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FAMILY LAW BULLETIN

A NEWSLETTER FROM LAW OFFICES OF MATTHEW Z. MARTELL, P.A.

ISSUE TWO
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Answers to Common Questions About Child Support

How is child support determined?

In most cases, a parent who obtains physical custody of the children will be given an award of child support to help pay expenses incurred in

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Advantages of a Premarital Agreement

A premarital agreement allows a couple to alter the rights and obligations they otherwise would have to each other as spouses.

As a general rule, in a premarital agreement prospective spouses can:

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- Relinquish rights to the other spouse's income and property that they would typically acquire as a result of the marriage.
- Relinquish the right to inherit from a deceased spouse.
- Determine how property and liability for debts will be distributed between them should the marriage fail.
- Relinquish the right to alimony or agree on how much alimony one spouse will pay the other.
- Determine whether one spouse will or will not be obligated to pay the other's attorneys' fees if they separate or divorce.

A premarital agreement presents a couple with an opportunity to have a realistic discussion about how they expect to manage their finances and who they want to inherit their property. False assumptions can be exposed and examined before the marriage. Thus, the chances of marital conflict are reduced.

Problems a Premarital Agreement Can Resolve

Premarital agreements are adaptable to the needs of the couple. Every couple has different problems they want to solve in their premarital agreement. Here are some of the most common.

Individuals may find a premarital agreement valuable if they:

Are an older or mid-life person who has accumulated significant assets. The more assets a person owns, the more critical a premarital agreement becomes.

Want to avoid a contentious and costly fight over property and alimony upon divorce.

Are marrying someone with significant debt or money management problems.

Have children from a prior marriage or relationship to whom they want to leave their estate.

Own a business.

A. Preserving Assets during Marriage and on Divorce

- **Problem 1:** Expensive and contentious court fight over property if the marriage fails.
- **Problem 2:** One spouse has investments and earnings from those investments.
- **Problem 3:** One spouse's parents have furnished the down payment on a home.

B. Alimony

- **Problem 4:** The spouses have unequal wealth, income, or earning power, and the richer one doesn't want to pay alimony. Note that courts typically refuse to enforce alimony waivers if a spouse will be so impoverished that he or she will require public assistance.

C. Debts

- **Problem 5:** A prospective spouse has extravagant spending habits. However, a premarital agreement won't prevent creditors from coming after an ex for his or her spouse's debts.

D. Retirement Accounts

- **Problem 6:** Retirement savings are unequal.

E. Keeping Assets in the Family

- **Problem 7:** Family heirlooms or assets are especially prized.
- **Problem 8:** An inheritance is expected and desired to be kept in the family.
- **Problem 9:** Children from a prior marriage or relationship are the preferred beneficiaries of the estate.

F. Business Owners

- **Problem 10:** No spousal interference in management is preferred.

- **Problem 11:** No spousal ownership is wanted.

Creating an Enforceable Premarital Agreement

Most state laws and court decisions establish similar requirements for an enforceable premarital agreement. The most important requirements are:

- ✓ The agreement and any subsequent changes to it must be in writing.
- ✓ Before the agreement is signed, each party must fully disclose his or her financial information to the other.
- ✓ Each party must sign the agreement voluntarily after having sufficient time to review it and obtain legal advice.
- ✓ Each party should be represented by a different attorney. The parties should not use the same attorney or law firm.

What to Disclose

Here's a list of the materials that should be exchanged with a prospective spouse before entering into a premarital agreement:

- ✓ Last three years of tax returns, with all schedules and attachments.
- ✓ Current statements for all financial accounts.
- ✓ Identification of all real estate owned, how title is held, the current mortgage balance, home equity loans or lines of credit, appraised value, and appraisals, if any. Property in which a spouse has an interest but that is not in their name, such as property held in a trust should be included.
- ✓ Car titles, loan balances, and estimates of values.
- ✓ Most recent retirement account statements, along with loan balances and projected retirement benefits.
- ✓ Jewelry and personal property appraisals for art, antiques, and collections.
- ✓ Identification of family heirlooms, particularly any gifted to the fiancée for which return will be provided in the agreement.
- ✓ Business tax returns, profit and loss statements, balance sheets for the past three years. Copy of the owner's stock certificate, or similar designation of ownership percentage or interest. Include any business valuation appraisals.
- ✓ Life insurance policies, including loan information.
- ✓ Monthly statement from credit card, installment or other debts and obligations.
- ✓ The judgment for dissolution of marriage, marital settlement agreement, and parenting agreement from any prior marriage from which obligations or entitlements still exist.

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Outline of a Typical Premarital Agreement

The clauses that are appropriate for a premarital agreement and how they should be worded depend on the problems to be addressed. Provisions that are appropriate for a second marriage, couples with similar net worth, or a late in life marriage may not be appropriate for a couple with widely disparate wealth.

A. Property

Waiver of interest in other party's separate property. Each party can list the property that they owns at the time of the marriage either in the agreement or in schedules attached to it. The agreement can then provide that each waives any interest in the other's property that they would otherwise acquire because of the marriage.

Property to remain separate. The parties can agree that the property they own on entering the marriage will remain their separate property and, if the marriage ends, the property will remain each spouse's property free from any claims of the other.

Appreciation in separate property to remain separate. The parties can agree that appreciation, both active and passive, of separate property or any property acquired in exchange for separate property will remain separate property.

Facilitation of sale or encumbrance of separate property. Each can agree that the other has a right to sell or borrow against his or her separate property and that the other spouse will sign the documents necessary to complete the transaction.

Waiver of inheritance rights. Each party can waive any rights he or she may have under state law to inherit from the other. The agreement can clarify that the waiver does not extend to any inheritance that one spouse may leave the other in a will, codicil, or trust to protect the surviving spouse's right to an inheritance that the deceased spouse intended to provide him or her.

Waiver of interest in retirement accounts. Each party may agree to waive any interest they would otherwise acquire by marriage in the other party's retirement accounts. However, to waive an interest in an employer-provided retirement plan subject to ERISA, the parties should execute written waivers after the marriage as only spouses can execute ERISA waivers.

Marital property. The parties can agree on how they will divide any marital or jointly owned property that they acquire if the marriage ends in divorce. The division may or may not be equal.

Down payment on marital home. If one party provided the down payment from separate property, the agreement can provide that, if the parties divorce, the down payment will be returned to the party who provided it before any remaining equity in the home is divided.

B. Alimony and Support

Specification of alimony or waiver of alimony. Each party can waive the right to receive alimony or spousal support from the other. Alternatively, the parties can agree that one party will pay the other a specified amount of alimony. The alimony may be payable as a one-time lump sum or periodically for a specific period of time.

Child support for children of prior relationships. The parties can agree that neither is obligated to pay child support for the other's children and that any child support received by one spouse is that spouse's separate property.

C. Income and Debts

Income to remain separate. The parties can agree that each party's income earned during the marriage will remain the separate property of the person earning it.

Premarital debts. The parties

> **“The clauses that are appropriate for a premarital agreement and how they should be worded depend on the problems to be addressed.”**

can agree to remain solely responsible for any debts that they have at the time of the marriage including child support from prior relationships.

Debts incurred during marriage. The parties may want to agree that neither spouse will obligate the other on any debt after the marriage without that spouse’s express approval and neither will sign the other’s name to any obligation.

Allocation of debts on divorce. The parties can specify how they will divide their debts on divorce. They may provide for an equal (or some other percentage) division of debts for joint credit card and other joint debt. They could further provide that debt incurred in one spouse’s name will be the sole responsibility of that spouse.

D. Business Interests

One spouse’s waiver of interest in the other’s business. If one spouse owns a business, the non-owner spouse can waive any right or claim to the business that he or she would otherwise acquire because of the marriage.

Non-owner spouse’s employment in the business. If the non-owner spouse works or may work in the business, he or she can agree that the work does not entitle him or her to any ownership interest in the business or additional compensation.

Owner spouse’s salary is fair compensation. In this provision, the non-owner spouse agrees that the owner spouse was adequately compensated by the business. It is intended to preclude the non-owner spouse from claiming that the marital unit was unfairly deprived of income and thus, he or she is entitled to a larger share of the property in compensation.

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raising them. State child support guidelines provide a formula for calculating child support. The formula considers the income and other financial resources of the paying parent, how many children the parties have, and the number of children from other relationships that the paying spouse is obligated to support.

The court can set child support higher or lower than the guidelines after considering numerous factors such as the child's age and specific needs, the amount of time the child lives with each parent, and the availability of financial resources other than child support that can be used for the child's benefit. The parties can also agree to a different amount, but the court will not approve child support below the guidelines if it will not adequately provide for the child.

Can a parent be required to pay child support after the child turns 18?

Child support usually lasts until the child turns 18 or graduates from high school. It can last longer in the case of a child who became disabled before the age of 18 or if the parties agreed to post-graduation expenses like college expenses for example.

Proving that a child is disabled requires testimony from doctors, teachers, and counselors along with medical and school records supporting the disability's existence. The amount of support that has to be paid can include not only a monthly figure but also medical expenses and health insurance.

Can the court order a parent to pay for college expenses for children?

If a parent agrees in a divorce settlement agreement or divorce decree to pay college expenses, a court can enforce the agreement if the parent refuses to pay. However, if the parent did not agree to pay college expenses, the court likely cannot order the parent to pay them. This is because the court usually does not have the power or jurisdiction to order child support past the age of 18.

What penalties can be imposed on a parent who does not pay court-ordered child support?

A parent who does not comply with a court order to pay child support can be held in contempt of court. The judge can fine the parent and even send the parent to jail. The judge can order that the child support be deducted from the parent's wages.

In addition, the parent's property can be seized, his or her tax refund intercepted, and his or her driver's license and professional licenses suspended. In some cases, the parent can even be prosecuted for a crime.

Divorce Options for the Family Home

The home that spouses shared could be the most difficult asset to address in negotiating a property settlement.

Four issues are likely to arise:

1. The home is probably the most valuable asset in the marital estate, making its disposition central to a property settlement.
2. Houses are difficult to value. Property appraisal is anything but an exact science. Two appraisers can come up with significantly different values for the same home. In fact, the only sure way to determine the value of a house is to sell it.
3. The spouses may have a significant emotional attachment to the home. The home is a place of comfort and security, and an object of pride and status. In addition to money, one or both spouses may have invested "sweat equity" to bring the home to its present condition.
4. A house creates substantial economic burdens. It costs money to insure and maintain. If a family has relied on two incomes, it may be difficult for one spouse to buy out the other's equity and then pay the mortgage, taxes, insurance, and maintenance.

Three questions must be answered in the disposition of the house: (a) Does either spouse want the house? (b) Can either afford it? (c) If so, can a value be agreed upon?

Answering these questions in order will lead to three possible solutions to the house:

1. The house will be sold and the proceeds divided.
2. The spouses will agree on a value for the house, perhaps after getting an appraisal or competing appraisals, and include it in the marital estate for division.
3. The spouses will not be able to agree on a value and the house issue must be referred to the court for a decision.

If one of the spouses wants the home and has the financial ability to keep it, the equity in it is credited to that person's share of the marital estate. The spouse taking the house will have to provide the other spouse with equivalent assets in compensation for his or her portion of the equity in the house.

In many-to-most cases neither party can maintain the marital home and, as difficult as it may be emotionally, the only realistic solution is to sell it and split the proceeds.

Tips for Avoiding Anxiety and Conflict During a Divorce

Divorce is an emotionally charged process. Even the most innocuous or insignificant of circumstances can spiral out of control on a moment's notice.

These tips can help divorcing couples avoid escalating conflict.

#1. Change the way you think about your spouse.

Imagine your spouse as a business associate or co-worker whom you might not like, but with whom you must work. Your "business" is rearing your children and negotiating a satisfactory arrangement to end your marriage.

#2. Walk away when emotions flare.

Back off and allow time for things to settle down. Maintain as your mantra: "This is just business now." You will be happier both in the short and long run, and your children will remember you for it later in their lives as well.

#3. Use your lawyers as buffers.

When a topic comes up that you and our spouse don't agree on, don't let it provoke a fight. Instead, ask your spouse to consult his or her lawyer and tell your spouse you will do the same.

#4. Believe what your lawyer tells you.

Your spouse may feel animosity toward your lawyer and attempt to undermine your confidence in him or her. Believe what your lawyer tells you and not what your spouse says.

#5. Don't fall for threats and posturing.

Be skeptical when your spouse tells you what the law is or what his or her lawyer has said. Don't believe your spouse if he or she tells you, "My lawyer says I'm going to get everything and you are entitled to nothing." Or "I'll get custody and make sure you never see the kids again."

#7. Don't negotiate or settle on your own.

Do not negotiate the terms of your settlement with your spouse without your lawyer's knowledge. Do not make any agreements or sign any documents without talking to your lawyer first.

#8. Get a post office box and secure your divorce paperwork.

Maintain a post office box for the duration of your case so that your attorney can send you mail that has no chance of being intercepted by your spouse. Do not keep letters from your attorney or other paperwork from your divorce any place where it can be found and read by your spouse.