



Question: I was widowed at 64 and am financially comfortable. For the past two years, I have been keeping company with a widower who just turned 70 and is also solvent. We are both in good health, and enjoy each other so much that we have been discussing marriage. But the six children by our prior marriages (two are mine and four are his) have been rather outspoken about the topic, and while some have made good points and we have listened, we have not been dissuaded from moving ahead with our plans.

We each went to a separate lawyer to get advice on a premarital agreement and received draft documents to take home. When we compared them, we were shocked that they looked like the exact same forms with the names changed around. We each have long-term care insurance, but want to make sure there are no claims by either of us against the assets of the other and that no one contests our agreements. The lawyers tell us that there is no way to ensure that our agreement will not be attacked. Are there other options we are missing?

Answer: Because of the changing nature of the American family, a premarital agreement should be viewed as not only a vehicle to establish financial responsibilities of both husband and wife if there is a divorce, but also, and probably more importantly when it comes to seniors, as a plan for future health care issues, death, and disability.

In that you have long-term care insurance, a potentially expensive and difficult contingency has been resolved. Therefore, your agreement can be negotiated to determine how to divide property if there is a divorce, who will handle the finances if one or both of you becomes incapacitated, and what will happen at the first and second deaths.

Generally speaking, when a couple considers a premarital agreement, the prospective spouse with more assets has one agenda, while the dependent spouse has quite another. The negotiation of this type of agreement must satisfy the needs of both sets of priorities, a very difficult task. That's why form agreements should give way to creative thinking.

Because of the scrutiny with which premarital agreements may be viewed if they are later attacked, in order to survive an assault, the agreement must be fair and the product of reasonably full financial disclosures. Each of you should have an independent attorney to represent your interests.

While there are no guarantees against one party (or others on his or her behalf) later attacking an agreement, there are ways in which a person who may later look to set aside an agreement -- and the lawyer who is hired to accomplish this task -- might be dissuaded. For example:

- 1) Keep all assets titled separately and maintain only one joint checking account into which each of you deposits enough income each month to pay the ongoing bills.

- 2) if one or both of you will sell a house and purchase a new one, make sure that you divide the equity on the second death based on the percentage of downpayment each of you contributes. Make sure that the survivor has the right to continue residing in the residence until his or her death or disability, at which time the sale and division of proceeds would take place.
- 3) Consider complete estate waivers and waivers of all rights to be beneficiaries of each other's qualified funds that comply with the law of your state of residence as to financial disclosures so that, at the first death, the survivor will have no claims whatsoever.
- 4) Despite the waivers, consider including a bonus payment to the survivor at the time that the estate of the first to die is to be closed even though there would be no obligation to do so. This payment could be based on the length of the relationship or could be a percentage of the estate.
- 5) Include economic penalties if either party takes any position inconsistent with the terms of the agreement.
- 6) Consider a trust agreement and an independent trustee with instructions not to make any payments if an attack is later made.
- 7) Provide that all disputes regarding the agreement will be resolved through final and binding arbitration, not the courts. Each party should relinquish all rights to have any court review the arrangement.

Regardless of what your agreement says, your supporting documents – durable powers of attorney, health proxies, wills, and/or trusts -- must be coordinated at part of the protection package.