators, personal representatives and assigns of the parties.
   10. **Marital Property Laws Superseded.**  Bride and Groom each acknowledges that should, at any time, either become domiciled in a community or marital property jurisdiction, or should his or her domiciliary jurisdiction adopt such property rules, it is their intention and agreement that no community property, quasi-community property, marital, nor quasi-marital property rules should in any way alter, enlarge, modify, or affect the rights of either of them in the income, property, and debts of the other, other than as set forth in this Agreement.
   11. **Intervening Events.** The parties acknowledge that a considerable period of time may elapse between the execution of this Agreement and its enforcement. This Agreement is designed and intended to anticipate and provide for this contingency. Accordingly, the parties assume the risk of any intervening changes in circumstances including, without limitation, inflation, deflation, recession, depression, increases or decreases in the income or assets of the parties, geographic relocation, changes in the law, or any other change in circumstances, except as expressly provided herein.
   12. **Voluntary Execution of Agreement.** The parties acknowledge that each has entered into and signed this Agreement willingly and voluntarily, and free of influences from the other or any other person.
   13. **Child Support.** Nothing in this Agreement shall relieve either party of any obligation to support any children of the marriage.
   14. **Timing of Marriage.** As of the date of execution of this Agreement,Bride and Groom have not yet made final plans for the particulars of their intended marriage, including the intended date thereof, pending completion of execution of this Agreement. However, following the execution of this Agreement, Bride and Groom may elect to marry immediately thereafter; if so, the parties agree and acknowledge that, since the particulars of their intended marriage were not yet decided as of execution of this Agreement, the fact that there may have been close proximity in the timing of the execution of this Agreement and the parties' subsequent marriage does not give rise to an inference of any pressure on either party to sign this Agreement; each of them is entering into this Agreement freely, voluntarily, and without any pressure on him or her to do so.
   15. **Prior Discussions of Premarital Agreement.** Bride and Groom each acknowledges that the parties discussed the prerequisite of entering into a premarital agreement, conceptually consistent with the foregoing terms, prior to reaching their decision to marry. Bride and Groom each acknowledges that the presentation to him/her of this Agreement did not constitute a surprise or other unexpected circumstance, irrespective of the amount of time between the drafting and/or execution of this Agreement and the date of the parties' intended marriage.
   16. **Entire Agreement.** This Agreement contains the entire understanding of the parties concerning the rights of each in the property and estate of the other by reason of their marriage, and there are no representations, warranties, covenants, undertakings, or promises of either party, other than expressly set forth herein.
   17. **Execution of Additional Documents and Remedies.** Each party hereto shall, at the request and expense of the other, hereafter execute and deliver to the other any and all deeds, bills of sale, instruments of assignment and other documents which the other may reasonably require for the purpose of giving full force and effect to the provisions of this Agreement.
   18. **Severability.** The provisions of this Agreement are severable and, if any provision is held to be invalid and unenforceable, the remaining provisions of this Agreement shall continue to be applicable and binding on the parties as though any such invalid or unenforceable provision had not been included in this Agreement.
   19. **Captions.** Titles or captions of articles and sections contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Agreement or the intent of any provisions hereof.
   20. **Construction.** For all purposes this Agreement shall be deemed drafted by both parties and not individually by one party.

[THIS SPACE INTENTIONALLY LEFT BLANK]

Bride’s additional recitations prior to execution:

I have hired the law firm of \_\_\_\_\_\_\_\_\_\_\_ to represent me concerning the preparation, negotiation, and execution of the premarital agreement. The selection of legal counsel was of my own choosing.

I have had the opportunity to meet with my attorney as often as I requested during the negotiation process to discuss and review the premarital agreement.

I am satisfied with the advice provided by my attorney as well as answers to my questions and the attorney’s explanations of state law.

I am entering into this premarital agreement freely and voluntarily without duress or coercion.

The fact that my wedding has been scheduled within the next \_\_\_ days has not altered my decision to enter into this premarital agreement under the terms agreed to. If my wedding was one year from today’s date, I would still be agreeable to enter into this premarital agreement under the very same terms.

No medications have been prescribed for me, nor have I been under the influence of any medication, alcohol, or any drug during the drafting, negotiation, and/or execution of this premarital agreement that would affect my ability to understand the rights and obligations as set forth in this premarital agreement.

I am satisfied with the financial disclosure provided to me by Groom and I do not request any further financial disclosure. I understand that Groom has offered to provide additional financial records to me if I desire, but I am satisfied and waive my right to any further financial disclosure.

I find the premarital agreement to be acceptable and fair and I intend to be bound by each and every provision.

I understand that once I enter into this agreement, the only way to modify the agreement is to prepare an instrument and execute it consistent with the same formalities as this premarital agreement.

I have not been forced to enter into this premarital agreement and have not been promised anything by anyone other than what has specifically been set forth in the prenuptial agreement.

IN WITNESS WHEREOF, Bridehas executed this Premarital Agreement on the \_\_\_\_\_ day of .

Bride

WITNESS #1: Signature:

Printed name:

WITNESS #2 Signature:

Printed name:

STATE OF INDIANA )

)SS:

COUNTY OF \_\_\_\_\_\_\_\_\_\_\_ )

Personally appeared before me, a Notary Public in and for said County and State, Bride, who, having first been duly sworn upon her oath, states that she has read the foregoing Premarital Agreement, and that the facts and representations contained therein are true and, further, that she is signing this Premarital Agreement after reading it in its entirety, giving it careful consideration, having had an opportunity to consult about same with legal counsel and, having done so, wishes in sound mind to be bound by the terms set forth above.

Sworn and subscribed before me this \_\_\_\_\_\_ day of .

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Printed

My commission expires:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

County of residence:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Groom’s additional recitations prior to execution:

I have hired the law firm of \_\_\_\_\_\_\_\_\_\_\_ to represent me concerning the preparation, negotiation, and execution of the premarital agreement. The selection of legal counsel was of my own choosing.

I have had the opportunity to meet with my attorney as often as I requested during the negotiation process to discuss and review the premarital agreement.

I am satisfied with the advice provided by my attorney as well as answers to my questions and the attorney’s explanations of state law.

I am entering into this premarital agreement freely and voluntarily without duress or coercion.

The fact that my wedding has been scheduled within the next \_\_\_ days has not altered my decision to enter into this premarital agreement under the terms agreed to. If my wedding was one year from today’s date, I would still be agreeable to enter into this premarital agreement under the very same terms.

No medications have been prescribed for me, nor have I been under the influence of any medication, alcohol, or any drug during the drafting, negotiation, and/or execution of this premarital agreement that would affect my ability to understand the rights and obligations as set forth in this premarital agreement.

I am satisfied with the financial disclosure provided to me by Bride and I do not request any further financial disclosure. I understand that Bride has offered to provide additional financial records to me if I desire, but I am satisfied and waive my right to any further financial disclosure.

I find the premarital agreement to be acceptable and fair and I intend to be bound by each and every provision.

I understand that once I enter into this agreement, the only way to modify the agreement is to prepare an instrument and execute it consistent with the same formalities as this premarital agreement.

I have not been forced to enter into this premarital agreement and have not been promised anything by anyone other than what has specifically been set forth in the prenuptial agreement.

IN WITNESS WHEREOF, Groomhas executed this Premarital Agreement on the \_\_\_\_\_ day of .

Groom

WITNESS #1: Signature:

Printed name:

WITNESS #2 Signature:

Printed name:

STATE OF INDIANA )

)SS:

COUNTY OF \_\_\_\_\_\_\_\_\_\_\_ )

Personally appeared before me, a Notary Public in and for said County and State, Groom, who, having first been duly sworn upon his oath, states that he has read the foregoing Premarital Agreement, and that the facts and representations contained therein are true and, further, that he is signing this Premarital Agreement after reading it in its entirety, giving it careful consideration, having had an opportunity to consult about same with legal counsel and, having done so, wishes in sound mind to be bound by the terms set forth above.

Sworn and subscribed before me this \_\_\_\_\_\_ day of .

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Printed

My commission expires:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

County of residence:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_