

These materials are adapted from materials presented at a seminar sponsored by the Institute of Continuing Legal Education for Michigan family law lawyers.

I. Property Settlement Agreements

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A. Overview

A property settlement agreement is the end product of the negotiations of the parties and their teams. It should be a comprehensive stand-alone document, a contract. It should be complete, unambiguous and easily comprehensible by the parties as well as disinterested parties. Generally a settlement agreement is not modifiable, even by the court, except by written agreement of the parties. Although a property settlement agreement is often incorporated by reference into the subsequent judgment of divorce, it should be preserved as a separate contract. In other words, it may be “incorporated by reference” into the judgment so its provisions do not have to be entirely repeated in a public record, but it should expressly “not merge” with the judgment. The contract should not be inadvertently subsumed into the judgment.

The parties should not sign the settlement agreement until they have had an adequate opportunity to review it and confirm their understanding of it. Since it will usually not be filed with the court, each party and attorney should retain a fully executed copy.

Who else should review the agreement?

There may be others who should review the agreement before it is signed. If there are any provisions with potential tax implications, the agreement should be reviewed by a CPA before it is signed. This will insure the document is adequate to achieve the desired tax results and that no tax issues are left unresolved. It will also afford the CPA an opportunity to advise the client of any necessary tax planning that should follow from the agreement. For example, if the client will be receiving taxable alimony payments, the CPA may advise the client of the need to pay quarterly estimated taxes.

Every family law practitioner will know one or more local CPA’s who are conversant with the kinds of tax issues that arise in the context of divorce. Often the client has a CPA and may wish to have his or her own CPA review the contract. If the settlement involves the client’s closely held business, the client will definitely want his or her own CPA to be involved. However many CPA’s are not familiar with the “front-loading” alimony rules or the safe harbor for “unallocated family support.” Depending on the issues involved, the practitioner may want to strongly encourage review by a CPA with tax experience in the context of divorce.

Another team member who should be involved before the agreement is final is the individual who will prepare the orders for transfer of retirement assets. Retirement benefits often comprise a major portion of the marital estate. With the variety of plan types, and the myriad plan variations it is not possible for the average family law practitioner to be familiar with all the nuances and therefore the provisions that should be addressed in the agreement. More frequently, family law attorneys are delegating the drafting of qualified domestic relations orders, eligible domestic relations orders and other domestic relations orders to experts, who include certain actuaries as well as certain attorneys who specialize in preparing such orders. The drafter should review the agreement before it is final, when it is still possible to make

necessary additions or changes. This sometimes raises issues not yet considered by the parties, which may lead to further negotiations.

If the client has estate-planning documents in place, such as a trust, or is agreeing to undertake to create a trust as part of the settlement, the estate-planning attorney should review the agreement.

Others who might be asked to review parts of the agreement before it is final include insurance agents (to review specific insurance provisions) and the attorney for any closely held entity such as a corporation, partnership or LLC (where it is contemplated that an interest will be divided or transferred to the other spouse).

Practice pointer.

Even when basic agreement to a settlement has been reached, the agreement often goes through several permutations before the parties are ready to sign it. It can be difficult for everyone involved to keep track of the changes in each revision. It may be useful to transfer the document back and forth by e-mail with each version showing the changes from the former by “red-lining” or “tracking changes” which most word processing programs now do. This is an easy way to revise a lengthy document and allow everyone involved to readily see the suggested changes.

Practice pointer.

Although settlement agreements are usually not signed under time pressure, and some times are completed even before the action for divorce is filed, there are times when the parties are under a time crunch. Negotiations sometimes take place in earnest on the day of a settlement conference or trial. The urgency of the situation can be the catalyst for the settlement. When a settlement is placed on the record under such circumstances it is helpful to come to court with a draft settlement agreement, which can then be marked up as necessary to reflect the terms. The marked up agreement can be used as an exhibit when the settlement is placed on the record. The advantage of having an agreement in hand is that the parties are less likely to omit points or argue after the fact about the details that often arise during the drafting stage. If it is not possible to prepare an agreement in advance, then the practitioner should be prepared with at least a checklist, such as the one included in these materials.

B. General outline of the agreement

Most agreements follow a similar format. Following is an outline of a typical settlement agreement in a case with minor children.

Introduction

Agreements regarding the children

- Legal custody/Parenting time
 - Parenting schedule
 - Vacation and holiday schedule
 - Mechanism for communication
 - Plan for resolving disputes
- Support issues

- Child support
- Child care expenses
- Medical insurance and health care expenses
- Other child expenses

Notifications to Friend of the Court

Reference to provisions required by law to be included in the judgment

- Domicile

- Support cannot be retroactively modified

- Surcharge on past due support

- Lien

- Public assistance

- Application for federal subsidy for Friend of the Court

- 100-mile rule

Spousal support

- Specific obligation/reservation/termination

- Unallocated family support

Property settlement

- Personal property/vehicles

- Real estate and mortgage debt

- Liquid assets/bank accounts

- Investment assets/stocks and bonds

- Retirement assets

- Retained assets

- Assignments between parties

- General terminations

- Unsecured debt

- Payments

- Cash payment

- Section 71 payments

- Alimony in gross

Life insurance

- Security for support

- General terminations

Tax matters

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Attorney fees and other professional fees

Concluding provisions

C. Checklist

Every practitioner can benefit from a checklist of provisions that may need to be included in a settlement agreement. Following is a sample checklist.

Custody/parenting issues

- ✓ Legal custody
 - Joint or sole
 - If joint, define what the parties mean
- ✓ Parenting time
 - Regular weekly schedule
 - Holiday/special days schedule
 - Summers and school vacations
 - Conflicts between regular parenting time, holiday/special days schedule, and summers and school vacation schedule
 - Contact with children when with other parent
 - Transportation,
 - Who will provide
 - Drop off and pick up points
 - Right of first refusal to provide child care for other parent
 - Make-up parenting time
 - Provisions for compensation to a parent when the other parent fails to exercise scheduled parenting time
 - Provisions for move-away by either party
- ✓ Other parenting issues
 - Religious upbringing
 - Private/public schooling
 - If public, which parent's school district
- ✓ Communication between parents
 - Frequency and designated time
 - Method— e-mail, internet, by telephone at work, by telephone at home, face-to-face

meetings

- Emergency contact information
- Notice of out-of-town trips
- ✓ Dispute resolution around parenting issues
 - Commitment to discuss issues with each other before initiating formal procedures
 - Mediation, privately or through FOC, and sharing of cost
 - Use of parenting facilitator (special master, parenting coordinator)
 - Automatic referral to FOC to investigate and make a binding recommendation

Child support

- ✓ Payment mechanism
 - Direct or through FOC
 - OIW or no OIW
- ✓ Include declining amounts payable as each child reaches 18 (graduates from high school)
- ✓ Parenting time abatement
- ✓ Provisions for payment of arrearages
- ✓ Sharing of child care expenses
- ✓ Sharing of enrichment costs
- ✓ Sharing of transportation costs
- ✓ Sharing of direct child-related expenses, when the shared economic responsibility formula applies
- ✓ Periodic review

Health care for children

- ✓ Which parent will provide medical, dental, optical insurance
- ✓ Will premiums be shared
- ✓ Allocation of uninsured medical costs
 - Orthodontia
 - Therapy
- ✓ Mechanisms for reimbursement/sharing
- ✓ Mechanism for providing insurance information and processing claims
- ✓ Are parents limited to “in-plan providers” for non-emergency services
- ✓ Will there be a “qualified medical child support order”

Other child-related issues

- ✓ College (can be obligated only by contract)
 - What expenses will be covered
 - How is each parent's portion determined
 - What about grants/scholarships received by the child
 - What other limitations are placed on the parents' responsibility
 - Will the obligation be funded
- ✓ Children's assets
 - Who will manage - cannot have co-custodians of accounts created under the former Michigan Uniform Gifts to Minors Act or the current Michigan Uniform Transfers to Minors Act. MCL 554.535(2).
 - Any restrictions on use

Alimony/spousal support

- ✓ Barred (reserved if not barred)
 - As to one or both parties
- ✓ Permanent
- ✓ Modifiable or nonmodifiable
 - *Staple* language if nonmodifiable (waiver of statutory rights)
 - Triggers for modifiability
 - Periodic review
- ✓ Term
 - Commencement date
 - Termination date or number of payments
 - Triggers for termination
 - Death of payee (required for tax deductibility by payor)
 - Death of payor
 - Remarriage of payee
 - Cohabitation by payee
- ✓ Tax deductible to payor and taxable to payee or the reverse-specify
- ✓ Additional payments in the nature of support
 - Ex.- health insurance premiums
- ✓ Unallocated family support
 - Triggers for change in payment (watch for "safe harbor")

- ✓ Payment mechanism
 - Direct or through FOC
 - OIW or no OIW

Alimony in gross Not truly alimony – more in the nature of property settlement payments

Section 71 payments

Personal property

- ✓ Indicate if already divided or method to be used if not, including timeframe
- ✓ Jewelry and other personal effects
- ✓ Household furniture and furnishings
- ✓ Photos
- ✓ Holiday decorations
- ✓ Vehicles and other titled equipment (boats, snowmobiles, motorcycles, campers, trailers, etc.)
 - If owned, transfer of title and assumption of debt
 - If leased, assumption of responsibility on lease
- ✓ Pets

Marital home

- ✓ If to be sold immediately
 - Provisions for attempts to sell “by owner” – time limit
 - Determination of selling price and listing agent
 - Engagement of real estate attorney to jointly represent the parties
 - Responsibility for fix-up costs and other sale-related costs such as appraisal and attorney fees
 - Responsibility for carrying costs (mortgage, property taxes, insurance, utilities, and routine maintenance) while on the market
 - Allocation of sale proceeds
- ✓ If delayed sale with sole occupancy by one party and continued co-ownership pending sale
 - Triggers for sale. Ex, term of years, remarriage, cohabitation, children no longer live at the home, default on underlying mortgages, etc.
 - Responsibility for capital improvements
 - Responsibility for carrying costs (mortgage, property taxes, insurance, utilities, and routine maintenance)
 - Provisions for later sale – see above
- ✓ If awarded to one party with immediate buy-out of equity

- Requirement for recordable deed stating consideration of less than \$100 from relinquishing party in exchange for any necessary payment from the other party (preferably do not tie this in directly or it may trigger an increase in Taxable Value for property tax purposes to retaining spouse) MCL 211.27a(7)(g).
 - Assumption of mortgages by party retaining the property and hold harmless of relinquishing party
 - Requirement that retaining party obtain release of relinquishing party from mortgages
 - Amount and deadline for equity payoff
 - Requirement that relinquishing party turn over all papers and records in connection with the home
- ✓ If awarded to one party with delayed buy-out of fixed equity-in addition to above provisions
- Provisions for lien on home to secure delayed payment
 - Triggers for payoff. Ex, term of years, remarriage, cohabitation, sale of home, children no longer live at the home, default on underlying mortgages, etc.
 - Terms of payment - interest rate, monthly interest only payments with later balloon, single balloon payment with accrued interest, amortized monthly payments
 - Requirements for retaining party to maintain property and insure relinquishing party's interest as mortgagee
 - Provision for relinquishing party to subordinate lien to allow for refinancing
 - Provision for recording release of lien upon payment in full
 - Requirement that relinquishing party turn over all papers and records in connection with the home

Include complete and accurate legal description in body of agreement or as attachment (obtain old deed or title policy, or order title search if needed – do not use property tax description)

Other real property interests

- ✓ Second home, cottage, vacant land, etc. – see above provisions for marital home
- ✓ Time shares
 - Provisions for time banked with an exchange company (Ex. RCI, II)

Liquid assets

- ✓ Bank accounts, cash management accounts, credit unions, etc.
 - Assign ownership and provide for accounts to be closed or to remove name of relinquishing spouse

Investments

- ✓ Government savings bonds
 - If to be divided, by redemption value or face value?

- ✓ Stocks or corporate bonds
 - If to be transferred or divided, consider requirements of broker (Ex. guaranteed signatures, etc.)

Stock options

- ✓ Requirements for exercise
- ✓ Provisions for sharing proceeds
- ✓ Responsibility for income taxes

Deferred bonus/restricted stock

- ✓ Provisions for sharing proceeds
- ✓ Responsibility for income taxes

Business interests - Partnerships, LLC's, closely held corporations

- ✓ Transfer of ownership documents, stock certificate, etc.
 - Consider requirements of governing instrument (partnership agreement, articles, etc.) and specify documents to be signed (Ex. endorsement of stock certificate, etc.)
 - Provide for resignation of relinquishing party from position as officer, director, etc. Indemnification by owner spouse
- ✓ Assign responsibility for debts associated with the entity

After acquired property

Miscellaneous

- ✓ Club memberships
- ✓ Frequent flyer miles
- ✓ Medical expense reimbursements
- ✓ Employee expense reimbursements
- ✓ Vacation pay
- ✓ Royalties and other intellectual property rights

Retirement benefits

- ✓ Accurately identify each parties' retirement plans
- ✓ Identify those plans that will be retained by the participant
- ✓ Identify those plans that will be assigned, partially or wholly, to the other party (alternate payee)
- ✓ As to plans that will be assigned
 - Identify who will draft the EDRO, QDRO, DRO, etc.
 - State how the drafter will be paid

- Indicate if the alternate payee may elect to receive the assigned benefits at the earliest time allowed under the plan, even if the participant has not retired
- Commit the parties to cooperate to amend any order not accepted by the plan administrator (not infrequently the case, even if drafted by a specialist) *nunc pro tunc*
- ✓ For “defined contribution” type plans (Ex. 401k, 403b, profit sharing) indicate
 - Division date
 - If the assigned benefit is a percentage of the entire account at the division date, a percentage of the marital portion at the division date, or a fixed dollar amount
 - If the award is a percentage of the account balance,
 - Indicate if the account balance is net of any outstanding loans
 - Indicate if the account balance should include forfeitures and plan contributions after the division date which are attributable to the period prior to the division date
 - If the assigned benefit is a fixed dollar amount,
 - Indicate if the alternate payee receives investment income and gains or losses which are attributable to the award between the division date and the distribution
- ✓ For “defined benefit” type plans (Ex. pension, many state and local government plans) indicate
 - Division date
 - If the alternate payee’s benefit is a *fixed monthly amount*
 - If the alternate payee’s benefit is a *percentage* of the participant’s accrued benefit at the division date,
 - Whether it is a percentage of the entire benefit or only a portion of the benefit
 - If the alternate payee’s benefit is a percentage of only a portion of the accrued benefit (Ex. the period attributable to the marriage), is the portion of the benefit determined by
 - The tracking method,
 - The accrued coverture method, or
 - The prospective coverture method
 - If the alternate payee will receive a portion of early retirement subsidies
 - If the alternate payee will receive a portion of disability retirement benefits paid prior to earliest (non-disability) retirement age
 - If the alternate payee will receive a portion of post-retirement cost-of-living increases or other plan enhancements
 - If the alternate payee can receive benefits in any form allowed by the plan
 - What rights the participant will have if the alternate payee dies

- Before the participant and before the alternate payee's benefits begin
- Before the participant and after the alternate payee's benefits begin
- What rights the alternate payee will have if the participant dies
 - Before the alternate payee and before the alternate payee's benefits begin
 - Before the alternate payee and after the alternate payee's benefits begin
- ✓ IRA's are not qualified plans and do not require a special court order
- ✓ 457's are government plans that are not qualified and may or may not be divisible -consult your specialist before attempting to draft provisions for the division of such a plan
- ✓ If the parties have agreed to liquidate a portion of a defined contribution plan and are assigning it to the non-participant spouse to make it available prematurely and/or to avoid the 10% early withdrawal penalty, indicate
 - How the alternate payee's tax liability will be covered if it exceeds the amount withheld by the plan
 - The alternate payee's responsibility to disburse the funds as agreed immediately upon receipt
- ✓ Include standard waiver of rights to all benefits accrued after the division date and include a reminder for the parties to change beneficiary designations

Note that a waiver will not override a beneficiary designation on record with the plan if the plan is governed by ERISA. *Egelhoff v Egelhoff*, 532 U.S. 141 (2001).

Practice pointer.

The detail mentioned above may seem excessive, but in fact even more detail may be needed depending on the provisions of the plan. This is why the individual who will be assigned the task of drafting the DRO should review the settlement agreement before it is signed. In *Quade v Quade*, 238 Mich App 222; 604 NW2d 778 (1999) the parties' judgment awarded the alternate payee 50% of the participant's interest in his pension plan. The judgment referred to the award of rights of survivorship but did not mention the early retirement subsidy. The trial court entered a QDRO, but would not include a provision granting the alternate payee a share of the participant's early retirement benefits because those benefits "were not specifically granted to plaintiff in the judgment of divorce." Page 224. Citing *Roth v Roth*, 201 Mich App 563, 569; 506 NW2d 900 (1993), the Court of Appeals held that pension plans consist of separate and distinct components and each must be specifically awarded in the judgment to be included in the QDRO. Because the judgment and DRO flow from the settlement agreement, these details must be set forth in the settlement agreement.

Unsecured Debt

- ✓ Credit cards – close and arrange for payment of balances
- ✓ Assumption of debt on property awarded

Insurance

- ✓ Include standard waiver of rights to life insurance after entry of judgment and include a reminder for the parties to change beneficiary designations.

Note that a waiver (and even final judgment) will not override a beneficiary designation on record for employer-provided coverage governed by ERISA. *Egelhoff v Egelhoff*, 532 U.S. 141 (2001) held that ERISA preempts state law that otherwise terminates rights to insurance proceeds upon divorce.

- ✓ If either party has medical insurance coverage through the other's employer, include standard COBRA provision as a reminder
- ✓ If support (alimony or child support) or other delayed payments (alimony in gross or other property payments) are involved, consider a life insurance clause as security in the event of payor's death

Tax provisions

- ✓ Unfiled returns for completed tax years - to be filed joint or separate
 - Designation of tax preparer and payment of fees, if joint
 - Allocation of responsibility for taxes, penalties and interest due
 - Allocation of refunds
 - Allocation of exemptions and deductions, if separate
- ✓ Refiling as joint, returns previously filed separately
 - Designation of tax preparer and payment of fees
 - Allocation of responsibility for taxes, penalties and interest due
 - Allocation of refunds
- ✓ Return for current year – consider postponing entry of judgment to allow joint filing
- ✓ Return for current year – divorce before end of year
 - Allocation of deductions on marital home – mortgage interest and property taxes
 - Allocation of passive income (dividends, interest, etc.) earned on investments prior to property distribution
- ✓ Exemptions for children – often negotiated
 - Which parent will claim which children
 - Conditions for custodial parent to sign over IRS Form 8332. Ex.- all support timely paid
- ✓ Filing status
 - Consider correlating parenting time to qualify both parties for head of household status (when there is shared physical custody)
- ✓ Liability for jointly filed returns
 - Audit provisions

Miscellaneous provisions

- ✓ Dower - include waiver of dower and obligation of each party to cooperate by signing any additional documents needed by other party (Ex. mortgage, not note) to acquire real estate

prior to judgment

- ✓ Waiver of claims
 - Do not include a generic waiver if a possible tort claim is unresolved
- ✓ Incorporation of agreement into judgment, without merger
- ✓ Implementation of executory provisions (such as transfer of title to real estate) by recording agreement, filing with Secretary of State, etc.
- ✓ Payment of professional fees – attorneys, mediator, CPA, retirement plan specialist, appraisers, etc.