



FAMILY LAW AND ESTATE PLANNING TOPICS

Presented by:

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MARITAL CONTRACTS FACT SHEET*

Marital contracts or agreements may be created before or after marriage depending on the purpose of the contract. Because of the legal nature of all contracts and the very important rights they give or remove, you should always consult with an attorney before signing any contract.

Premarital Contracts

Generally, a premarital contract is an agreement which seeks to address exclusive or shared rights each individual will have after they are married or in the event that they should eventually divorce. There are no required rights which must be given or addressed in a premarital agreement (also called a prenuptial agreement). This document is typically used to protect assets, grant rights to certain assets or finances to one or both parties, or to clearly identify the status of premarital property prior to marriage for the purposes of any future property division in the event of either party's death or divorce. This type of agreement may even address future custody or child support rights. However, the court may find such terms not to be legally binding if the terms of custody and/or child support fail to meet the court's best interest standard. Additionally, the court may strike any portion of a premarital agreement which does not comply with the law.

Divorce Contracts

Generally, a divorce contract is created in preparation for a divorce settlement or a settlement of marital assets. These contracts are usually created in conjunction with or in preparation for divorce. You may have heard these contracts also referred to as separation agreements, marital settlement agreements, or divorce agreements. Some parties use their premarital contract as a divorce contract when it meets all the requirements of a divorce contract. In Maryland, a contract or agreement which is created in preparation for divorce must contain provisions that at a minimum address the following issues:

- Alimony/ Spousal Support,
- Property Division, and
- Child Custody & Child Support (if the parties have children under the age of 18 years).

Other Post-Marital Contracts

Other contracts may come about right after marriage or any time before divorce or death. These contracts can have the same purpose as a premarital contract or a divorce contract. However, these contracts can be created for numerous other reasons. Some such reasons include:

- To effectively transfer assets from the parents to children,
- To grant guardianship of children in the event of simultaneous death,
- To separate ownership of specific property in consideration of children from a prior marriage or prior spouses,
- To separate assets and decide use and possession of property during a temporary separation,
- For the purpose of making a nonmarital asset into a marital asset, and many other reasons.

It is important to note that a will, a trust, a power of attorney, or other contract may be the most effective tools for transferring property rights or assets to children or other persons outside of the marriage.

* Based on Maryland Law as of April 2024

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CHILD CUSTODY & SUPPORT AFTER DEPORTATION FACT SHEET*

Until or unless a case for child custody comes before the court, both parents have equal rights to access time with their children and to make major decisions for and about their children. Additionally, both parents are equally responsible for contributing to the financial and emotional well-being of their children. However, in our society, it may be rare to see parents who are no longer in a relationship sharing equal rights and responsibilities for their children. When one or both parents are not permitted to exercise his/her rights relating to their children, they may seek intervention of the court. Court intervention may also be sought when one or both parents fail to take responsibility for the care of their minor children. The inability to assert rights or failure to take responsibility may happen for many reasons which may be within the control of the parent or completely beyond the parent's control. This fact sheet will cover what to do when you or someone that you know is not able to assert parental rights or is unable to fulfill your responsibility to your children due to deportation.

Custody and Support of Minor Children after Parental Deportation

Generally, the issue of custody and support of children will have the biggest impact when undocumented parents have minor children who were born in the United States (U.S.) or who have become citizens of the U.S. under the law. While undocumented parents may be deported by U.S Immigration and Customs Enforcement (I.C.E), their children who are U.S. citizens may not be deported or allowed to leave the country with the parents unless the children have dual citizenship in both the U.S. and the parent's country of origin. This can create huge problems for families who have not made a plan for their children in the event of deportation.

Both parents have equal rights and responsibilities to their children until or unless a court of law changes that. If only one parent is undocumented, the other parent with U.S. citizenship rights may assume all care and custody of the minor children without any legal action. However, this can be problematic when the children are estranged from the parent who has citizenship rights prior to the undocumented parent being deported. In this case, and in any case where both parents are deported or unavailable, the parents need to devise a plan of care for the minor children which may include a legal agreement. Undocumented parents should identify other relatives or friends who may be able to care for their children in the event of deportation and consider one of the following types of agreements or legal actions:

- Power of Attorney
- Formal Custody Agreement (through court)
- Informal Custody Agreement (with notary or witnesses)
- Guardianship
- Obtaining dual citizenship for your children

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POWER OF ATTORNEY FACT SHEET*

In Maryland, there are three main types of powers of attorney (POA) are limited power of attorney, general power of attorney, and durable power of attorney. There are key differences between limited, general, and durable POA. The person granting authority in a POA is called the principal. The person receiving authority in the POA is called the agent.

Understanding the different types of POA

A limited POA restricts the agent's authority to specific acts and timeframes defined in the document. A general POA grants broad authority to the agent, with few limitations on their powers. The general POA usually includes an authorization for the agent to make bank transactions; purchase, sell, convey, transfer, or lease real and personal property; invest; take out loans or mortgages; manage insurance; plan for retirement; litigate, or participate in administrative proceedings; utilize safety deposit boxes; and forgive or seek to collect debts. Other authorizations that may be given to an agent in a general POA include the ability to make gifts, disclaim inheritance, manage tax issues, fund trust, and appoint a successor agent. It is important to note that even if an agent is granted the right to act in a tax matter by a general POA, there may be other forms which the state taxing agency or the IRS require the principal to complete and sign for full authorization to act in tax matters. A general POA is presumed to also be a durable POA unless the principal states otherwise within the document. A durable power of attorney remains in effect even if the principal becomes incapacitated or disabled. Maryland statutes provide statutory forms which can be used to create a power of attorney but which are not mandatory.

Creating a Valid POA

To create a valid power of attorney in Maryland, there must be a written document, signed by the principal (or principal's proxy) before a notary and witnessed by two adults. The agent must also sign to indicate acceptance of their responsibilities.

Termination of a POA

A power of attorney terminates upon the principal's death, revocation, incapacitation (for non-durable types), or completion of the authorized acts. Powers of attorney also end if the agent dies, becomes incapacitated, or resigns, unless a successor is named.

Agent Abuse

If an agent exceeds or violates the scope of their authority, the principal can file suit to have the agent's actions declared void. Principals can also petition a court to compel the agent to perform their duties. To prevent abuse, principals should choose agents carefully and limit powers as needed. Principals can require regular accountings from the agent and revoke the power of attorney if misuse is suspected. The Maryland General and Limited Power of Attorney Act also contains safeguards against abuse.

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LIVING WILLS AND ADVANCE HEALTHCARE DIRECTIVE FACT SHEET*

A living will and an advance directive are both healthcare planning instruments. A living will details medical treatment and life-sustaining measures that an individual may or may not want if they become terminally ill or enter into a persistent vegetative state. An advance directive, on the other hand, encompasses both documents that contain instructions, like a living will, and documents that select a decision-maker, like a durable power of attorney for health care.

Purpose of Creating a Living Will or Advance Directive

The purpose of creating a living will or an advance directive is to convey an individual's treatment preferences and designate a healthcare agent or proxy in the event the individual is unable to make medical decisions on their own behalf due to an incapacitating medical condition.

Creating a Living Will or Advance Directive

To create an advance directive in Maryland, an individual may use a witnessed written or electronic document, voluntarily executed properly by the declarant; a witnessed oral statement, validly made by the declarant; or an electronic document, voluntarily executed by the declarant, in which the declarant's identity is authenticated. In Maryland, the Health Care Decisions Act (HCDA) contains sample forms that may be used to create advance directives. However, it is not mandatory that these exact forms be used. Many attorneys use the forms as a skeleton and add significantly to the suggested forms.

Termination of a Living Will or Advance Directive

A competent individual always has the right to make decisions for him or herself and may always overrule a decision by an agent if he or she so desires without voiding the advance directive. However, the advance directive or living will may be terminated by the declarant (person who gave the authority) at any time before incapacity or death.

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GUARDIANSHIP OF MINOR CHILDREN FACT SHEET*

Depending on the purpose of guardianship of the minor child, guardianship may be granted over a minor child's person and/or a minor child's property. Guardianship of a minor child's person and guardianship of a minor child's property have different responsibilities and roles. A guardian of the person is appointed by the court or, in the case of a minor with no living parent, by the probated Will of a parent of the minor, to make decisions regarding the support, care, education, health, and welfare of a minor. This guardian has the authority to care for a minor and exercise the custodial rights that would otherwise belong to the minor's parents. A guardian of the property is also appointed by the court or by probated Will when the minor child either has no living parent or the other parent does not contest such guardianship. Guardianship of the minor child's property essentially makes the person being granted such guardianship a trustee over all property or specified property until the child reaches the age of majority. Property may include both tangible and intangible assets like stocks, bonds, bank accounts, real estate, etc.

Guardianship of a Minor Child with a Living Parent

In Maryland, any interested person may file a petition requesting a court to appoint a guardian of the property of a minor or of the person of the minor child. The petition for guardianship of the property or person of a minor should be filed in the form set forth in Maryland Rules. Guardianships of minor children may be done by consent. Where both parties and the minor child if the minor child is age 14 years or older consent to the guardianship, the court will generally grant the guardianship. If the guardianship is contested by either of the parents or the child, it will be more difficult to grant or obtain guardianship. If the guardianship is contested, the court will have to take evidence and determine whether the guardianship is in the best interest of the minor child. In proceedings to establish a guardianship for the minor, the court may appoint an attorney for the minor. However, the appointment of an attorney for a minor is discretionary because, in many cases involving minors, the guardian is a parent or other close family member and the circumstances do not indicate a need for an attorney for the minor.

Guardianship of a Minor Child with a Deceased Parent

In terms of granting guardianship of a minor child in a Will, the parents must nominate a guardian or guardians for the minor child. If guardianship of the person of a minor child is sought, consent of the living parent to the guardianship should be obtained, if possible. Guardianship of property does not necessarily require the consent of the other living parent. However, in the situation of death, it may be better to place the property in a trust for the minor child so that a trustee of choice may be appointed without any guardianship issues.

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LAST WILL AND TESTAMENT FACT SHEET*

The Last Will and Testament, also known as a Will, can be an important tool in ensuring that you have provided for those you leave behind when you die. No matter how small or big the estate, most people should have a Will. Many moderate to low-income families may not believe they have enough assets to warrant creating a Will. However, wills are not only used to transfer assets but may also be used to transfer authority.

General Definitions

There are several terms that are important to know when seeking to understand the purpose and use of a Will.

- **Testator** – this term refers to someone who has died and has left behind a Will.
- **Intestate** – this term refers to someone who has died but failed to leave behind a Will.
- **Decedent** – this term can be used to refer to any person who has died.

Purpose of a Will

A Will is a written document, created in accordance with state law, which describes how property is to be distributed at the testator's death. A Will also names a personal representative to handle the decedent's financial affairs. The personal representative may also be called an executor or executrix. A Will may be used to dispense property and assets or to give rights to use and possess certain property and assets. Wills may also be used to create trust. A trust is a fiduciary relationship where the legal title to property is held by one or more persons, under an obligation to convey, apply, or deal with such property for the benefit of other persons. The personal representative or another person may be appointed to administer the trust via the Will. A Will may also grant guardianship of minor children. However, if there is a living parent who does not consent to the guardianship, the guardianship may be contested. Changes may be made to a Will at any time in a person's life prior to death. Generally, such changes would be done by Codicil. A Codicil is an addition to or qualification of an existing Will made by the testator to alter, amend, or supplement the provisions of the Will.

Valid Will and Codicil

A valid will in Maryland must meet several requirements. It must be in writing and signed by the testator, or by someone else in the testator's physical presence and at the testator's express direction. The Will must also be attested and signed by two or more credible witnesses in the physical (or electronic) presence of the testator. A codicil, which is an amendment to an original Will, must fulfill the same requirements as the execution of a Will. It has the effect of republishing the will, which can save what would have otherwise been an invalid Will.

Revocation of a Will

A will can be revoked in Maryland by a provision in a subsequent, validly executed will which either expressly or by necessary implication revokes any prior will or part of a prior will. A will can also be revoked by the testator himself destroying, burning, tearing, or canceling the will, or by another person performing the destructive act at the testator's direction and in the testator's presence. A subsequent marriage of the testator followed by the birth or adoption of a child will revoke all wills executed prior to the marriage, and a divorce or annulment of a marriage between the testator and his spouse will revoke all provisions in the will relating to the spouse.

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