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## The Matrimonial Agreement Primer

by Joel R. Brandes

[Editor's note: The drafting and understanding of matrimonial agreements is of prime importance to the new attorney, and requires

a thorough knowledge of statutory law. Here, in the first of a three part installment, is a comprehensive article on matrimonial agreements by two leading experts.]

Part I

It has become common practice, both before and after the marriage

ceremony, to have attorneys draft matrimonial agreements.

"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. 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. [see

"Beyond the Bar", January, 2001, "Case Law Update", "It Ain't Over Even

When It's Over"] 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.

Parties are encouraged to reach an agreement and to settle between

themselves. In this article 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.

To be continued...

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