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Achieving “Fairness” in Premarital Agreements between Parties with Significantly Different Financial Resources

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This memorandum will provide a brief overview of the treatment of premarital agreements under New Hampshire law, and explore how a hypothetical wealthy or “propertied” prospective spouse might make some accommodations for his or her fiancé who is substantially less wealthy to reduce the risk that the agreement might be set aside as unfair or unconscionable if it is challenged after the marriage dissolves.

A. The General Legal Principles. A New Hampshire statute specifically addresses the issue of premarital agreements. This is good because in some states the enforceability of these agreements is uncertain because some courts feel that it is bad public policy to allow prospective spouses to waive their important marital property rights, perhaps under pressure from the other spouse. The law acknowledges that these agreements are enforceable in New Hampshire provided that they are “fair” and “balanced” both when they are entered and when they are sought to be enforced. An agreement will generally be held to be fair and balanced if the parties enter the agreement voluntarily and with full knowledge of the rights they are waiving and the consequences of their waiver.

The New Hampshire Supreme Court has considered cases involving challenges to prenuptial agreements. The court has generally looked most favorably upon agreements signed well in advance of marriage which were fully considered by the parties and are the product of the give and take of negotiation conducted by independent counsel separately retained and compensated by the respective parties. There must be full mutual disclosure of the parties’ assets, liabilities and income so that each prospective spouse can place a dollar value on the rights he or she is waiving. Those rights include possible spousal support payments in the event of separation or divorce, and the rights to a property settlement upon divorce and to receive a “statutory share” of the other spouse’s estate (generally, one-half the value of that estate) if the deceased spouse’s will either disinherits the surviving spouse or provides gifts to the surviving spouse having a value of less than the statutory share. If, as in many cases, there is a substantial disproportionality in the wealth or income of the spouses, a court is unlikely to enforce an agreement involving comprehensive mutual waivers of both spouses’ marital rights regardless of the circumstances surrounding the

dissolution of the marriage. In such cases courts like to see some accommodation made by the propertied spouse to the non-propertied spouse to provide him or her with some financial security should the marriage end by death or divorce.

B. Terms of the Agreement.

1. Full Disclosure and Separate Representation. The agreement should satisfy the requirements of full disclosure and separate legal representation by requiring that each prospective spouse complete separate Schedules attached to the agreement describing each party's assets and income and having each party's attorney sign a certification attached to the document stating that each attorney has reviewed the document and all appendices and have explained its legal significance to the client. It is best to circulate and negotiate these agreements several months before the date of the marriage.

2. "Fairness": A Hypothetical Propertied Spouse's Accommodations to a Non-Propertied Spouse. To address the "fairness" issue, here is a list of several accommodations our hypothetical propertied client "John" might make in a draft premarital agreement we are proposing that he enter with his fiancé "Mary", as we might explain them to John in a letter accompanying the first draft of the agreement.

(a) Your Obligations if the Marriage Ends in Divorce.

(1) If the Marriage has a Duration of Two Years or Less. If legal proceedings for separation or divorce are commenced before the second anniversary of the marriage, you have more limited obligations than if the marriage has a longer duration. If the legal proceedings are conducted during the first year of marriage, you must pay Mary \$50,000 in lieu of any other property settlement or support obligation. If the divorce occurs during the second year of marriage you must pay \$100,000. If you previously gave Mary an interest in the home she must transfer that interest back to you.

(2) If the Marriage Lasts More than Three Years. You have more extensive obligations if the legal proceedings are commenced after the second anniversary date of the marriage. You must first pay Mary one-half of the fair market value of the primary residence you and she were occupying together. This will be the "property settlement" portion of your undertakings. It should allow Mary to find suitable replacement living accommodations. You also agree to pay her as spousal support an inflation-indexed annual amount of \$10,000 for a guaranteed payment period of five years. After the expiration of this initial five year period you reserve the right to petition the court for a modification of the support order based on general principles relative to support modifications. If you exercise this right, the court might, for example, reduce or eliminate your support obligations if it finds that Mary is financially independent or has the means to become financially

independent through employment, other resources, etc. For Mary's part, she must transfer to you any interest she has in the personal residence back to you (assuming you had previously given her an interest in the residence) before the divorce decree becomes final.

(b) If You Die Before Mary. If you predecease Mary, and you and she are married to each other on the date of your death, you assume different obligations regardless of the duration of the marriage as of the date of your death. First, you must provide in your estate planning documents that Mary will receive your interest in the residence free of any mortgages or other liens. In other words, your executor or other personal representative must first pay off any mortgage balance due on the property before transferring it over to Mary so she will not be burdened by the obligation to make mortgage payments. Second, you must grant Mary an interest in a trust which provides her with annual distributions in amounts sufficient to pay property taxes on the residence or any replacement residence Mary acquires if she sells the residence, plus property and casualty insurance premiums. Mary will be on her own for things like utilities, maintenance, improvements, etc. The trust must also be funded with an amount sufficient to produce annual "indexed annuity payments" of \$50,000 for Mary's remaining life expectancy, plus provide for a reserve fund of \$100,000 which might be tapped if the basic annuity amount does not provide for Mary's health, maintenance and support. This trust must exist as a segregated trust fund which will not be controlled in any way by any of your family members. This segregation requirement ensures that your children and Mary have no economic interrelationship and no ability to interfere with each other. Mary has the right to designate the initial Trustee and any successor Trustee of the trust. If she becomes incapacitated a successor Trustee can be appointed by a designee of Mary's choosing. You retain the right to determine who gets any property remaining in the trust upon Mary's death.