
Beyond the Bar

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The Matrimonial Agreement Primer - Part 2

by Joel R. Brandes

[Last month we featured the first of three installments of "The Matrimonial Agreement Primer" which is available in the February, 2001, Beyond the Bar archive. This invaluable and comprehensive article will conclude next month.]

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

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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.

...Joel Brandes represented the ex-wife of BTB Editor Alan Miller in their divorce proceeding some years ago. (This explains why Alan walks around in a barrel). Joel's web site "New York Divorce and Family

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