

MARITAL SETTLEMENT AGREEMENTS: Some Considerations

This list is suggestive, but not exhaustive, of the kinds of considerations that may be addressed in Agreements.

I. Separation – Is it a voluntary separation with the intention of ending the marriage relationship? As of what date?

II. Child Custody Provisions

A. Legal vs. physical custody –

Taylor v. Taylor, 306, Md. 290, 508 A. 2d 964 (1986)

(discusses concepts of physical and legal custody):

“**Legal custody** carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child’s life and welfare . . . Joint legal custody means that both parents have an equal voice in making those decisions, and neither parent’s rights are superior to the other. **Physical custody**, on the other hand, means the right and obligation to provide a home for the child and to make the day-today decisions required during the time the child is actually with the parent having such custody.”)

(*Taylor* discusses factors court is to consider in making a joint custody award such as (1) capacity of the parents to communicate and to reach shared decisions affecting the child- “clearly the most important factor”, (2) potential disruption of child’s social and school life, (3) fitness of parents, (4) demands of parental employment, (5) geographic proximity of parental homes, (6) willingness of parents to share custody; (7) child’s relationship with each parent; (8) child’s preference – if of suitable age and discretion; (9) age and number of children; (10) sincerity of parents’ request; (11) financial status of the parties; (12) benefit to parents; (13) other factors)

1. **Physical/Residential Custody:** With whom is the child going to reside? What’s the child’s schedule in each parent’s home?
 - reasonable rights of visitation v. more detailed and specific schedule
 - 2-2-5-5, week/week, 3/4-4/3, and other schedules; see Visitation/Access below
 - any restrictions for the child’s safety: alcohol/drug abuse; no smoking in child’s presence due to child’s asthma; appropriate car seat
 - “significant other”/paramour’s presence
2. **Legal Custody:** Who is going to make the decisions?
 - is a 3d party intermediary necessary? (therapist; parent coordinator)
 - any decisions already made, private school, orthodontia, religious upbringing
 - Decision making process in the event of an impasse:
 - Mediation
 - Tie-breaking authority

- C. Split Custody. One child residing with one parent and another child residing with the other parent.

- D. Relocation out of state.
 - Prohibition; written consent or court order necessary
 - advance notice (e.g. FL§ 9-106 provision for 45 days advance written notice of relocation)
 - permitted, with change of visitation schedule
 - visitation outside U.S.A. – adequate security for prompt return

- E. VISITATION/ACCESS: Specific visitation vs. reasonable rights
 - Summer; school breaks; holidays – federal/state, religious; birthdays (child’s, Mother’s, Father’s); Mother’s Day; Father’s Day; family reunions, etc.
 - Transportation
 - location of drop-off/pick-up
 - grace period if late?
 - Any safety/transition issues?
 - Supervised Visitation – court sponsored program; neutral supervisor
 - Child Transfer Access Location
 - telephone, email communication
 - expenses of travel
 - vacation contact information, itinerary, etc.
 - Weekend visitation: Friday to Sunday; Friday to Monday a.m.; alternate arrangements; right of “first refusal” when parent not available to care for child during scheduled time; after school v. specific time such as 6 p.m. pick up
 - Midweek visits - afternoon and evening: after school v. specific time for pick up; overnight v. until a specific time
 - Gradual increase re: young child or reunification situation

III. Support Provisions

A. Alimony

1. Tax Considerations: IRC § 71(a) and 215(a)
2. DURATION – indefinite vs. rehabilitative (or even compound)
 - terminating events: FL 11-108 provides that “[u]nless the parties agree otherwise, alimony terminates: (1) on the death of either party; (2) on the marriage of the recipient; or (3) if the court finds that termination is necessary to avoid a harsh and inequitable result.”

- Typically, agreements provide for termination on death of either party or the remarriage of recipient.
- *N.B. If you have bargained for alimony to continue even following remarriage, then it is imperative that this be clearly expressed in the agreement.*
- Sometimes parties include a provision that alimony will terminate not only on remarriage, but also in the event the recipient enters into a marriage-type relationship, or cohabits with an unrelated person of the opposite sex.
- Where an agreement provides that non-modifiable alimony would terminate only on remarriage, living with a boyfriend is not remarriage and does not terminate the obligation. *Panitz v. Panitz*, 144 Md. App. 627, 799 A.2d 452 (2002).
- subject to increase or decrease?
 - as payor's income increases?
 - COLA (Cost Of Living Adjustment)?
 - ANY INTERACTION WITH RETIREMENT BENEFITS –how long until kick in; any overlap?

3. MODIFIABLE vs. NON-MODIFIABLE: If the agreement for payment of alimony is not intended to be subject to any modification by the Court, this should be made explicit in the agreement.

See FL § 8-103, 8-105(b)

4. Reservation of Alimony

5. Waiver of alimony.

B. Child Support

1. Public Policy considerations
(MD. FAM. LAW CODE ANN. § 8-103(a) & 8-105(b))
- never permanent; waiver can be disregarded

2. Basic Support

- due date – “payable in advance, without deduction”; 1st & 15th of month;
- Direct deposit payment; payment by Earnings Withholding Order (EWO);
- terminating events –death of parent or child; child’s emancipation; age of majority (or

19/completion of high school if enrolled at age 18); effect of terminating event re: one child or “both” children? Recalculation when terminating event occurs re: one child.

- **Note:** child support continuation after age 18? Yes, for children who have not attained age 19 years, are not married or self supporting, and are enrolled in secondary school. (know children’s ages)
- A court can require a parent to support a healthy child only until the child reaches majority (or 19/secondary school as mentioned above); the parents can, however, contractually obligate themselves to support a child for a longer period, and a court can enforce such an obligation if the parties consent to have the agreement incorporated or merged into the judgment of divorce. *Corry v. O’Neill*, 105 Md. App. 112, 658 A.2d 1155 (1995) (judicial modification of a mother’s and father’s agreement, increasing father’s child support obligation, ceased to be in effect when the parties’ child attained the age of eighteen, and thereafter the father’s obligation for child support reverted to the contractually fixed monthly amount.)
- Periodic recalculation? Financial information exchange.
- CPI or COLA?
- If the agreement provides for a departure/deviation from the amount of the child support that would otherwise be payable under the Guidelines, then the Agreement should specify the amount of child support that would be payable under the guidelines, the amount of the departure, the reasons, etc.
- Attach a copy of the Child Support Guidelines Worksheet to the Agreement.

3. Additional Issues:

A. Health Insurance (FL § 12-102)

- court may require parent to include child if
 - 1) parent covered by health insurance policy; &
 - 2) child can be included at reasonable cost
- limit to employer provided?
- Require after minority so long as eligible

(NOTE: For Spouse: continuation of group health coverage after divorce under state & federal law (COBRA – Consolidated Omnibus Budget Reconciliation Act); see

Bricker v. Bricker, 78 Md. App. 570, 554 A. 2d 444 (1989)
FL 11-111 & Sec. 15-408 of Insurance Article)

B. Non-insured Medical Expenses – income % -
Guidelines calculations may include “extraordinary” medical expenses; by agreement, perhaps could agree on sharing of all non-covered medical expenses.

- what does it include? Psychological, prescription, orthodontia; is a party’s consent required 1st?
- workable mechanism if reimbursement situation
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C. Private School – which expenses – income % (See *Witt v. Ristaino*, 118 Md. App. 155, 701 A.2d 1227 (1997))

D. Developmental, Extracurricular Activities Costs

E. College Expenses (court can order re minor child only)

- consider limitation on type of expense, or on dollar amount, or some objective standard (e.g. the tuition, room & board, etc. cost of an in-state Maryland resident attending the University of Maryland, College Park)
Limitation on \$\$

F. Dependency exemption

- perhaps tie in to child support being current
- Execute IRS Form 8332

G. Life Insurance – discussed in Paragraph VII.

4. Impact of Maryland Child Support Guidelines (FL § 12-201 et seq.) *Walsh v. Walsh*, 95 Md. App. 710, 622 A. 2d 825 (1993), rev’d on other grounds, 333 Md. 492, 635 A.2d 1340 (1994). Where child support has been agreed upon by the parents, a “judge must do more than merely rubber stamp anything to which the parents agree. Judges have an obligation to assure that children do not suffer because of any disparate bargaining power of their parents.” *Walsh v. Walsh*, 333 Md. 492, 635 A.2d 1340 (1994). When reviewing child support which has been agreed upon by the parents, “judges should refer to the child support guidelines, and when approving and

incorporating an agreement containing a downward deviation from the guidelines, the record should reflect the reasons why the judge adopted such an agreement.” 333 Md. 492, 635 A.2d at 1346; *see also* FL §12-202(a)(2)(v). The court’s responsibility to follow the statutory scheme for deviation from child support guidelines in accepting an agreement applies to any deviation, including where parties agree to an amount of child support greater than the amount calculated under the guidelines. *Knott v. Knott*, 146 Md. App. 232, 806 A.2d 768 (2002).

- if some trade-off for greater/lesser amount of child support, specify so court knows, and for subsequent litigation
- interaction between visitation/CS formula (Application of Shared Custody guidelines if 128 or more overnights – results in reduction of child support obligation than what would be the obligation under primary custody calculations)

IV. Property Division

A. Tax Issues

-may be better off negotiating a settlement which determines tax consequences than hoping court considers tax issues (Court considers if not remote, speculative)

B. Marital Residence

1. Buy-out

- Transfer from one spouse to the other
- Terms – refinance of mortgage, or release of other party?
- existing mortgages - Who pays; indemnification, hold harmless
- Refinance - time frame to apply, obtain
- If payment for buy-out is deferred (or late), will there be interest, late fees, security (disclosures; 6 month extension)
- What if refinance not obtained? Sell house?

2. Sale to third party

- Listing broker
- Listing price (appraisal)
- Sales price (e.g., w/i 95% of listing price)
- Accept bona fide offers
- Payment of fix-up costs

- Payment of mortgage, utilities, etc. – contribution/reimbursement, i.e. “Crawford Credits”?
- Cooperation (lockbox)
- Division of proceeds

3. Use and Possession

(FL §8-206 through 8-213)

- a. Duration – court may order for period not to exceed three years from the granting of a limited or absolute divorce; will it terminate upon remarriage, cohabitation, etc.
- b. allocation of expenses
 - mortgage; real property taxes; insurance
 - utilities
 - maintenance, repairs: ordinary v. extraordinary

C. Retirement Benefits

- court authority to divide (FL 8-205)
- present valuation
- “if, as & when” vs. trade off of present value
- “Bangs” formula re: division of marital portion on “if, as & when” basis
- Survivor benefits – need to address separately; what benefit, who pays cost, etc.
- Any waiver should be expressed clearly
- If Orders will be necessary to divide pension benefits to effectuate the parties’ agreement, it would be prudent to draft them together with the drafting of the Agreement. This will bring to forefront and resolution any issues that really had not been fully considered, agreed upon; and it will save the time and expense of scrambling to complete these matters at the time of a divorce hearing. A client may not be too pleased to complete negotiations for an agreement, and then many months later get hit with a substantial bill for the Orders.

D. Personal Property: As court cannot transfer title to personal property (except retirement benefits, family use personal property), parties can come to an agreement that suits them rather than having a court-ordered sale of joint personal property. Personal property, including

- clothing, jewelry and other tangible personal effects
- household furniture and furnishings, artwork
- motor vehicles, motorcycles, boats, aircraft, jet skis – (who’s going to pay any liens?; auto insurance);
- stocks, bonds, savings bonds, and other securities and investments;

- bank accounts: savings, checking, CDs, and other depository accounts;
- pensions, CSRS, FERS, military, State retirement, or other pension plans;
- survivor annuity benefits;
- IRA, deferred compensation, 401 (k), 403(b), 414(p), SEP-IRA, Thrift Savings Plan (TSP), profit sharing, and other similar retirement plans and accounts;
- Cooperatives
- Vacation timeshare;
- sole proprietorships, partnerships, close corporations and other business interests;
- stock option plans;
- Country club memberships;
- Sports season tickets
- Pending claims/receivables
- life insurance cash values.

E. Family pets

F. Waiver of Monetary Award?

- V. Debts, Credit cards – mortgages, home equity lines of credit, car loans, etc.
- Who's responsible to pay?
 - Joint vs. separate
 - Close joint credit cards; no further purchases that may obligate other party
 - Indemnify and hold harmless

- VI. Income Tax Returns
- Joint v. separate returns; Allocation of refunds or payments due
 - Dependency exemptions; tie in to child support payments being current?
 - Head of household filing status
 - Indemnification and hold harmless re: past tax liabilities, present return
 - Execution of documents required by IRS or State
 - Business tax obligations - 941 and FICA and Medicare

- VII. Life Insurance
- Amount: will it reduce over time
 - term v. whole life
 - duration
 - owner of policy
 - beneficiary of policy

- trustee - spouse or 3rd party
- insurability
- policy loans
- dividends
- cash value
- death benefit option
- payment of premiums
- medical exam cooperation
- life insurance trust
- reciprocity - both or neither
- penalties for non-compliance; claim against estate

VIII. Attorneys Fees

- Contribution by one spouse to other's fees
- Each pay own fees
- Entitlement to reasonable attorneys fees to enforce agreement upon other party's breach
- Court costs

IX. General Clauses

- Independent counsel
- Full disclosure? Acknowledge proceeding w/o formal discovery?
- Waiver of monetary award
- Waiver of inheritance rights (NOTE: remember to revise your Last Will & Testament as necessary and appropriate)
- Mutual release: waiver of tort claims?
- Governing law
- Dependent vs. independent
- Granting clause (is it recordable?)
- Execution of necessary documents
- Effect of resumed cohabitation or reconciliation on agreement terms
- GET or religious divorce
- Future dispute resolution of disputes under the agreement: mediation, arbitration?
- Effect of the Agreement on prior agreements/ pending litigation
- Modification in writing – Note: the parties may orally modify a written agreement even if the agreement provides modification must be written. See *Fantle v. Fantle*, 140 Md. App. 678, 782 A.2d 377 (2001).
- Incorporate, but not merge, into Judgment of Absolute Divorce – enforceable as a judgment or as an independent contract. See *Fultz v. Shaffer*, 111 Md. App. 278, 681 A.2d 568 (1996); FL §8-103 & 8-105.
- Grounds for divorce
- Social Security benefits
- Effect of bankruptcy