

SILENT PARTNER

SEPARATION AGREEMENTS

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments should be sent to the address at the end of the last page.*

STANDARD AND ADMINISTRATIVE PROVISIONS

INTRODUCTION. First of all, remember the basics:

- A separation agreement is a contract between a husband and wife when they separate from each other. In this document they resolve such matters as property division, debts, custody and support. It is not a “temporary paper” drafted just to get someone off post, back to the states, etc. It contains binding and – in most cases – final promises. It may be the most important contract that the parties sign.
- No law requires a separating couple to execute a separation agreement; however it is a wise idea if there are debts, children, support claims or property involved and the parties want to settle these matters in writing.
- In most places, a separation agreement requires the notarized signatures of both parties at or after the parties’ separation.
- No one can compel a spouse to sign a separation agreement. An "agreement" means that both parties sign voluntarily. Coercion, fraud, undue influence or lack of knowledge will void the terms of a separation agreement.
- A separation agreement is not proof of the parties’ separation. It is a document reciting their promises and agreements. Whether it makes a divorce easier or faster is a matter of state law.

STANDARD CLAUSES

A good separation agreement starts by listing the parties' full names, their states of residence, the dates of marriage and separation, and the names and birthdates of any children of the marriage. These facts give helpful background information, and the recitation of children's names provides a useful reference when the children's names are stated later in the text of the agreement in defining terms for visitation, custody, child support, college expenses or allocation of the dependency exemption.

The standard or "boilerplate" clauses usually found in such an agreement state that:

- 1) The parties are separating (or have separated) and have the right to live separate and apart from each other as if single and unmarried.
- 2) Neither party shall harass, molest or interfere with the other.
- 3) Neither party shall incur debts in the other's name.
- 4) Each party waives all marital, estate and inheritance rights.
- 5) Each party waives all claims against the other, except a claim for marital dissolution or absolute divorce (this important term is called the "General Release" clause; more on it is found below).
- 6) Breach of the agreement will allow recovery of attorney's fees, damages and, if applicable, enforcement by specific performance.

PREPARATION OF THE AGREEMENT. No single attorney can represent both husband and wife in a separation agreement. It is best to have two attorneys involved, one to advise each partner. In this way, the husband and the wife both know that they have received independent legal advice for their individual situation from a lawyer who does not have a conflict of interest in trying to represent two clients with different goals and needs.

Leave out options that encourage extreme, unrealistic or illegal choices. A provision for no visitation rights, for example, is probably unenforceable--so don't leave room for it in the agreement. The same goes for a clause permanently waiving child support. Encourage the parties to be realistic in their promises.

Use basic English, not arcane legal-ese. When a difficult word must be employed, use synonyms along with it (or a definition in parentheses) to ensure that it is understood. While lawyers might think in terms of "equitable distribution," the clients will better understand (and the agreement should speak of) "property division." When discussing "maintenance" or "alimony," be sure to define it as "support payments for a husband or wife."

Using a separation agreement questionnaire makes clients think seriously about areas and issues that will need agreement if the time and expenses of litigation are to be avoided, such as property/pension division or alimony. And it requires clients to confer

with their partners on arrangements that will require agreement to be workable in the first place, such as custody and visitation, payment of debts, and the structure of support.

WHAT A SEPARATION AGREEMENT CANNOT DO. There are several limitations on what a separation agreement can do:

1. Since it is a contract between spouses, it cannot bind third parties (such as banks or finance companies) that have not signed it. If, however, one party promises to pay a bill and then breaks that promise, then the innocent party may sue the other for breach of contract for the amount of money paid. It's a good idea to use an indemnification clause to ensure this. The clause should state that the breaching party will defend, indemnify and hold harmless the other party from any costs, expenses or damages incurred because of the breach.
2. A separation agreement cannot stop one spouse from harassing the other. While separation agreements usually have a nonharassment clause in them, please advise your clients that no piece of paper -- be it agreement or court order -- is going to stop a person from doing something he or she wants to do. If the problem is one of physical violence, a court order would be better than a separation agreement and could be used to punish the wrongdoer if he or she then violated the order. If it is some other form of harassment, it may be possible to go to court for an injunction or to sue the spouse for money damages, but these may not be very effective remedies in most cases, and they certainly will not be cost-effective.
3. The terms for child custody, visitation and support are not binding on the court; they can always be modified by the court, if in the best interest of the children. In the absence of proof to the contrary, however, there is a presumption in many states that the terms concerning the children in the agreement are fair, reasonable and necessary for the best interest and welfare of the children. If you really want binding and enforceable terms for custody, visitation or support, get a court order.

"DATING CLAUSES." There is no such thing as a "dating clause" that legitimizes adultery. Sexual relations with a person who is not one's spouse is adultery, and no "dating clause" will serve to make legal something that is illegal. Most separation agreements do, however, contain a clause that allows each spouse to be left alone as if single and unmarried and that forbids each spouse from harassing, molesting or interfering with the other. Again, please advise that this is not a license for adultery.

SECURING PROMISES. If you represent the intended recipient of monthly payments (child support, alimony, pension payments or property division installments), be sure to secure those promises! While it's hard to secure them against nonpayment (short of getting a court order for wage assignment), getting life insurance to secure a promise will help the recipient if the payor dies while he's still making the payments. Be sure to use private insurance, however, not SGLI. That's because of a Supreme Court case, Ridgway v. Ridgway, 454 U.S. 46 (1981). In that decision, the Court stated that a member's beneficiary for SGLI is whomever he has selected at his death, regardless of agreements

or court orders to the contrary. No private contract or state court order can supersede the federal statutes concerning SGLI. Thus no agreement you prepare can bind the servicemember to keep the recipient as beneficiary for life insurance if you use SGLI – you'll need to look to a private policy of life insurance for this.

When you use a private policy, make sure you include a clause that transfers ownership of the insurance policy to the non-insured party for the term of the obligation. If you do this, the beneficiary cannot be changed by the insured party, and the new owner will always be notified of pending cancellation due to a lapse in premium payment. The clause should also require prompt execution of the company form to transfer ownership (such as within thirty days of signing the separation agreement).

MAKING PROMISES NON-MODIFIABLE. Child-related promises, such as visitation, support and custody, cannot be removed from the court's overview; a judge can always change the terms for these when it's in the child's best interest. But what about alimony payments? Or property division promises? Can those be made unchangeable so that the recipient doesn't lose the benefit of her negotiated bargain? The answer is YES – if you do your homework (i.e., research). You'll have to contact an attorney in the state where the agreement might be enforced, but you'll usually discover that there are several ways to make these binding and enforceable:

1. You can, in some states, simply insert a provision that the terms are non-modifiable without the consent of the parties.
2. In other states, you can accomplish this by making the promises part of an unincorporated separation agreement. All you need to do is state that the agreement (or, if you wish, the specific clauses involved) may not be incorporated into a divorce decree or other court order. This would make the promises unmodifiable without the parties' consent, as in a future amendment to the agreement. You'll need a clause that says: *This separation agreement [or Paragraph X of this separation agreement] may not be incorporated into a divorce decree or other court order; it shall remain non-modifiable without the express written consent of the parties.*
 - The disadvantage of this approach is that you usually cannot monitor whether the agreement is offered for incorporation by the other side once a divorce lawsuit is filed.
 - In addition, it's usually impossible to predict where the divorce case will be filed. What if it is filed in a state that requires incorporation?
3. Alternatively, you can make the promises interdependent, as part of an integrated property settlement. If you do this, then even if the agreement is later incorporated, it will not be modifiable (at least under North Carolina law). You'll need a clause that says: *The terms herein for property division [and alimony if that's included] are an integrated property settlement. They are interdependent and reciprocal, given in*

exchange for each other. They shall remain non-modifiable without the express written consent of the parties.

ENFORCEMENT. The violation of a separation agreement, when it's not incorporated into a divorce decree, is by lawsuit for breach of contract. The remedies available include money damages, injunction and specific performance (that is, an order from the court directing a party to perform the promises he made in the agreement). Contempt of court is not available for breach of an unincorporated agreement, since contempt is the wrongful refusal to obey a court order. Contempt is available, however, when a party breaches an agreement that has been incorporated into a court order or decree. When drafting a separation agreement, be sure to include a clause allowing the court to award expenses and attorney's fees to the party who has to bring the enforcement action.

INCORPORATION. What can you do about incorporation of the agreement into a divorce decree? There are several options for the drafter:

- You may include in your separation agreement a clause that requires its incorporation into a decree of divorce.
- Or your clause can bar the incorporation, or only bar it unless the parties later agree to this in writing.
- You may also leave out any reference to incorporation, so that it will have to be decided at the time of divorce.

So what's the low-down on incorporation? The answer is not very good – because there's simply no way of reproducing here all the state-by-state information you'll need to decide what to do about incorporation in Utah or Florida or Alaska. There are at least 51 different rules... more if you count the local variations from county to county. For example, separation agreements are routinely incorporated in divorce decrees in Fayetteville, NC (near Ft. Bragg). But this seldom occurs in Raleigh, NC, just 60 miles away!

In some states, incorporation is mandatory and there's no way of doing a separation agreement without incorporating it into the final decree of divorce or dissolution. In some it's optional – the attorney may or may not choose to include a clause about incorporation. In some states, incorporation means mere approval of the agreement by the judge; sometimes this provides a measure of insulation against later attack.

In some states, incorporation means that the promises become part of the court's order but that the contract still remains intact and enforceable as a contract between the parties. And in some states incorporation means merger – the contract becomes the court's order, and all provisions are enforceable (by contempt, garnishment, etc.) and also modifiable (if there's a change of circumstances regarding an "executory" promise, one

not yet completed). The best answer is to contact an attorney in the state where you expect the divorce will be filed and ask him or her what to do about incorporation, as well as what effects incorporation will have.

SUBSTANTIVE PROVISIONS

PROPERTY DIVISION. The parties usually agree on a division of property in their separation agreement, and that agreement will be binding on them. The property to be divided consists of real property (land and the buildings on it), tangible personal property (cars, jewelry and furniture, for example) and intangible personal property (such as bank accounts, stocks and bonds, and life insurance). Pensions and retirement rights can also be considered marital property. This type of property is often very valuable, and it is an important aspect of equitable distribution.

In many states there is a presumption that all property acquired during the marriage is equally divisible. This is presumed to be fair. Other divisions, such as 60-40 or 75-25 are certainly legal if the parties agree that the division is fair and equitable, or if the judge makes findings in the property division order that justify an unequal division. The property acquired during the marriage is called marital property in most states, and community property in those states with community property laws.

A good questionnaire will divide personal property into four categories: household furnishings and personal effects; motor vehicles; stocks, bonds, bank accounts and certificates of deposit; and other intangible personal property (cash value of life insurance, retirement benefits, etc.). The parties fill in each section with the correct information, also indicating which one will be entitled to which assets.

Real estate is divided in many separation agreements. This section would list the property address and deed description (it is advisable to use both) and would state which party gets what parcel of real property. If jointly-held land is to be divided, a deed is usually prepared in tandem with the agreement, since the separation agreement clause, standing alone, may not be effective to transfer title. When the land is mortgaged, an "assumption clause" would be used, making the title-holding party responsible for the mortgage and binding him/her to hold harmless and indemnify the other in regard to the mortgage debt. Such transfers generally do not trigger the "due on sale" clause contained in most institutional mortgages.¹

Next comes division of retirement benefits. If there is to be no division, the agreement should say so. If the decision on pension division is to be put off or deferred until the divorce because there is no present agreement, that also should be stated clearly. Make sure the agreement is very specific and plain in this area. The parties' intent as to dividing a pension or waiving this should be explicitly stated. A poorly worded

¹ Under the Garn – St. Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3, such transfers are exempt from a "due on sale" requirement if the real property contains fewer than five dwelling units and a spouse of the borrower becomes an owner of the property.

agreement may be challenged in court as vague and unenforceable, or it may result in a loss of any rights to pension division because they weren't preserved properly in the agreement. If you leave out pension division because there's no agreement, be sure that it's not unintentionally waived by virtue of the "general release clause" in the agreement. Better to say, "*The issue of pension division has not been decided by the parties and it is left open,*" or words to that effect. There is more about this topic below.

The division of pension rights in a separation agreement can be done in two ways, a present-value offset or a future percentage of payments. The former of these involves calculating (or estimating) the present value of the pension right now and setting it off (trading it) against the value of another asset, such as the other spouse's pension or the marital residence. The second approach puts off the division until whenever the employed spouse starts receiving pension payments. At that time the nonpensioned spouse would receive a share of each check equal to one-half (or some other percentage) of the marital share. The marital share is that which accrued during the marriage. The marital share can be calculated by dividing the years of marital pension service by the entire number of years of pension service. If the latter is unknown, the marital share is expressed as a formula, such as: " $19/x$, where 19 represents the years of military service for Husband during his marriage to Wife, and x represents his total years of military service." This fraction is then multiplied by the amount to be divided, which is sometimes the member's pay at separation or divorce (at that rank and years of service) and sometimes at retirement. Again, this depends on state law.

In military pension division cases, be sure to review the SILENT PARTNER on "Getting Military Pension division Orders Honored by DFAS" to be sure your wording is correct. Also remember that any order or decree (including one incorporating a separation agreement) that provides for SBP coverage must be submitted to DFAS within one year of the divorce for it to be honored; ignoring this time limitation can be a costly mistake.

HOW TO RESERVE PENSION DIVISION (OR ALIMONY). When the parties cannot agree on pension division, alimony or some other item, don't just leave it out! In this area, it's not "Silence is golden" -- it's "Silence is dangerous!" Omitting an item for which there is no agreement means that it's waived. The reason? Every good separation agreement contains a general release clause. This states that any rights or claims not set out in the agreement are waived. And that kills pension division (or alimony or whatever item is still in dispute). A good legal assistance attorney will always include a reservation clause such as: "*The parties cannot agree on military pension division. This issue is reserved for later agreement between them or for court decision.*"

However, that may not solve the problem. What if Mrs. Jones doesn't know what "reservation" means? What if she thinks it means that "she's got it" and she needs to do nothing more? Such a view, for a non-lawyer, isn't too unrealistic. If this is her interpretation, then you can just bet that, when the divorce complaint and summons arrive several weeks or months from now, she'll just ignore them instead of getting an attorney to draft a counterclaim for pension division and alimony (which is what she should do to

keep these alive after the divorce). If there's no claim pending for alimony or equitable distribution (including pension division) at the time of divorce, then these may be lost under state law. And that's an expensive mistake for Mrs. Jones to make-- and one that can be prevented.

When faced with this situation, you should do two things for your client, Mrs. Jones:

- First, include a statement in the separation agreement that informs her of what she needs to do, such as, *"The reservation of [alimony/pension division] in this agreement does not mean that it has been decided. Wife must file a claim for this with the court when a divorce is requested by either party. If Husband serves her with divorce papers, she must file this at court in a timely response to the divorce papers for [alimony, pension division]. If she files for divorce herself, she must request this in her complaint filed with the court. If she does not do this, then she may lose these rights."*
- Secondly, put it in a follow-up letter to her. Make it as plain and forceful as you can. Be sure she knows that her rights could be lost if she doesn't ask for them at the time that the divorce petition or complaint is filed. You should send it certified mail to be sure she gets it, and keep a copy of your letter and the receipt!

DEBT DIVISION. A good separation agreement also contains terms for allocation of marital debts. You should set out a schedule for who pays what debt in the agreement, including the creditor's name, account number, purpose of the debt, approximate balance and monthly payment amount. This will not stop the creditor from suing both parties if payments are not made by one spouse and both names are on the obligation, but it allows the innocent party to ask the court to hold the wrongdoer accountable for the debt as set out in the agreement.

As to who should get what debts, there is no "right" answer to this question. In one case, the husband may take on payment for all the debts because he is the sole source of income in the family or because he created the debts in the first place. In another case, the wife may take over certain debt payments for things she charged or purchased or for things that she is being given in the property division. For example, if the husband is getting the station wagon and the wife is getting the washer and clothes dryer, it might seem fair that each should assume the debt payment for the items he or she is receiving.

CUSTODY AND VISITATION. The parties should detail their plans for custody and visitation. The rise of joint custody statutes and cooperative parenting arrangements² in the last fifteen years has caused some lawyers to replace the prior separation agreement entry, which indicated the parent who would have custody of the children, with several alternatives regarding sole or joint custody, joint custody being further subdivided into joint legal custody (or "shared decision-making") and joint physical custody (or shared time with the children). Other attorneys prefer to keep the

² See Schwartz, "Toward a Presumption of Joint Custody," 18 Fam. L. Q. 225 (1984).

choices simple for separating spouses, leaving the only custody question on the separation agreement questionnaire as, "Who will have custody of the child/children?"

The section dealing with visitation rights should allow two alternatives--reasonable, flexible visitation rights (unspecified and by agreement of the parties), and specific, structured visitation rights. The latter might include, for example, visitation privileges every other weekend, during four weeks each summer, and for every other Christmas and spring vacation. Leave plenty of space for the parties to detail long-distance visitation arrangements if or when one of the parties moves pursuant to military orders. Further information on visitation (as well as custody) options can be found in the SILENT PARTNER on "Counseling on Custody and Visitation."

ALIMONY. The next section might deal with spousal support, also known as alimony or maintenance. Alimony is money paid by one spouse to the other to help with food, shelter, transportation, clothing and other living expenses. When the parties have agreed on some measure of temporary or permanent support, you should definitely put that in the separation agreement. Such a provision might state, for example, that the husband shall pay the wife alimony of \$500 per month until he or she dies or until she remarries. Or it could state that the wife shall pay the husband alimony of \$100 per month for a total of four years, at which time it will terminate forever. Here are some other alimony tips:

1. For alimony to be deductible for the payor, it must be taxable to the recipient.³ For this tax treatment, however, the alimony payments must end no later than the recipient's death.⁴ It is also acceptable to make the alimony nontaxable to the recipient if it is nondeductible for the payor. This is a particularly important term, and the agreement should clearly indicate how alimony payments shall be treated for tax purposes.
2. Alimony usually ends at the death of either party or the remarriage of the recipient (usually the wife). Sometimes a separation agreement states that alimony will also end at such time as the recipient starts living with an unrelated person of the opposite sex on a regular basis as if they were husband and wife. With today's societal changes, it would not be a bad idea to say that payments stop upon the recipient's romantic cohabitation with any person, whether of the opposite sex or not.
3. Alimony can be waived. It is always best to set out such a term clearly in the agreement. Don't just leave it out or let the agreement be silent on this issue. A waiver of alimony is such an important term that it should be clearly spelled out in the agreement so that there is no misunderstanding. If the agreement is silent on this issue, the general release clause will operate to waive alimony.

³ I.R.S. Code §§ 71 and 215.

⁴ Temporary Reg. §1.71-1T, Q-10.

4. What if Mrs. Jones asks, “Am I entitled to alimony?” Be careful – you can’t answer that question. How can you say what she’s entitled to? Non-consensual alimony is only granted by the court. While you can’t predict what the court will do, you can tell Mrs. Jones that the court would probably grant her alimony if you do your homework. Some research will tell you whether, for example, fault is necessary for alimony, alimony is only granted for rehabilitative purposes, alimony depends solely on her need for support, and other issues. If she is returning to Ohio, for example, you’ll need to research the law of that state, which is where she may be able to bring her claim in court. Some states even have guidelines for alimony, maintenance or spousal support. Such research in North Carolina law, for example, would show you that she’ll likely receive spousal support if:
- a. She files a lawsuit requesting alimony;
 - b. She is the dependent spouse – she is financially dependent on her husband or in need of support from him or her;
 - c. Her husband is the supporting spouse; and
 - d. An award of alimony is equitable under the circumstances after considering numerous factors set out in the statute.

In the absence of alimony guidelines, the best way to figure how much alimony a client needs is to calculate the difference between her reasonable monthly needs and her current net income. To do this, follow these steps:

- First of all, figure out the total monthly needs of Mrs. Jones. Make sure you have deducted any monthly expenses that are attributable to Major Jones or that he’ll be paying.
- Next, figure out which ones are “reasonable” and discard the rest. This is difficult but necessary. A monthly budget that includes huge car payments or expensive weekly trips to the beauty salon and clothing stores may be frowned upon by the judge.
- Then subtract the net income of Mrs. Jones – the result is “her gap” between reasonable monthly expenses and net income. This is her unmet needs, the net amount she needs each month.
- Next compare this figure to the difference between the supporting spouse's income and his reasonable monthly expenses.

Her gap should be equivalent (under ideal circumstances) of the "extra" money he has left over from his paycheck after he pays for his own reasonable monthly expenses. Since these "gaps" seldom exist in reality and everyone is usually spending a lot more than he or she is making, it is often a question of haggling, discussion, bargaining and horse-trading as to how much alimony should be paid in any individual case.

The next step is to take the “gap amount” for Mrs. Jones and “gross it up” to the pre-tax equivalent. This means imputing the amount that, after taxes are taken out, will yield the “gap amount” for her. The way to do this is as follows:

1. Find out Mrs. Jones’ federal tax bracket (look at the IRS tax tables). [For illustration purposes, let’s assume this is 25%.]
2. Add in the percentage of her state tax bracket (if any). [Let’s assume this is 7%.]
3. Add the two together. [25% + 7% = 32%]
4. Subtract the sum from 100%. [100% - 32% = 68%]
5. Divide this into the “gap amount” to get the pre-tax amount that will be needed. [If the gap amount is \$1000 a month, then the taxable alimony needed is \$1000/.68, or about \$1470.]
6. You can double-check this calculation by multiplying the federal and state tax bracket percentages by the taxable alimony to get the taxes to be paid. Then subtract the taxes from the alimony and you should arrive back at the “gap amount.” [Let’s check: \$1470 x 32% in taxes = \$470. And \$1470 - \$470 = \$1000 as the gap amount. Voila!]

CHILD SUPPORT, COLLEGE AND CHILD TAX ISSUES. Child support should also be settled in a separation agreement in those cases in which there are minor children. When there is more than one child, the support should ordinarily be allocated between the children, and a specific ending date should be stated.⁵ Assuming that military medical care or CHAMPUS will take care of most medical expenses, space should be left for division of any uncovered health care expenses between the parties. There should also be room left for college education provisions (should the parties desire to continue support through college) and terms for life insurance (to secure child support should one of the parents die). As a final aspect of child support, the parties should indicate in the separation agreement who will claim the dependency exemption for each child (which will determine who gets the child tax credit, currently \$500 per child). In the absence of an agreement, the parent who has physical custody for more than half of the year is entitled to claim the exemption.⁶ See the SILENT PARTNER on “Child Support Options” for more information on how to deal with support amounts, medical expenses, college clauses and allocation of the dependency exemption and child tax credit.

TAX CLAUSES. You should include a clause about tax filing. This provision can save the parties a lot of money in taxes if prepared properly. A good example would be a clause that required the parties to file jointly so long as they are eligible to do so (usually until the year they are divorced) and to divide the refund or liability for taxes in a specified way, such as 50-50, or 75-25, depending on the incomes of the parties. It would

⁵ In the absence of an allocation of child support between children, a parent is not entitled to reduce or modify unilaterally the amount of support when a child turns 18 or is otherwise not entitled to support. Craig v. Craig, 103 N.C.App. 615, 406 S.E.2d 656 (1991); Brower v. Brower, 75 N.C.App. 425, 331 S.E.2d 170 (1985); Gates v. Gates, 69 N.C.App. 421, 317 S.E.2d 402 (1984).

⁶ I.R.S. Code § 152 (e).

also require them to cooperate and exchange documents in the event of an audit, and to be individually responsible for any taxes, interest or penalty due to a party's misstatement of income, adjustments, credits or deductions.

SEPARATION AGREEMENT CHECKLIST. Finally, here's a comprehensive checklist that covers every aspect of separation agreements, from basic information needed to substantive clauses.

I. DATA ACCUMULATION.

A. Personal.

1. Names (including maiden name), Social Security numbers (SSN's).
2. Dates of birth (DOB).
3. Residence and domicile.
4. Children: names, dates of birth, SSN's
 - a. Of this marriage.
 - b. Prior marriages.
5. Date and place of marriage
6. Date of separation
7. [Optional: prior divorces, immigration status, citizenship, prior support orders, antenuptial agreement, work and education histories, special needs/handicaps.]

B. Income.

1. Current gross pay.
2. Mandatory withholdings by employer.
3. Tax withholdings (W-4 form).
 - a. Marital status.
 - b. Number of withholding allowances claimed.
4. Other income or cash receipts.
 - a. Interest/dividends.
 - b. Rent.
 - c. Pensions.
 - d. Child support.
 - e. Spousal support.
 - f. Anything else?

5. Deferred compensation plan contributions? § 401K Plan?

C. Medical Insurance Available.

1. Cost? Waiting period?
2. Coverage available after divorce? Convertible to individual policy?
3. If so, at what cost?
4. Dental plan available? Cost? Waiting period? Orthodontia covered?
5. Mental health coverage?

D. Assets.

1. Insurance policies.
 - a. Name of insurer.
 - b. Policy number.
 - c. Policy owner.
 - d. Type (term, whole life, etc.).
 - e. Cash surrender value.
 - f. Death benefit.
 - g. Loans outstanding?
2. Stocks, bonds, notes.
 - a. Name of certificate/instrument.
 - b. Name of location of certificate/instrument.
 - c. Valuation; date and method used.
 - d. Income tax basis.
 - e. Form of title.
3. Tangible Personalty.
 - a. Automobile(s).
 - (1) Make, model, and year.
 - (2) Fair market value and method of valuation.
 - (3) Outstanding loan balance and monthly payment.
 - b. Furnishings and appliances of significant value.

- (1) Describe.
 - (2) Value and method of valuation.
 - (3) Outstanding loan balances and monthly payments.
- c. Miscellaneous items (lawn mower, trailer, canoe, etc.).
 - (1) Describe.
 - (2) Value and method of valuation.
 - (3) Outstanding loan balances and monthly payments.
4. Financial accounts.
 - a. Type.
 - b. Account number.
 - c. Owner.
 - d. Institution (name, address).
 - e. Value.
5. Other financial assets.
6. Real estate.
 - a. Present occupant.
 - b. Popular description.
 - c. Legal description.
 - d. Type of asset.
 - e. Title in whose name? Form?
 - f. Encumbrances?
 - (1) Who is creditor?
 - (2) Type of security.
 - (3) Who is debtor?
 - (4) Amount due? Payment rate?
 - (5) Any balloon payment required?
 - (6) Interest rate? Flexible or fixed?
 - (7) Any unrecorded claims (i.e., amount owed to family)?

g. If leased, length of lease - rental received/obligations of owner.

7. Pensions.

a. Military – pension, Thrift Savings Plan.

b. Civil service.

c. Other.

(1) Vested?

(2) Contributions by employee?

(3) Defined benefit or defined contribution?

E. Debts.

1. Who is the creditor?
2. Type of debt (unsecured loan, revolving charge account, mortgage, etc.).
3. Reason for incurring the debt.
4. Encumbered property (if any).
5. Account number.
6. Account balance.
7. Monthly payment.
8. Interest rate.
9. Status of account (current or in arrears).
10. Who is obligated to pay?
11. Have joint credit accounts been converted to only one spouse?
12. Have military check-cashing privileges for the spouse been cancelled in the local command, the commissary, and the exchange system?

II. DRAFTING THE AGREEMENT.

A. Recitals/Boilerplate.

1. Identity of parties and vital statistics.
2. Marital status; is the marriage valid?
3. Fact basis of agreement (i.e., the parties are separated).
4. Intent as to "jointly held" property.
5. Unique factors that have been considered (e.g., re: allocation of debt responsibility, spousal support, child support, etc.).

6. Dissolution proceeding contemplated or filed; court and case number if filed.
7. Intent as to incorporation.
8. Parties' intent re employment.
9. Health of parties.
10. Completeness of agreement; any issues left remaining?
 11. Pendente lite orders and prior support agreements or obligations.
 - a. Being superseded?
 - b. All payments current?
 - c. Amount of arrears?
 12. Dispute resolution provisions?
 13. Statement of consideration.
 14. Waiver of estate, role as executor/trix, etc.
 15. Non-harassment provision.
 16. Method of modification.
 17. Effect of reconciliation.
 18. Opportunity to consult an attorney; each understands the agreement.
 19. Payment of attorney's fees and costs for agreement; for divorce; and if breach?

B. Child Custody and Visitation.

1. Type of custody.
 - a. Joint legal.
 - b. Joint physical.
 - c. Sole custody to one parent.
 - d. Split custody.
2. Sole legal custody.
 - a. Can custodial parent move from the jurisdiction? The country?
 - b. Visitation terms--
 - (1) With visitation specified.

(2) With no visitation specified.

3. Extent of visitation.
 - a. "Reasonable."
 - b. Specified times.
 - c. Notice to custodial parent.
 - d. Mutual agreement?
 - e. Location; overseas?
 - f. Non-use of visitation does not constitute a waiver of future visitation.
 - g. Transportation costs.
 - (1) Fly unaccompanied?
 - (2) Transportation to/from airport.
 - (3) Additional transportation costs custodial parent moves.
 - h. Consequences of denial of visitation.
 - i. Grandparent visitation if noncustodial parent cannot exercise right.
4. Miscellaneous matters.
 - a. Right to telephonic communication.
 - b. Copies of report cards.
 - c. No other surname to be used.
 - d. No remarks disparaging the other parent.

C. Child Support.

1. Amount to be paid.
 - a. Flat sum, or per child basis.
 - b. Periodic adjustments? How often? What basis for a new amount?
 - c. Adjustment for extended periods of visitation?
2. Medical, hospital, dental, orthodontic, and surgical.
3. Who pays any costs not reimbursed by insurance?
4. Obligation to keep child as designated beneficiary on life insurance policy?
5. Duration of payment:

- a. Define emancipation?
- b. 23 if in college?
- 6. Who claims child as dependent for income tax? Promise to cooperate and execute necessary IRS forms; remedy for failure to do so. Conditioned on current support payments? Hold harmless from increased taxes due to loss of dependency exemption and tax credit?

D. Spousal Support.

- 1. Waiver?
- 2. Purpose of support.
- 3. Periodic or lump sum.
- 4. Duration.
- 5. Taxable to recipient?

E. Asset Division.

- 1. Preliminary.
 - a. Identify; describe the assets.
 - b. Classify: marital/community, or separate?
 - c. Evaluate.
 - d. Allocate between the parties.
- 2. Confirmation of separate property or transfer from one to the other.
- 3. Continued co-ownership as true "joint tenancy with right of survivorship?"
Tenants-in-common?
- 5. Disposition of personal effects.
- 6. Specific clauses for military pension division, SBP coverage (if applicable),
other pension division (or waiver, or reservation by court over pension division)
- 7. Sale of real property
- 8. Possession pending sale
- 7. Delayed sale.
 - a. Responsibility for mortgage.
 - b. Payment of rental value?
 - c. Responsibility for maintenance, upkeep, and income in interim.
 - d. Division of proceeds upon sale?

- e. Reservation of jurisdiction by court over the asset and division thereof if delayed disposition.

F. Debts.

1. Identity of separate debts.
2. Identity of marital debts.
3. Disposition of debts. (Note: This is not binding on creditor).
4. Defend, indemnify and hold harmless.
5. Credits for payments after separation.
6. Warranty re future debts for which other may be responsible.

G. Taxes.

1. Consider state as well as federal.
2. Filing status for current year.
3. Filing status for future years (up to date of divorce).
4. Division of refund for current (and future?) years.
5. Allocation of additional taxes, penalties, and interest for:
 - a. prior years.
 - b. current year.

H. Warranties.

1. Full property and debt disclosure.
2. No known factors affecting value.
3. After-discovered marital property.
4. Effect of invalidity of any one clause.

I. Judicial Action and Miscellaneous.

1. Applicable law.
2. Covenant to carry contract through to execution: sign documents, deeds, assignments.
3. Failure to sign or deliver document required by contract (or judgment); application to court.
4. Provision for the return of dependent ID cards.
5. Effective date of agreement.
6. Signature of parties and notarization.

7. Names of attorneys.
8. Exhibits attached?
9. Has client been advised to:
 - a. Modify his/her will to exclude the spouse as a beneficiary?
 - b. Revoke powers of attorney -- with spouse as agent?
 - c. Designate new beneficiaries for insurance policies?
 - d. Designate new beneficiaries for military benefits?
 - e. Designate new beneficiaries for retirement benefits [401(k) plan, IRA, etc.]?

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SILENT PARTNER IS PREPARED BY COL MARK E. SULLIVAN (USAR, RET.). FOR REVISIONS, COMMENTS OR CORRECTIONS, CONTACT HIM AT 2626 GLENWOOD AVENUE, STE. 195, RALEIGH, NC. 27608 [919-832-8507]; E-MAIL – MARK.SULLIVAN@NCFAMILYLAW.COM.