
Beyond the Bar

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The Matrimonial Agreement Primer - Final Part

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[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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