Separation and Pre-marital Agreements: What should they contain?

"Antenuptial" or "pre-nuptial" agreements refer to documents

executed before marriage. In our experience, the trials and

tribulations of negotiation become a significant reason why two

lovers may not marry. "Opting-out" or "post-nuptial" agreements are

those made between spouses during marriage, where they failed to

execute an antenuptial agreement when the prospect of divorce or

dissolution was not a factor, or during a reconciliation after a

separation. "Separation" and "property settlement" agreements, which

are sometimes known as "stipulations", usually refer to agreements

made before or during a separation of the spouses, or during

litigation by spouses who are married and intend to live separate or

dissolve their marriage. Each of these agreements governs the

respective rights and obligations of spouses in the event of a

dissolution.

The public policy of each state encourages those who are married or

about to be married to "opt out" of the statutory system and to

create their own provisions for support and property division upon

the dissolution of a marriage.

An agreement made before or during the marriage is usually valid and

enforceable in a matrimonial action if the agreement is in writing,

voluntarily signed by the parties, and acknowledged, where required.

The necessary formalities vary from state to state. New York requires such

agreements to be acknowledged or witnessed in the same form as necessary to

entitle a deed to be recorded. These agreements

generally include a provision to make a testamentary provision or a

waiver of any right to elect against the provisions of a will;

provisions for the ownership, division or distribution of separate,

community or marital property; provisions for the amount and

duration of maintenance or child support, and other terms and

conditions related to the marriage relationship; and provisions for

the custody, care, education and maintenance of any child of the

parties.

Each state's public policy limits what may and may not be covered in

these agreements, and should be given careful scrutiny before the

drafting of any documents. In most jurisdictions marriage is

considered a fiduciary relationship and agreements between spouses

are subject to strict standards. Their terms must be fair and

reasonable at the time of the making of the agreement. While the

permissible subject matter of such agreements has been greatly

expanded in recent years there remain limitations upon their terms.

To be enforceable and to "opt out" of the statutory system, the

matrimonial agreement must not violate the declaration of public

policy expressed in state statutes. For example, in many states

parties are not free to waive their duty to provide support for the

other if that party is about to become a public charge. The public policy of most

states is to ensure that minor children receive adequate financial support from their

parents. The terms of a settlement agreement must provide for the welfare of the

children. An inadequate child support provision is usually voidable

and cannot bind an appropriate court from remedying the inadequacy,

nor can it bind a parent from seeking to remedy the inadequacy. Many

states prohibit parents from waiving child support or providing for

arbitration of custody disputes. At most, parents may allocate

custody rights and child support duties, so long as their terms are

not detrimental to the welfare of the children.

While there is restricted freedom of the parties to contract

regarding custody and child support, they have relative freedom to

waive inheritance rights, to fix the amount and duration of

maintenance, and to distribute property as they see fit, by an

agreement. Caution: New York law requires that child support agreements

comply with the provisions of the Child Support Standards Act.

Parties are encouraged to reach an agreement and to settle between

themselves. We will list and define the essential

clauses that should be part of these agreements.

CONSIDERATION:

The consideration for an antenuptial agreement is the mutual promise

to marry. The consideration for separation agreements or "opting

out" marital agreements are the mutual promises contained in the

agreements. These agreements are generally authorized by the

Domestic Relations Law of the particular state, as long as they

comply with the statutory requirements; "consideration" may be

unnecessary.

EFFECTIVE DATE:

The antenuptial agreement becomes effective upon the marriage of the

parties; it should specifically provide that it becomes effective

upon the marriage.

SEPARATE RESIDENCE:

In a separation agreement, a provision providing for the parties'

separation must be in the agreement, (i.e., "The Parties will live

separate and apart as if such parties were single and unmarried.")

This is not, however, authorization to engage in adultery.

NON-MOLESTATION CLAUSE:

This clause requires each spouse to leave the other alone during the

period of the parties' separation and not to interfere with the

other or sue to compel a resumption of cohabitation. A covenant

against molestation in a separation agreement is an independent

condition, and its breach does not terminate the agreement or

relieve the other spouse from his or her obligations.

DEBTS:

This clause designates the party responsible for past, present and

future debts, or specifies the division of obligations. It should

also provide the penalty for a breach.

MUTUAL RELEASES/GENERAL RELEASE:

Each discharges the other, his/her heirs, executors,

representatives, etc., from all past claims under law (except causes

of action for divorce, separation or breach of the agreement). A

general release clause is the standard format for this provision.

MUTUAL WAIVER AND DISCHARGE OF RIGHTS IN ESTATES:

This provision assures that each party waives the right to take an

elective share against the estate of the other, to act as

administrator or executor of the estate of the other, including the

right to inherit from the other pursuant to a previously executed

will. As the caption indicates, rights to claim in the estate of the

other party are waived. This provision does not in any way eliminate

or reduce the rights of children.

SUPPORT AND MAINTENANCE OF THE SPOUSE:

A key to this provision is to be explicit concerning the amount and

duration of maintenance. This may be or may include a weekly or

monthly cash allowance which separates maintenance from child

support for tax purposes. Termination events should be clear and

specific. Generally, maintenance continues during the payor's

lifetime until either the death or remarriage of the recipient,

whichever is earlier, or the termination of the obligation period to

pay maintenance. To assure maintenance deductibility, payments must

terminate on the death of the payee. Other elements of support

include:

Auto Expenses

Costs of operating the Marital Home

Exclusive Occupancy

Credit Cards

Medical, Hospital, Psychiatric, Orthodontic, Pharmacy and Dental

Expenses and/or Insurance Coverage

COBRA

SUPPORT AND MAINTENANCE OF THE CHILD(REN):

This provision sets forth that the father/mother will pay during

his/her lifetime weekly support of $\_\_\_\_\_[(to cover food, clothing,

shelter and other basics)]. Likewise, it must state when child

support terminates.

Education - The parties should provide in this provision, where

appropriate, for private school, university or college, professional

or graduate school, if any. Often the terms include the requirement

of the payor's consent to the choice of school, which consent will

not be unreasonably withheld. Exactly what expenses are included

should be detailed in the Agreement.

Medical, Hospital, Psychiatric, Orthodontic, Pharmacy and Dental

Expenses and/or insurance coverage - This section usually provides

that payor will pay for medical, hospital or dental insurance for

the child (comparable to that which presently exists). In addition,

the payor will generally pay all reasonable and necessary medical,

dental and hospital expenses for the unemancipated child; this may

or may not include cosmetic or elective treatment/surgery, unless

the payor is consulted and agrees. The custodial parent must comply

with all requests for documentation. Again, the custom is, except

for emergencies, that the custodial parent must obtain the payor's

approval before committing the child to a course of care or

treatment.

Camp - Payor to pay for a camp, teen tour, or summer activity,

provided payor is consulted in advance and consents to it, which

consent will not be unreasonably withheld). The exact expenses

included must be detailed in the Agreement.

EMANCIPATION:

The Agreement should provide the age at which child support payments

terminate if sooner than age 21. Where an agreement makes provision

for the support of the children of the marriage, the paying spouse's

obligation for each child, respectively, terminates upon each child

attaining age 21. Child support obligations beyond age 21 cannot be

compelled unless the contract provides that a parent's obligation of

support will continue to a later date. In some states the child

support obligation ends at 18.

THE INCLUSION OF ESCALATION/COST-OF-LIVING INCREASE:

The inclusion of cost-of-living or escalation clauses should be

encouraged since they eliminate repeated court appearances for

modification, often accompanied by a concomitant renewal of

hostilities.

CUSTODY:

This provision should cover: The type of custody - Sole custody to

the (Mother)(Father); Joint custody; Shared custody; Physical

custody; Visitation/parenting/access schedule; who picks up and

delivers; when; where. Child not to be known by any other name.

Details as to dates and times of pick-up and return must be spelled

out and may cover, for example:

Weekend parenting to the non-custodian (Friday night through

Sunday night);

Weekday dinner or visit or overnight visit;

Telephone access;

Internet or e-mail communication and access;

Immediate notification to non-custodian of any emergencies or

change of location; access to child when ill.

Alternate public and religious holidays, school recesses.

Summer vacation.

Father's day; Mother's day; child's birthday,

Relocation. Indicate if the custodial parent is to be restricted

to a state or mile radius.

JOINT DECISION MAKING WITH REGARD TO THE CHILD(REN):

It is not considered consulting if the custodial parent makes the

ultimate decision when the parties are unable to agree. Joint

decision making means the parents must agree or resolve it through

Court or arbitration proceedings. Areas to consider include:

Education, Legal, Religion, Health, Confirmation, Bar/Bat Mitzvah.

EQUITABLE DISTRIBUTION AND/OR DISTRIBUTIVE AWARD OR DIVISION OF

COMMUNITY PROPERTY:

Equitable distribution is a tax-free distribution not included in

the income of the recipient or deductible to the payor. Furthermore,

pension and retirement funds can be transferred to the recipient by

a Qualified Domestic Relations Order ("QDRO"), leaving its

retirement nature intact while avoiding violation of the

anti-alienation provisions of ERISA, with its resultant penalties

and taxes to the transferor. Likewise, the recipient will take the

transferor's basis in any real property, recognizing the gain only

at the time of the sale to a third party and only to the extent it

has appreciated since the time of purchase (not the date of

transfer). The transfer of appreciated property is considered a gift

for tax purposes. Other items to consider, for example:

Cash - Consider an installment payment arrangement versus a lump

sum. Assuming a lump sum arrangement is preferred, be specific on

the date it is to be given and its form (check, wire transfer or

change of title on account).

Stocks and Bonds - Be sure the value placed has a date, an

approximate value and an understanding that fluctuations in

valuation are not a basis for claiming fraud.

Jewelry - Must be itemized - Description, purchase price, market

value, source of funds, separate or personal and total value.

Art - Must be itemized - Description, purchase price, market value,

present location.

Auto - The recipient is (or is not) responsible for all expenses

attendant to the operation of the automobile, including insurance,

upkeep, gasoline.

Real Property - Indicate if title and possession are to be

transferred to the husband/wife or sold. Specify who pays the cost

of the transfer. If a joint tenancy or tenancy in common and title

is transferred to one spouse, provide for relinquishment of all

claims and rights to the property and release the transferor from

all notes and obligations attributable to the property. A hold

harmless clause should be employed as well as an agreement for a

party to use his/her best efforts to have her/him removed as

obligor. If the property is to be sold, specify the details of sale,

sale price, costs, brokers, expenses, legal fees.

Real Estate Considerations in General:

When to transfer title: Properties held jointly revert to the

survivor should one party die before the dissolution of the

marriage. To alter this position you may change the manner in

which title is held immediately upon execution of the Agreement,

but you must specifically provide for this in the Agreement. It is

recommended to have the transfer documents executed simultaneously

with the Agreement.

All real property transferred, if any, must provide for the tax

consequences, costs of sale and carrying costs.

Once a spouse removes from the marital home, he/she loses the

"principal residence" nature which will impact his/her ability to

roll over the sale proceeds into another residence.

Exclusive Occupancy - Be sure that the occupant is obligated to

remove himself/herself by a date certain. If the residence is to be

sold, he/she must agree to leave the premises a certain number of

days from the execution of a contract for sale of the premises.

Specify who is responsible for any expenses attendant to operating

the home. Make provisions for penalty upon failure to leave.

Consider who will pay the moving costs and arrange the move. Make

provisions to access the premises for inspection or otherwise.

Photographing or videotaping the premises before leaving the

premises is wise.

PERSONAL PROPERTY:

Make lists, lists, lists and more lists of who gets what. The

knickknacks, bric-a-brac, crystal, china, furniture and the like are

nightmarish to divide, so forgotten items may be gone forever.

PENSION PLANS AND RETIREMENT FUNDS:

Generally, transferring a portion of these funds to the spouse as

part of the Equitable Distribution is advantageous, as previously

noted. The transferee receives the retirement funds on a tax-free

basis. They continue to accumulate tax free until distribution to

him/her from the plan. The transferor makes the transfer tax-free

and has no penalty. It is worthy of note, experienced practitioners

will net out the value of this tax free exchange in calculating the

Equitable Distribution.

INCOME TAX RETURNS AND REFUNDS:

Provide who is responsible for errors, omissions, penalties,

assessments, and interest on previously filed joint income tax

returns and the costs associated with opposing or defending an audit

or assessment, including accounting fees. So long as they remain

married, they can and should file joint tax returns. Determine how

the refund, if any, is going to be distributed. Make provision as to

who claims the child(ren) as an exemption. Unless provided otherwise

in writing, the custodial parent is entitled to the exemption. To do

otherwise, the custodial parent must sign an IRS form to entitle the

non-custodial parent to the exemption.

LEGAL REPRESENTATION:

Include the name and address of the attorneys who represented each

of the parties and a statement that each counsel was chosen freely.

LIFE INSURANCE:

Generally, a spouse purchases or maintains an existing policy for

the benefit of the child in an agreed upon amount (usually

sufficient to cover the child support obligations for the child

unless otherwise provided by will). It is not unusual for life

insurance to be purchased or maintained for the payor's maintenance

obligations or obligations to pay out a cash sum over a period of

time. Provision must be made to verify that the insurance remains in

effect and the premiums paid.

LEGAL FEES:

If one party is to contribute, partially or wholly, to the legal

fees of the other, it is generally best for the payor to contribute

a lump sum amount on behalf of the recipient's legal fees in payment

of the negotiation of the agreement, and any subsequent action for

dissolution. The recipient should hold the payor harmless for any

other fees and the recipient's lawyer should be required to waive

all other claims for the legal fees for the agreement or dissolution

proceedings against the payor.

RELIGIOUS DIVORCE:

Both parties should agree (if relevant). Make provision for

obtaining it by a specific date, payment of costs and fees, and that

both spouses must cooperate with religious authority.

MUTUAL WAIVER OF OTHER ASSETS:

Except as provided in the agreement, each spouse should waive all

rights and interests, if any, to the other's businesses, licenses,

professional degrees and other assets, real and personal, in that

party's possession, custody or control, whether or not mentioned in

the agreement.

DISCLOSURE:

Acknowledge the extent of disclosure and/or opportunities for

disclosure of assets and income of each party. It is suggested, at a

minimum, that each party provide a Net Worth Statement.

VOLUNTARY EXECUTION:

Acknowledge that the agreement was executed freely and voluntarily,

and was not the product of fraud, duress or coercion practiced by

either party or any other person upon either party. Acknowledge that

each party had full knowledge and understanding of all of its

provisions, and an opportunity to question his/her attorney with

regard to the provisions of the agreement.

ARBITRATION OF DISPUTES:

You can establish your own procedure to settle any future disputes

(a more anonymous solution) or utilize the American Arbitration

Association.

MISCELLANEOUS PROVISIONS AND USUAL "BOILERPLATE CLAUSES":

The term "boilerplate clauses" refers to the usual, commonly used

clauses that are almost always found in matrimonial agreements. The

most important clauses to consider are:

Severability: a provision stating that if any part of the Agreement

is held void or unenforceable, the balance of it will remain in full

force and effect. Without such a clause, if a material provision or

dependent clause of an agreement that does not have a severability

clause is held void, the entire agreement may be declared void.

Independent Covenants: a provision stating that each clause of the

agreement is independent of and may be enforced independently of any

other clause. This permits enforcement of the balance of the

agreement even after the breach of a particular provision, and a

party who has breached a portion of the agreement may continue to

seek enforcement of the balance of the agreement.

Counsel Fees in Event of Default: a provision that a party who is in

default of his/her obligations under the agreement will be liable

for the counsel fees and expenses of the other party incurred to

enforce the agreement in a plenary action. Without such a provision,

counsel fees might not be awarded in any plenary action to enforce

the agreement.

Further Instruments: a provision that each party will execute and

deliver all documents and take all further steps as are necessary to

effectuate the terms of the agreement, usually at no cost to the

other party.

Entire Understanding: a provision that there are no representations,

other than as set forth in the agreement, that are relied upon by

either party.

Incorporation by Reference :a provision regarding the incorporation

of the terms of the agreement in a judgment of dissolution or

support order, in the event of a divorce, dissolution or support

proceeding. This is extremely important to include.

Survival or Merger: a provision indicating the intent of the parties

as to whether the agreement survives or merges into a subsequent

judgment of dissolution. If it survives, modification may be limited

by state law.

Modification and Waiver: a provision setting forth the formalities

with which the parties must comply (such as a written and

acknowledged change) to amend or modify the agreement or waive any

of its terms.

Laws Governing: a provision setting forth the law which shall apply

to the interpretation and construction of the agreement.

Binding Effect: a provision stating that, except as otherwise stated

in the agreement, all the provisions of the agreement shall be

binding upon the respective heirs, next of kin, executors and

administrators of the parties.

Reconciliation: a provision that the agreement shall not be

invalidated or otherwise affected by a reconciliation between the

parties or by a resumption of the marital relations between them,

unless the reconciliation or resumption is documented by a written

statement executed and acknowledged by the parties.

Notices: a provision providing addresses to send any future notices

required by the agreement.