

## Ten Practice Tips for Postnuptial Agreements: Drafting Considerations and Formalities

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### Introduction

Every postnuptial agreement is unique because the need for an agreement between spouses can arise from a variety of factual situations. It may be that a prenuptial agreement was not done in time or the idea of a prenuptial agreement was raised too close in time to the marriage. It may be that one party receives a substantial inheritance during the marriage and wants to shield it from potential future division. Marital infidelity or issues of addiction may exist, but the couple is working through their issues and wants an agreement to provide a level of certainty and stability. In certain instances, spouses may simply want to update an older prenuptial agreement that has, over time, become outdated for any number of reasons, e.g., length of marriage, birth of children, health issues, or other events that were not foreseeable or anticipated prior to marriage.

In short, when approaching the drafting of a postnuptial agreement, whether as the draftsperson or the attorney reviewing a prepared draft, you must be aware of the dynamic within which the agreement is being raised to properly advise your client as to what issues *must* be addressed versus what *can* be addressed, issues to consider and issues to disregard, and those instances where silence is the best option. While it is not possible to cover every contingency or potential drafting concern because one size

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never fits all when it comes to a postnuptial agreement, the following are our top ten drafting tips for the family law practitioner.

### I. Be Generous

Don't forget the consideration! States differ as to what constitutes adequate consideration in a postnuptial agreement, *so be careful, be clear, and be generous*. Some states hold that neither the marriage itself nor continuation of the marriage can serve as sufficient consideration for a postnuptial agreement because past consideration cannot support a current promise.<sup>1</sup> For example, in New York, in order to be enforceable, the agreement must be based upon valuable consideration.<sup>2</sup> A release by one spouse of his or her interest in the estate of the other spouse in exchange for a similar release by the other spouse may constitute adequate consideration for a postnuptial agreement but this is not true in all jurisdictions. Consider arranging for the transfer of an additional asset of value or the provision of an additional payment and expressly labeling it as consideration for the agreement *in addition to* the promises and mutual covenants otherwise contained therein so there is no possible dispute. Be mindful of the old Wall Street adage: "Bulls make money, bears make money, pigs get slaughtered."

### II. Disclose, Disclose, Disclose

When drafting a postnuptial agreement, it is very important to remember the parties are in a fiduciary relationship (a confidential relationship), and full and fair disclosure is required.<sup>3</sup> Arguably, the obligation to fully disclose is even more important when drafting a postnuptial, as opposed to a prenuptial, agreement because the parties are already married and have rights and obligations as prescribed by law that they did not have prior to their marriage. Indeed, Florida, by statute, has eliminated the duty to disclose altogether with respect to prenuptial agreements, but it maintained the requirement with respect to postnuptial agreements.<sup>4</sup> Provide a full

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1. *Simmons v. Simmons*, 249 S.W.3d 843, 846–47 (Ark. Ct. App. 2007) (“[P]ast consideration will not support a current promise . . . [;] marriage is not adequate legal consideration.”); *Whitmore v. Whitmore*, 778 N.Y.S.2d 73 (App. Div. 2004) (holding that the husband’s continuing to remain married to the wife did not provide adequate consideration).

2. *Whitmore*, 778 N.Y.S.2d at 73; *O’Malley v. O’Malley*, 836 N.Y.S.2d 706 (App. Div. 2007) (“Postnuptial agreements are contracts which require consideration.”).

3. *Christian v. Christian*, 365 N.E.2d 849, 855 (N.Y. 1977) (“Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith.”).

4. FLA. STAT. § 732.702(2) (2018).

financial statement if possible, or at the very least, an inventory of all property and have it signed by both parties. Consider setting out in the agreement itself what documents were provided (i.e., tax returns, deeds, etc.). To be clear, what may pass as sufficient disclosure in one state may not in another, so be very aware of the law in your particular jurisdiction as to what constitutes ample financial disclosure.<sup>5</sup>

An attorney should *always* err on the side of providing more, rather than less, financial information to the other party. The lack of detail may later be used to attack and possibly invalidate an agreement based on concealment. If a value is unclear or unknown, note it in the agreement. If an asset is worth more than a stated amount, be clear as to the basis for value and possible reasons why it might be other than as set forth so that the other party will be on notice and cannot later be heard to complain (e.g., no formal valuations or appraisals have been performed and values provided are good faith estimates; discounts have/have not been provided for minority interest and/or lack of marketability; potential tax implications of liquidation of assets have/have not been taken into account; etc.).

If full or detailed disclosure is not possible, be certain to include an effective waiver of the right to disclosure and an affirmation that both parties have adequate knowledge of the other parties' assets, including a provision stating that the other party had a full opportunity to engage in discovery, retain experts, and review all the records they sought, and that no requests were refused.

### **III. Insist on Independent Legal Representation**

An agreement during a marriage not only imposes obligations of good faith but also creates unique risks of bad faith transactions. The best way to protect your client is to insist both parties have independent legal representation.

Legal representation will help down the road with all sorts of potential enforcement claims, such as whether the agreement was entered into voluntarily, there was duress, or the terms were unconscionable. It is, therefore, essential that both parties have separate, independent legal representation. A dependent spouse may not understand what he or she is waiving without consulting an attorney who can explain what the party's rights would be if there were no agreement. Remember, a married

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5. In that vein, whether the parties intend to relocate in the future, and if so, where and when, should be discussed. A review of that jurisdiction's law on postnuptial agreements and requirements for disclosure should be taken into consideration and, whenever possible, followed to eliminate any avenues for future attack.

party is waiving an existing right, unlike an unmarried person. Married parties have to understand what they are waiving. Because the parties are also fiduciaries to one another, it is important that each spouse have independent counsel of his or her own selection to fully explain the terms of the agreement.

Provision should be made in the agreement to reflect not only the names of the respective attorneys and their firms but also that each of the parties had ample opportunity to meet with counsel, have the agreement fully explained, and have all questions answered prior to execution.

#### IV. Think Globally

A choice of law provision should be included when drafting a postnuptial agreement. In this day and age, it is likely that the state in which the parties enter into their agreement may not be where they reside when a divorce ensues. They may well end up in a state or foreign jurisdiction where such agreements are discouraged or not enforced (i.e., Nebraska), a different standard is applied (i.e., New Jersey), and/or the decisional law is limited (i.e., Connecticut).<sup>6</sup> The parties' ownership of assets or residences in different states or different parts of the world could set the stage for a jurisdictional quagmire, making it even more important to have parties agree on the law that will govern.

Absent a choice of law clause, the court may apply the conflict of law provisions of the state in which the parties file for divorce. Where a choice of law provision is present, a majority of states will give it weight.<sup>7</sup> But note that there is little uniformity in the case law interpreting the scope, validity and enforceability of choice of law provisions contained in postnuptial agreements. In New York, courts routinely enforce choice of law provisions.<sup>8</sup> There are some courts, however, who will use public

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6. *Denvey v. Denvey*, 886 N.W.2d 61 (Neb. 2016); *Herr v. Herr*, 98 A.2d 55 (N.J. 1953); *Bedrick v. Bedrick*, 17 A.3d 17 (Conn. 2011).

7. RESTATEMENT (SECOND) CONFLICTS OF LAW § 187(2) (AM. LAW INST. 1971) (“The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . , unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state . . . [.]”); *see, e.g.*, *Nanini v. Nanini*, 802 P.2d 438 (Ariz. Ct. App. 1990); *Elgar v. Elgar*, 679 A.2d 937 (Conn. 1996).

8. *See, e.g.*, *Friedman v. Roman*, 885 N.Y.S.2d 740, 741 (App. Div. 2009) (“Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction.”) (citations omitted).

policy reasons of the forum state to disregard certain provisions, especially spousal support waivers.<sup>9</sup>

When drafting a choice of law provision, consider including the current domicile of the parties, any real estate or other assets located in the chosen forum, and/or the reasons the law of that particular state has been chosen to govern. This will help down the road if there is ever a challenge to the clause.

An attorney drafting a postnuptial agreement should also consider whether the choice of law provision only applies to the validity and enforceability of the agreement or whether a broader clause that would control the determination of any issue that may arise under the agreement (e.g., spousal support) is desirable. In addition, think about whether the law to be applied is the law that exists at the time the agreement is being entered into and, if so, make sure the provision is clear in that regard.

Notwithstanding the choice of law, always prepare for the clause not being enforced, and reference not only “separate” and “marital” property but other types of property as may exist in other jurisdictions, such as “community property.”

## V. Prepare to Divide and Conquer

Not all provisions are created equal. If one clause of the agreement were to fail in the future, is it your client’s intention that the entire agreement be thrown out? A severability clause will protect the agreement if one clause or provision is determined to be unlawful and/or unenforceable by providing that the other clauses of the agreement will continue in effect. Although standard in most agreements today, older agreements that failed to contain a severability clause still exist. Does the client understand the potential consequences? At a minimum, it is very important to discuss this with clients and make sure they understand the implications of including or excluding such a clause.

## VI. Deter Future Non-Compliance or Challenges To Validity

*—Pecunia non satiat avaritiam, sed iritat. (Money doesn’t satisfy greed; it stimulates it.)*

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9. This goes back to our number one tip—be generous. Do not give a court a reason to want to set aside an agreement or any one of its provisions because it is facially unfair, unconscionable, or against public policy.

This maxim of Publilius Syrus, written more than two thousand years ago, can be used to aptly describe the attempted actions of those who make a deal and then, after reaping (and keeping) the benefits, demand more.

Unfortunately, this scenario is an all too common occurrence. As a result, it is not enough to simply consider the possible avenues of attack. As a draftsman, one must do one's best to buttress the agreement against any such future attacks.

#### *A. Voluntariness*

A properly drafted postnuptial agreement must include a specific provision reflecting that each party was entering into the agreement freely and voluntarily. To the extent there are property waivers, it must be absolutely clear that such waivers were both knowing and voluntary. It is something nearly every court in every jurisdiction looks for.

#### *B. Claims of Duress, Coercion, Undue Influence, and/or Overreaching*

The words fraud, duress, coercion, undue influence, and/or overreaching are not magic talismans entitling the utterer to relief. The chanting of these mantras, however, is all too familiar. It is essential that a postnuptial agreement contain a plain-language clause stating that each of the parties had ample opportunity to review the agreement with independent counsel of his or her own selection, that each found the agreement fair and reasonable, and that each waives the right to contest the validity of the agreement in any suit or other proceeding on the grounds of unconscionability, duress, fraud, overreaching, or undue influence.

#### *C. Default*

Once the agreement is executed, you want to make sure that there: (1) is compliance with its terms; and (2) no future challenge to its validity. One way to deter potential noncompliance is to provide for parties who default on their obligations under the agreement or challenge the validity of the agreement to bear responsibility for the other litigant's fees should they be found in default by a court of competent jurisdiction or lose their challenge to the agreement. Knowing that defaulting parties will be responsible not only for their own fees but also possibly for their spouse's fees encourages compliance and discourages challenges.

### *D. Mutual Drafting, Actual Negotiation, and the Opportunity to Negotiate*

Make it clear that both parties participated in the drafting of the agreement and that they acknowledge that it is the result of negotiations between the parties and counsel.

This is important because if one party drafted the agreement and an ambiguity or question of intent arises, the other party may claim that a presumption or burden of proof arises disfavoring the drafter by virtue of authorship.

To avoid such a claim in the future, it is recommended that you provide that, although the agreement was drafted by counsel for one of the parties, the terms of the agreement were negotiated by counsel for both parties over a period of time and that changes were made as a result of such negotiations.

Keep the various drafts of any agreement in the event it becomes necessary to demonstrate that both parties participated.

## **VII. RESEARCH THE FORMALITIES**

### *A. Execution Formalities*

The formalities of executing a postnuptial agreement will vary from state to state. For example, in some states, marital contracts must be acknowledged and recorded.<sup>10</sup> In other states, the signatures must be acknowledged but recordation is not necessary.<sup>11</sup>

The consequences of failing to comply with such formalities can also vary among states and often depends on the surrounding circumstances.<sup>12</sup> For example, in New York, if an agreement is not acknowledged, the agreement will be invalid.<sup>13</sup> In certain circumstances, the failure to strictly observe such formalities may be excused.<sup>14</sup> If for some reason your state does not have statutory requirements, the agreement should

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10. See, e.g., ARIZ. REV. STAT. ANN. § 33-412 (2018).

11. CAL. FAM. CODE § 1611 (2018). See also CAL. CIV. CODE § 5134 (repealed 1985).

12. See *Galetta v. Galetta*, 991 N.E.2d 684 (N.Y. 2013) (providing a general discussion of the required formalities, failure to abide such formalities, and how surrounding circumstances may impact the outcome).

13. See, e.g., N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2019) (addressing the procedural formalities of an agreement); *Smith v. Smith*, 694 N.Y.S.2d 194 (App. Div. 1999) (finding unenforceable a prenuptial agreement that was not properly acknowledged).

14. See *In re Cleveland v. Cleveland*, 142 Cal. Rptr. 783 (Ct. App. 1977) (upholding unacknowledged marital agreement at the time of execution where both parties testified under oath at trial as to the validity of the agreement).

be executed at least with the formalities required for execution of a last will and testament, with two witnesses and a notary public, in the event the agreement would ever need to be recorded or the bona fides of its execution are ever challenged.

### *B. Videotape and/or Additional Affidavit*

Because there is usually a stricter standard for enforcement with a postnuptial agreement, err on the side of caution. Videotaping the execution is one option. That said, there is certainly a divergence of view with respect to videotaping. If all goes smoothly, it is great evidence to have, as needed, in the future. However, if it does not, and a party says something you wish he or she had not said or claims that the agreement was unfair or that signing took place under duress, etc., the evidence will be out there forever and will certainly be part of any future challenge.

Our preference is to have an additional affidavit executed by each party, which takes the form of an allocution. It is short, in plain language, and accomplishes the same objective as the videotape execution but without any of the risk.

## **VIII. Prepare for Contingencies**

### *A. Transfers Made Pursuant to the Agreement*

Postnuptial agreements are often used to transfer property mid-marriage. If property transfers are contemplated under an agreement, be sure to include a provision that (1) the transfers will be made within a certain period of time; (2) describes the property (and successor property, if any) being transferred; (3) expressly sets forth the details of each party's obligation; and (4) delineates the consequences for a failure to timely comply. Prepare for contingencies in your drafting, and make sure clients understand exactly what they are obligated to do after signing agreement and within what time period. We would suggest providing the client with a summary memo following execution identifying all obligations and the timeframe for required completion.

### *B. Estate Planning Provisions*

A postnuptial agreement may also provide for the release of any statutory or elective share, the right to receive any intestate share in the other party's real or personal property, and the right to qualify and serve as the executor or personal representative of the other's estate. Again, the law of each state is key here, as is the choice of law clause discussed above. To



draft an enforceable waiver of these rights, the lawyer must set forth with specificity the state law and each parties' rights.

We often include a provision that, notwithstanding such relinquishment of marital rights at death, a party may voluntarily make the other a beneficiary of his or her estate *following* the execution of the postnuptial agreement. In other words, a subsequent will can supersede the postnuptial agreement.

## IX. DO NOT OFFEND PUBLIC POLICY!

### A. Penalty for Infidelity

This is a very interesting area of the law that will certainly require legal research in each jurisdiction. In *Diosdado v. Diosdado*, a California divorce court found that a penalty for infidelity was in direct violation of the public policy underlying “no-fault” divorce and was thus unenforceable.<sup>15</sup> The court found:

To be enforceable, a contract must have a “lawful object.” A contract is unlawful if it is contrary to an express provision of law, contrary to the policy of express law, or otherwise contrary to good morals. Here, where the agreement attempts to impose a penalty on one of the parties as a result of that party’s “fault” during the marriage, it is contrary to the public policy underlying the no-fault provisions for dissolution of marriage. For that reason, the agreement is unenforceable.<sup>16</sup>

Such clauses are not common and certainly would add a layer of complexity to any negotiation (particularly as to defining what proof is required). If the objective of the agreement is to keep a marriage intact, provisions for punishing the bad actor are not necessarily the best way to go. We would submit that a better approach may be to provide the injured party with something tangible in connection with the provisions of the agreement that do not tie to infidelity (e.g., a first option on a residence or an additional distributive award or other type of payment). Take care in

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15. *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494 (Ct. App. 2002); *see also In re Cooper*, 769 N.W. 2d 582, 583 (Iowa 2009) (voiding postmarital reconciliation agreement that “injected fault into the distribution of property contrary to established public policy”); *Parker v. Green*, 421 P.3d 281 (Nev. 2018).

16. *Diosdado*, 118 Cal. Rptr. 2d at 496–97.

drafting so that language calls for a further or additional provision for the spouse in the event of a dissolution of the marriage, rather than a penalty.

### *B. Child Support*

Child support is tricky. The public policy of each state may affect any provisions relating to children. Parties cannot effectively waive child support in a postnuptial agreement because it is the right of the children, not the parties, that is at stake, and it is generally (but not always) governed by some form of best-interests standard. Best practices in drafting would be to set parameters and explain intentions with the hope that the court gives credence to the parties' wishes.

## **X. Clearly Define Terms**

Do not leave the interpretation of a term in an agreement to the court. One word can result in losses or gains, depending on the client, of millions. Common terms requiring definitions include:

### *A. "Operative Event" or "Triggering Event"*

Always include a very specific trigger for an agreement to go into effect. Agreements that are unclear in this regard will undoubtedly result in litigation. We generally use the filing of a divorce action and/or a writing (a letter or formal notice with provision for service to ensure receipt) explaining a trigger of the operative event.

Do not use the word "separation" because that is a subjective term (e.g., was it physical separation? Was it legal separation? What happens if there was a subsequent reconciliation?). And if you do, be clear as to what it means and what happens if there is a subsequent resumption of living together (e.g., does the agreement remain "triggered" or is it "untriggered"). Regardless of the path chosen, a writing should always be required.

### *B. "Division of Property"*

One of the central objectives of a postnuptial agreement is to identify and classify property. Clarity as to what is in the proverbial pot for division and what is not is critical. From an economic perspective, is the marital partnership continuing? The answer to that question drives how to approach the classification of property on a going-forward basis. But what about property already acquired? Is existing property being divided or will the parties continue to be partners in such property in the future? If the existing property is sold, is it then divided? If it is not divided, what if there

is a disagreement as to how such property should be used or invested? If existing property is to be divided, how, if at all, does that impact spousal and child support?

If property is to be classified as separate and shielded from distribution, the agreement needs to clearly define and provide for the disposition of existing separate property, foreseen future separate property (such as a future business, inheritance, etc.), and the appreciation of income from existing and future separate property.

If property is to be classified as marital, it must be determined whether the definition is to be construed broadly or narrowly. Will any marital property be created following the execution of a postnuptial agreement? If no further marital property is to be established following the execution of a postnuptial agreement, what happens to the then-existing marital property? Is it being divided or will it continue to be maintained in existing accounts? If there is a dispute as to whether property is marital or separate, who has the burden of proof? What is the standard to be applied? Should marital property be used to maintain a party's separate property? Should a party's separate property be used to maintain marital property? These are the types of questions you must be exploring with your client regardless of whether you are drafting or reviewing. The answers will help shape what is to be classified as out-of-the-pot (i.e., nonmarital or separate property) and what is in the pot (i.e., marital property).

### C. "Income"

When examining what is in the pot and what is out, consideration must be given to income. If income is to remain in the marital pot for future division, how it is defined is critical. General phraseology of "income" or "net income" is pretty much useless. Income is what you define it to be. And if you are not careful in how that definition is crafted, it may lead to disputed interpretations years later.<sup>17</sup> For example, is deferred compensation to be included in the definition of income? If so, is there a distinction to be made between involuntarily deferred income versus voluntarily deferred income? Does that fact change when it should be counted? What if you represent a stockbroker who receives a bonus couched as a forgivable loan provided certain conditions are met? The

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17. See, e.g., *Keene v. Keene*, 572 N.Y.S.2d 592, 592-93 (App. Div. 1991) (parties litigated meaning of "current gross income" as that phrase was used in a separation agreement and the court concluded that it included a certain retirement incentive); *Dube v. Horowitz*, 684 N.Y.S. 2d 689, 690 (App. Div. 1999) (finding use of the term "wages" in the agreement ambiguous and permitting parol evidence to ascertain the parties' intent).

employee receives those funds at the time of the transaction, but it does not constitute income to him or her and will not have to be reported until years later if and when the conditions are met and the loan is ultimately forgiven. If not properly drafted, the situation is an invitation for future litigation.

#### D. “Support”

Spouses are typically free to fashion the amount, duration, and nature of the support to be provided to the other spouse except to the extent the resulting agreement renders a spouse a public charge<sup>18</sup> or terms are otherwise unconscionable.<sup>19</sup> If there is a significant property division at the time of the postnuptial agreement, should that impact support on a going-forward basis? And if so, in what way or ways?

If there is to be a waiver, prudence must be exercised to ensure the spouse waiving support is not rendered a public charge in the event of the termination of the marriage or that the terms are not otherwise unconscionable.<sup>20</sup> Alternatively, the circumstances under which such a scenario could arise should be contemplated as a potential carve-out from any support waiver.

As with any other provision of a postnuptial agreement, when drafting a spousal support waiver, there is a need for express, clear, and unambiguous language. For example, there should be express language as to what type of support is being waived, i.e., interim support, permanent support, or both. While an agreement might waive a spouse’s right to support, such a waiver without more specificity can be interpreted to waive permanent support and not temporary support.<sup>21</sup> If parties wish to waive temporary support, they should so state expressly and unambiguously.

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18. *See, e.g.*, *Bassler v. Bassler*, 593 A.2d 82, 87 (Vt. 1991) (dealing with a prenuptial agreement); N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 2019).

19. *See, e.g.*, VA. CODE ANN. § 20-151 (2018) *et seq.*; N.Y. DOM. REL. LAW § 236(B)(3)(3) (McKinney 2019); TEX. FAM. CODE ANN. § 4.105 (West 2017).

20. *Id.*

21. *Compare* *Solomon v. Solomon*, 637 N.Y.S.2d 728 (App. Div. 1996) (awarding *pendente lite* spousal support where agreement waived spousal support but did not specifically waive *pendente lite* support) with *Arizin v. Covello*, 669 N.Y.S.2d 189, 190 (Sup. Ct. N.Y. Cnty. 1998) (declining to award *pendente lite* spousal support where agreement specifically waived it); *see also* *White v. White*, 617 So. 2d 732, 734 (Fla. Dist. Ct. App. 1993) (agreement waiving “any other right or claim that may otherwise be available” held not to have waived a right to alimony at all).

*E. “Waiver of Retirement Benefits”*

This is the one area that is easier when drafting a postnuptial agreement than a prenuptial agreement. Such waivers have been found to be invalid in a prenuptial agreement because only a “spouse” may waive these rights, making post-marriage waivers necessary in the case of a prenuptial agreement.

To be effective in a postnuptial agreement, the waiver must comply with the Employee Retirement Income Security Act (“ERISA”) and Retirement Equity Act (“REA”).

*F. “Commingling of Assets”*

Most agreements spell out specific waivers for separate property but leave out any clause for commingling. When drafting a postnuptial agreement, you should include very specific clauses to guard against commingling and to detail what happens if and when commingling occurs. Consider including a “Separate Property Credit” provision. If properly drafted, it could save the monied spouse from a commingling disaster. In addition, be sure to explain to clients how important it is to be vigilant by maintaining separate accounts and to follow the terms of the agreement even if the marriage is going well.

*G. “Liabilities”*

Attorneys often include waivers as to property and support but neglect to include any provision for debts. Provisions addressing liabilities may be especially useful if one of the reasons for a postmarital agreement is concern over one party’s existing debt or spending habits. The provision should also contain an indemnity clause in the event that a creditor attaches the assets of the nondebtor party.

*H. “Sunset Provision”*

Depending on the reason for the postnuptial agreement, an attorney may want to suggest a “sunset provision,” which would require the agreement to terminate after a certain period passes. It is not uncommon to find such a clause in prenuptial agreements, and if the postnuptial was executed shortly after the marriage because the parties did not have enough time to execute prior to the marriage, this option may be something to consider. It is also possible the parties had a rough patch in the marriage and want a postnuptial agreement to make sure that they are back “on track” but with an automatic provision for expiration after a defined period of time.

**APPENDIX**  
**SAMPLE CLAUSES<sup>22</sup>**

**I. Division of Property**

*A. Carving Out Some, But Not All, Property*

Upon the occurrence of an Operative Event, nothing in this Agreement shall be construed as a waiver of either party's right: (1) to an equitable distribution award of marital property (as defined under the New York Domestic Relations Law); or (2) to claim that any property owned by either of them not designated as Separate Property under this Agreement nonetheless constitutes his or her separate property (as defined under the New York Domestic Relations Law) [*Appropriate references should be made to the law of the jurisdiction governing the postmarital agreement*]. Property designated as Separate Property of the Husband or the Wife, as the case may be, under this Agreement shall forever remain the Separate Property of that Party, free of any claim of the other.

*B. Carving Out All Property as Separate or Nonmarital*

Each party agrees that the other shall keep and retain sole ownership, control, and enjoyment of all income and all property, real or personal, tangible or intangible, and any and all interests therein and income therefrom and appreciation thereof and the proceeds of investment and reinvestment thereof, now or at any time hereafter owned or possessed by the other party or in the name of a nominee of the other party or trustee for the benefit of the other party, and that the other party shall be free to dispose of all or any part of such income, property, interests therein and the income therefrom, as they may at any time and from time to time determine, as fully and effectively as though the marriage of the parties hereto had not taken place.

The parties hereby intend and agree that all such property owned by each of them, the appreciation thereof, and the interest and income therefrom and the proceeds of investment and reinvestment thereof shall be his or her "separate property" and that in any jurisdiction such property shall exclusively be his or her "separate property" as distinguished from marital property, community property, quasi-community property, or any equivalent thereof.

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22. The examples provided here are clauses from agreements drafted by the authors and/or others in their firm.

Without limiting the generality of the foregoing, the parties agree that any property now or at any time hereafter owned or possessed by either of them, together with the income thereon and the appreciation thereof, and the proceeds of any and all investment and reinvestment thereof, cannot be transmuted or changed into marital property or be impressed with a special equity interest, or otherwise be transmuted or changed into any form of property interest as to which the other party has a claim or interest arising out of the marital relationship. The parties agree that the income from their separate property and the appreciation thereof, whether attributable to market conditions or to the skills and efforts of any person, including the owner thereof or the other spouse, shall also remain the separate property of each party notwithstanding their marriage.

## II. Income

*[This clause will have to be tailored to the specific facts of your case. Detail is the key.]*

“Earned Income” shall include wages, salary, bonuses, commissions, consultation fees, royalties, director fees, distributions, and net profit from self-employment, including the distributive share of general partnership, S-Corporation, and other profits paid on account of Spouse’s work, labor, or services (as opposed to distributions from entities in which the Spouse is merely an investor), and dividends received as employment compensation from the securities of an entity in which the Spouse is an employee (as opposed to passive investments), and perquisites. In calculating Earned Income, there shall be no deduction for withholdings such as income taxes, Social Security, and Medicare contributions or any other such deductions required by law. Items of compensation the receipt of which are *involuntarily* deferred or which are contingent upon a future event (i.e., *without* the Spouse’s voluntary election), shall not be included in the computation of Earned Income in the year in which they are earned, but shall be included based upon their value at the time the Spouse receives or becomes entitled to receive such Deferred Items of Compensation. Items of Compensation, the receipt of which are voluntarily deferred by the Spouse to a subsequent year or years, such as elective pension or 401(k) contributions, charitable contributions, or any other voluntary deduction or deferral that reduces the Spouse’s reported income, shall be calculated as part of Earned Income in the year earned.

### **III. Spousal Support**

#### *A. If No Waiver*

Upon the occurrence of an Operative Event, nothing in this Agreement shall be construed as a waiver of either party's right to make an application or request or claim for alimony, maintenance, or spousal support, whether temporary, interim, or permanent.

#### *B. If Waiver*

Each Party hereby waives any claim which he or she may have against the other for alimony, maintenance, or support, whether on a temporary, durational, or permanent basis, and each agrees that his or her respective duties to support and maintain the other are extinguished in consideration of all the provisions of this Agreement regardless of the laws of the jurisdiction in which the Parties may then be residing. The foregoing waivers are binding, nonmodifiable, and irrevocable for all time, irrespective of any changes in either Party's health, condition, or economic circumstances.

The Parties hereby acknowledge that the foregoing spousal support provisions are fair and reasonable at the time of the making of this Agreement and, subject only to a party becoming a public charge under *[Insert your jurisdiction's applicable statutory reference]* at the time of an Operative Event, shall not be deemed unconscionable at the time of entry of final judgment.

*[If you are in a state that has maintenance/support guidelines, it is imperative that you incorporate into your waiver language the requisite statutory opt-out language.]*

### **IV. Financial Disclosure**

The [Wife] confirms that to the extent she deemed it advisable, she has received financial information and disclosure of the Husband's assets and liabilities (a copy of such disclosure is annexed as Exhibit \_\_\_\_ hereto and made part hereof) and that she regards such information as sufficient to enable her to make an informed decision concerning this Agreement. The Wife further confirms that she wishes no further disclosure, either oral or written; that she has not been refused any requested information; and that she is under no duress or other pressure to refrain from obtaining additional disclosure, and that, upon advice of her independent counsel, she is fully aware of and understands all of the rights that she is surrendering or releasing and the obligations she is undertaking pursuant to this Agreement.

*[Include a reciprocal clause for the other Spouse.]*



### **V. Operative or Triggering Event**

An “Operative Event” is defined as:

- (a) The delivery to one Party of a written notice, signed by the other Party, sent in accordance with the provisions of Article \_\_\_\_, stating the Party’s intention to terminate the Marriage and/or to live separate and apart (the “Separation Notice”); or
- (b) The commencement by either Party of an action or proceeding for divorce, annulment, or separation in a court of competent jurisdiction.

### **VI. Independent Counsel/Voluntary Execution**

The Parties acknowledge that each has been represented by counsel, \_\_\_\_\_ for the Husband, and \_\_\_\_\_ for the Wife. Each Party acknowledges that he or she has been fully advised by his/her independent counsel of all rights that, except for this Agreement, would be conferred upon him/her in the property or estate of the other by virtue of their Marriage, and that:

- (a) Each is of sound mind, capable of appraising and controlling his/her conduct, and has carefully read this Agreement in its entirety;
- (b) Each understands all of his/her rights and obligations under this Agreement, and the Agreement accurately reflects those understandings;
- (c) The provisions of the Agreement have been fairly negotiated “at arm’s length” without any reliance upon promises or statements not set forth in this Agreement;
- (d) Each fully understands the advantages and disadvantages to him/her of this Agreement and executes the same of his/her own accord, freely and voluntarily and not as a result of duress, coercion, overreaching, or undue influence; and
- (e) Each accepts this Agreement as fair, just, and reasonable.

### **VII. Choice of Law**

This Agreement shall be governed by and interpreted, both as to validity and enforceability, pursuant to the internal laws of the State

of \_\_\_\_\_ in effect as of the execution of this Agreement and irrespective of: (a) the jurisdiction or forum where divorce, separation, annulment, dissolution, or death may occur; and (b) where the Parties are then residing without regard to duration. This Agreement shall govern all rights in all property, whether the property is situated within or without the State of \_\_\_\_\_, or within or without the United States of America.

### **VIII. Mutual Drafting, Actual Negotiation, and Opportunity to Negotiate**

This Agreement shall not be construed more strictly against one Party than the other merely by virtue of the fact that it has been prepared initially by counsel for the [Wife], it being recognized that both the Husband and the Wife and their respective counsel have had a full and fair opportunity to negotiate and review the terms hereof and to contribute to the substance and form of this Agreement.

### **IX. Severability Clause**

If any term, provision, paragraph, or article of this Agreement is declared illegal, void, or unenforceable by reason of public policy or otherwise, same shall not affect or impair the other terms, provisions, or articles of this Agreement which shall remain binding and fully enforceable; provided, however, in the event that any provision of this Agreement is so stricken or invalidated for any reason, the Parties shall jointly draft an amended version of the stricken or invalidated provision, in a manner consistent with the court's decision, to ensure that each Party receives the benefit of his or her respective bargain in negotiating this Agreement, and the Parties shall jointly amend this Agreement to include the revised provision. The doctrine of severability shall be applied. The Parties do not intend by this statement to imply the illegality, voidness, or unenforceability by reason of public policy or otherwise of any term, provision, paragraph, or article of this Agreement.

### **X. Waivers; Claims of Duress, Coercion, Undue Influence, and/or Overreaching**

*[Modify language as applicable.]*

Except as provided to the contrary elsewhere in this Agreement, each Party waives his or her rights and releases the other from any and all claims for spousal maintenance or alimony (permanent, durational, or on a temporary or interim basis prior to or during the pendency of any action or proceeding between them for support, divorce, or annulment); counsel

fees (whether prior to, during the pendency, or upon the conclusion of any action or proceeding between them); distribution of marital, community or quasi-community property, distributive awards, special relief; or claims of any nature regarding the other Party's income or assets. On the basis of the parties' asset and liability disclosures, and the fact that this Agreement was freely and willingly entered into through the joint negotiations of the Parties and through their counsel, the Parties further waive any right to contest the validity of this Agreement in any suit or other proceeding on the grounds of unconscionability, duress, fraud, overreaching, or undue influence.

### **XI. Default**

If a Party fails to comply with an obligation hereunder and said default is not remedied within twenty (20) days after written notice is sent in the manner prescribed in Article \_\_\_\_ specifying such default to such Party, the defaulting Party agrees to indemnify the other Party against, and to reimburse the other Party for, any and all expenses, costs, and reasonable attorney's fees resulting from or made necessary by any suit or other proceeding brought to enforce any of the terms, covenants, or conditions of this Agreement to be performed or complied with by the other, provided such suit or other proceeding results in a judgment, decree, or order in favor of the other. In the event such suit or other proceeding does not result in a judgment or order substantially in favor of the Party bringing such suit or proceeding, the Party who brought the suit or other proceeding shall reimburse the other Party for any and all expenses, costs, and attorneys' fees of the other Party resulting from or made necessary by such suit or proceeding.

For purposes of this Agreement, it is understood and agreed that if either Party institutes a suit or proceeding against the other to enforce any term, covenant or condition of this Agreement and after the institution of such action or proceeding but before judgment is or can be entered or said breaching Party shall substantially comply with such term, covenant, or condition of the Agreement, then and in that event, the suit, motion, or proceeding shall be deemed to have resulted in a judgment, decree, or order in favor of the nonbreaching Party.

### **XII. Waiver of Retirement Benefits**

*[The language in the first paragraph will have to be modified to reflect the parties' agreement. In this clause, each party will be retaining what he or she has now, and what he or she will respectively contribute in the future.]*

The Parties shall each retain the value of any retirement plan or account, including but not limited to those set forth on Exhibits A and B, as well as the value of any contribution(s) made by a Party or his or her employer, and any increase or decrease thereon, as his or her respective Separate Property.

- a. Each Party (as “Plan Participant”) hereby elects, and the other Party (as “Spouse”) hereby consents, to a waiver and release of any and all benefits, including without limitation any qualified joint and survivor annuity form of benefit and any qualified pre-retirement survivor annuity form of benefit or any other right under all pension, retirement, death benefit, stock bonus, or profit-sharing plans, systems, or trusts (hereinafter collectively called “employee plans”) of which the Plan Participant is or may become a participant, beneficiary, or member. The Parties intend that this Agreement be accepted as a consent by the Spouse to an election by the Plan Participant to waive a qualified joint and survivor annuity and a qualified pre-retirement survivor annuity pursuant to section 417(a) of the Internal Revenue Code of 1986, as amended, or the similar provisions of any subsequent law (the “Code”) and as a consent under section 417(a)(2) with respect to any rights of the Spouse under section 401(a)(11)(b)(iii) of the Code. In particular, where applicable, the Parties intend that this Agreement be accepted as a “general consent” by the Spouse to an election by the Plan Participant to waive a qualified joint and survivor annuity and a qualified pre-retirement survivor annuity pursuant to section 417(a) of the Code and Treasury Regulations section 1.401(a)-20, Q&A 31(c).
- b. The Spouse acknowledges that he or she has the right to limit his or her consent to a specific beneficiary and a specific optional form of benefit, where applicable, and the Spouse voluntarily elects to relinquish both of such rights and expressly consents to the designation of other beneficiaries and other forms of benefits without the further consent of the Spouse. Each Party acknowledges that such Party has received an explanation of a qualified joint and survivor annuity and a qualified pre-retirement survivor annuity in accordance with section 417(a)(2) (a)(iii), (a)(3)(a) and (a)(3)(b) of the Code and of the Spouse’s rights under section 401(a) (11)(b) (iii) of the Code and each further acknowledges that the intended effect of the consents herein, including any general consents, is to deny the Spouse any right, interest, benefit or annuity in or from

- the Plan Participant's benefits under any employee plan, now or in the future.
- c. The Parties understand that certain laws and regulations, including but not limited to section 417(a) of the Code and Treasury Regulations section 1.401(a)(20) require that, in order to be considered effective, certain of the elections, consents, waivers, and releases contained in this Paragraph must:
- i. Be consented to in writing by a Spouse;
  - ii. Designate a beneficiary or form of benefit which cannot be changed by the Plan Participant without the Spouse's consent unless the Spouse executes a "general consent" within the meaning of Treasury Regulations section 1.401(a)-20, Q&A 31(c), which expressly permits any future designations of other beneficiaries and other forms of benefit without the further consent of the Spouse;
  - iii. Acknowledge the effect of the Plan Participant's election to waive the qualified joint and survivor annuity or the qualified pre-retirement survivor annuity and the effect of the Spouse's consent thereto;
  - iv. Acknowledge that the Spouse of the Plan Participant has the right to limit his or her consent to a specific beneficiary and a specific optional form of benefit, where applicable, and that the Spouse voluntarily elects to relinquish both of such rights; and
  - v. Be witnessed by a plan representative or a notary public.
- d. In order to make the consents, including general consents, elections, acknowledgments, waivers, and releases contained in this Paragraph effective, the Parties agree that after their marriage, each Party, upon the request of the other Party, shall sign such separate documents as may be required (including a consent in substantially the form annexed as Exhibit \_\_\_ ) to effectuate said consents, including general consents, elections, acknowledgments, waivers, and releases provided for herein during the applicable election periods.

## **XII. Commingled Property**

Except as otherwise provided in this Agreement, if Marital Property is commingled with a Party's Separate Property, the Marital or Separate nature of the commingled property shall be determined as set forth by the definitions of Marital Property and Separate Property set forth in Articles \_\_\_ and \_\_\_ of this agreement and not by any method of apportionment.

Notwithstanding anything to the contrary, a Party cannot unilaterally convert Marital Property to Separate Property by transferring a jointly owned asset into his or her own name without the written consent of the other Party.

Joint use of Separate Property or use of Marital Property to maintain or improve Separate Property shall not give rise to joint ownership of such Separate Property or convert it to Marital Property unless such Separate Property is intentionally placed in the joint names of the Parties or the Parties agree otherwise in a jointly executed writing executed with the same formality as this Agreement. Nor shall the use of Marital Property to maintain or improve Separate Property give rise to any obligation to reimburse or right of recoupment or offset. The Parties expressly reject the concept of inadvertent transmutation of Separate Property into Marital Property, and no such change of character shall occur in the absence of a writing as mandated by this paragraph.

The use of Separate Property to maintain or improve Marital Property shall not convert such Marital Property to Separate Property, nor shall it give rise to any obligation to reimburse or right of recoupment or offset.

Likewise, either Party's contributions through personal efforts, cash, or otherwise ("Marital Efforts") to maintain or improve a Party's Separate Property shall not convert such Separate Property into Marital Property, nor shall it give rise to any obligation to reimburse or otherwise compensate the contributing Party or the Marital estate for any such Marital Efforts, regardless of the extent to which such Marital Efforts may have contributed to the appreciation or other increase in value of any such Separate Property.

### **XIII. Liabilities**

"Separate Liabilities" shall include all liabilities arising in connection with either Party's Separate Property (including without limitation all liabilities listed on such Party's respective financial disclosure attached hereto as Exhibit A or B). Each Party shall be solely responsible for his or her respective Separate Liabilities, which shall be paid from such Party's respective Separate Property.

"Marital Liabilities" shall include all liabilities incurred in joint name by the Parties after the Marriage, as well as any liability arising in connection with the Parties' Marital Property. The Parties shall be jointly responsible for such Marital Liabilities, which shall be paid from the funds, if any, constituting Marital Property.

#### XIV. General Provisions

**Binding on Successors:** This Agreement and all the obligations and covenants hereunder shall inure to the benefit of and bind the Parties hereto, their heirs, executors, administrators, legal representatives, and assigns.

**Merger:** This Agreement and its provisions merge any prior agreements, if any, of the Parties and is the complete and entire Agreement of the Parties.

**Implementation:** Each of the Parties hereto, without cost to each other, from time to time hereafter shall execute and deliver any and all further instruments and assurances, and perform any acts that the other Party may reasonably request for the purpose of giving full force and effect to the provisions of this Agreement.

**Modification:** Except as provided herein, no provision of this Agreement shall be amended or modified unless by agreement in writing duly subscribed and acknowledged with the same formality as this Agreement.

**Voluntary Payments:** Any payments in excess of the sums hereinabove specified voluntarily made by one Party (the “Payor”) to the other Party (the “Payee”) at any time for his or her support, maintenance, or otherwise shall neither alter the Payor’s legal obligations hereunder nor create any precedent for the future. Such excess payments shall not be construed as proof or indication of the Payor’s ability to make increased payments or of the Payee’s need thereof, and accordingly they shall not be used in any action or proceeding for evidentiary purposes or otherwise.

**Waiver:** Any waiver by either Party of, or failure on a particular occasion to enforce, any provision of this Agreement or any right hereunder shall not be deemed a continuing waiver and shall not prevent or stop such Party from thereafter enforcing such right, and the failure of either Party to insist in any one or more instance upon the strict performance of any of the provisions of this Agreement by the other Party shall not be construed as a waiver or relinquishment for the future of such provision, and the same shall continue in full force and effect.

**Independent Covenants:** Each of the respective rights and obligations of the Parties hereunder shall be deemed independent and may be enforced independently, irrespective of any of the other rights and obligations set forth herein.

**Notices:** All notices pursuant to this Agreement shall be sufficient if by both email to the Husband or the Wife at his or her last known addresses and either (a) sent to the Husband or the Wife at his or her last known address by overnight delivery (e.g., Federal Express), or (b) made by receipted personal delivery.

**XV. Execution Formalities: Allocution Affidavit**

**AFFIDAVIT OF JOHN JONES**

*[A reciprocal affidavit would be prepared for the other spouse.]*

STATE OF \_\_\_\_\_ )

) ss.:

COUNTY OF \_\_\_\_\_ )

**JOHN JONES**, being first duly sworn, according to law, deposes and says that he is the individual described as “John” in the foregoing instrument and makes this Affidavit in acknowledgment of the following:

- That he has read this Postmarital Agreement, word for word, paragraph by paragraph;
- That he understands its contents;
- That he understands and appreciates the legal effect of his signature to this Postmarital Agreement with JANE JONES (“Jane”);
- That this Postmarital Agreement completely and perfectly expresses his understanding of the terms of the agreement which he has arrived at with Jane;
- That this Postmarital Agreement expresses the entire understanding and agreement between himself and Jane, without any secret promises or other agreements or inducement, not therein expressed or stated;
- That his assent to this Postmarital Agreement was reached after mature deliberation and after consultation with counsel;
- That his execution of this Postmarital Agreement is of his own free act and deed;
- That this Postmarital Agreement is not the result of any collusion between himself and Jane or between himself and any third person or persons;
- That neither the terms of the Postmarital Agreement arrived at between him and Jane nor his signing and acknowledging of the foregoing Postmarital Agreement were occasioned, brought about, or influenced by the use of any duress, coercion, or undue influence practiced, or brought or exercised upon him in any manner by any person whomsoever;
- That he is not under the influence of any drugs or alcohol and/or other impairment preventing him from understanding the terms



and provisions of this Postmarital Agreement and the impact of him executing same;

- That he has had the opportunity to review the terms of the Postmarital Agreement with his attorneys and is satisfied with the services rendered to him by said attorneys.

\_\_\_\_\_  
**JOHN JONES**

Sworn to before me this

\_\_\_\_\_th day of \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_\_  
Notary Public