Beyond the Bar

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**The Matrimonial Agreement Primer - Final Part**

**by Joel R. Brandes**

[In the last two issues we featured the initial installments of "The

Matrimonial Agreement Primer" which are available in the Beyond the

Bar archive. This is the final installment of a valuable and

comprehensive feature which offers the foundation material necessary

for any matrimonial agreement.]

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 — 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 — 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 — 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 — 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 — provision that there are no representations,

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

either party.

Incorporation by Reference — 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 — 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 — 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 — provision setting forth the law which shall apply

to the interpretation and construction of the agreement.

Binding Effect — 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 — 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 — provision providing addresses to send any future notices

required by the agreement.

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