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Marital Settlement Agreements

Statute: NMSA § 40-2-4 ("All contracts for marriage settlements and contracts for separation, must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved."). A Marital Settlement Agreement actually encompasses agreements made in one of two distinct phases of the process: (1) A post-marital but pre-filing agreement made between the parties before they file for divorce, and seek to enforce or incorporate into a court order after a divorce is filed; and (2) A post-marital and post-filing agreement that the parties work out after they have filed for divorce and have spent some time engaged in discovery and mediation before resolving their differences.

However, the Court of Appeals ruled that a settlement agreement reached after court-sponsored mediation is binding, even though not signed, if the parties admit that was the agreement reached after mediation. *Herrera v. Herrera*, 1999-NMCA-034, 126 N.M. 705, [974 P.2d 675](#).

Although a Marital Settlement Agreement ("MSA") has to be notarized to be valid by statute, there are other situations imaginable where a Court might enforce all or parts of an un-notarized or even unsigned MSA if one of the parties relied on the settlement,

and changed his or her position accordingly. For instance, say a husband agrees in an e-mail to transfer all of the stocks and bonds to his wife in exchange for his keeping his government retirement account. He then transfers all of his stocks and bonds to his wife, who then depletes the value of the property. She then claims that the e-mail did not qualify as an MSA because it was not notarized. A Court would likely find an equitable way to provide some relief for the husband. Compare, *Webb v. Menix*, 2004-NMCA-048, ¶ 3, 135 N.M. 531, 90 P.3d 989 (discussing how retroactive child support can be waived by certain exceptional conduct). However, a mere e-mail settlement between the parties before either goes to visit with his or her lawyer would not likely be upheld unless someone had changed their position or relied on the arrangement.

In summary, the general rule in New Mexico is that an MSA is invalid unless it is a formal, and notarized, document. Nevertheless, there are many instances where a court may give some weight to an agreement by the parties that does not meet the requirements of an MSA by statute.

The term marital settlement agreement is also understood to include the "Parenting Plan and Child Support Obligation" even though the official rules of the state Supreme Court appear to treat them as two separate documents. See NMRA 4A (Domestic Relations Forms) sections 312, 313 and 313.

When minor children are involved, it is best, as always, to follow the preference of the Rules promulgated by the New Mexico Supreme Court, and provide a separate Marital Settlement Agreement (for assets, liabilities and spousal support if any) and a separate Parenting Plan and Child Support Obligation (for timesharing, other custody or decision making issues, and of course child support), as well as a separate decree which

incorporates the other documents by reference. However, it is common to combine the Parenting Plan provisions in a single Marital Settlement Agreement, and file that with the decree, or to even submit a single decree which contains everything in one document.

For the remainder of this paper, I will treat the MSA and the Parenting Plan as two separate documents, although, as stated above, they are often treated as a unified issue by the parties and by the Courts.

I. MSAs:

Jurisdiction and Venue:

At least one party has to have lived in New Mexico for more than six months. If children are involved, the jurisdictional issues become complex if the children are living or have recently lived in another state. If the children have continuously lived in the state, and there are no other proceedings that affect custody, then it is advisable to indicate that. It is very important to advise the court if there are issues that involve the Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”), NMSA § 40-10A-101 *et. seq.* Although the UCCJEA is complex, in summary, if the parents live in different states, or the child has not continuously lived in New Mexico for the previous six months, the UCCJEA may apply.

Prepared by an attorney?

In the uncontested divorces I prepare, I state early in the MSA if I prepared it even though the divorce is technically "pro se," and I am not really either party's attorney. The Rules of Professional Responsibility explicitly allow for an attorney to be an intermediary, but the Tenth Circuit Court of Appeals has ruled that not advising the Court

that an attorney has drafted documents constitutes an ethical violation as not showing appropriate candor to the Court. *Duran v. Carris*, 238 F.3d 1268, 1271 (2001).

Personal Property:

If the parties have divided personal property, then say so explicitly. If the parties have not divided all personal property, and some remains in the family residence or in a storage shed, the remaining property should be described in detail. Some surprising disputes have arisen over items of property that are not worth very much money and would seemingly be not worth fighting about.

Real Property:

It is a generally accepted principle of law that instruments conveying title to land should have the “legal description” of the property to be effective. I do not believe this is necessary in an MSA, because the document almost always has a provision requiring the execution of other documents as necessary. The deed that is eventually issued pursuant to the MSA must have the legal description. Nevertheless, I usually ask for the legal description, and have the MSA recite that.

After acquired property:

The statutes allow married parties to designate property that was acquired during the marriage as separate property. NMSA § 40-3-8. That is what much of an MSA does, divide assets and transform community property into separate property. Most couples draw the end of the marriage to be when they separate, which is usually months, and sometimes longer, before one of the spouses files a divorce petition. If property that is acquired after the separation is to be treated as separate property, then that should be stated. Property acquired after the divorce decree is entered is automatically separate

property. NMSA § 40-3-8(A)(1).

Debt Division:

It is important to be as thorough as possible when determining which debt is to be retained by which party after the divorce. It is important to note that, unlike property, the Court does *not* have the authority to designate community debts as separate debts. The only exception is for debts that are acquired after the parties separate, in which case the Court *may* rule that such a debt incurred by one of the parties and not benefiting the community or the dependents to be an “unreasonable debt.” NMSA § 40-3-10.1. That designation is only “between the parties,” although I believe that designation could be used to prevent third party creditors from collecting the “unreasonable debt” from the other spouse subsequent to the decree being entered.

It is important to advise clients that the division of debts in the divorce decree does not bind the creditors. If one of the parties is doing well a few years after the divorce, the ex-wife for the sake of example, and has paid off her share of the debts in the decree, but the former husband has defaulted and is unable or unwilling to pay, the creditors will find the ex-wife and seek payment. The creditors will be uninterested in the fact that the decree required the ex-husband to pay certain creditors. The creditors will tell the ex-wife to pay the debt, and sue the ex-husband, which is the remedy, but generally one that is not worth while. However, I have gotten a judgment and garnished a former spouse’s pay when my client had to pay off a debt that was assigned to the other former spouse.

If at all possible, try to pay off debts from community property at the time the decree is entered or shortly after. There are several reasons for this. One is the “back end debt ratio.” Your firm’s client may have paid off the debts he was required to under the

decree, but the ex-wife had not. That unpaid debt will still show up on his credit report, and may prevent him from getting a house or a car for years, because of the “back end debt.” Second, one of the ex-spouses may pay late habitually, doing damage to the other’s credit for years. Third, when one party does not pay, it re-ignites controversy that the parties tried to avoid by divorcing.

When debts are retained by one or the other, try to keep them small, or related to a specific asset, such as an automobile, which the other spouse has a vested interest in paying off within a certain time. It is generally a bad idea to split a debt so that one ex-spouse has to send in half the payment, either directly to the creditor or to the ex-spouse. Those arrangements are asking for future conflict. Instead, I try to insist on a lump-sum payoff of the portion of the debt, and require the other spouse to be solely responsible.

It is important to get the spouse who is giving up the home to be taken off the mortgage. The “back end debt” aspect of a mortgage will have serious consequences on the party’s ability to get into a new home in the future.

Taxes:

A former husband and wife are considered single for the entire year, for tax purposes, if they are divorced on or before the last day of the year. Also, for tax purposes, if a couple gets married on New Year’s eve, they are considered married for the entire year. 26 U.S.C. § 2. The MSA will often have a provision stating who is responsible for a tax deficiency, if any, or provide that all taxes for the years prior to the year in which the decree is entered are paid and that the parties will file separate returns for the year of divorce and afterwards. The MSA may also have a provision assigning any liability from any audit to the party who generated the income that was adjusted or in

proportion to their income.

Taxes are a very important aspect of a divorce, and can greatly affect the value of a settlement. For instance, if an ex-spouse has not been living in the house for years, and the house is sold, her share of the sale proceeds may be subject to capital gains tax; alternatively, the same amount of money would not be subject to capital gains tax if the husband kept the home and refinanced the property to provide her share.

Alimony is deductible by the payor and reported by the payee, but child support is not; that leads to perfectly legal allocations of payments between “child support” and “alimony” based on the tax consequences.

If significant assets are being distributed in the divorce, or if there is alimony, then there are other tax consequences. If distribution of assets is being deferred, that creates tax consequences in the future. I have a provision in my MSA’s that state that there may be tax consequences, and that the parties have been advised to get separate tax counsel or to see a CPA, and that the parties acknowledge that they have not relied on their divorce lawyers for tax advice.

Tax Deductions for Children

New Mexico courts are permitted to allocate the dependent tax exemption under the Internal Revenue Code; therefore, the parties can, and do, bargain for that as part of the negotiations in the MSA. *Macias v. Macias*, 126 N.M. 303, 968 P.2d 814, 816 (1998) (ruling that the state court can apportion tax exemptions).

Alimony

There are three types of alimony recognized in the statute: (1) Rehabilitative, to provide for training, (2) Transitional, for a definite period of time, or (3) Indefinite,

otherwise known as permanent. NMSA § 40-4-7(B). Alimony may be in a lump sum or in installments. If the marriage is over twenty years, the court retains jurisdiction over periodic spousal support payments indefinitely.

Alimony is inherently complex. Many people have not thought through what happens if the payor or payee becomes disabled, or if the payee remarries or starts cohabitating with someone else. Under New Mexico law, those events would be grounds to modify alimony, but not if those conditions were not covered and the decree states that alimony is non-modifiable.

Most, but of course not all, payors of alimony are men. Most payors want certainty, and favor lump sum or a higher short term award rather than having an indefinite commitment that can be modified later according to changed circumstances. The statute permits either transitional or rehabilitative alimony to be determined to be non-modifiable. It is a very common provisions in MSAs to provide that the amounts paid as alimony are “non-modifiable pursuant to NMSA § 40-4-7(B)(2)(B).”

General Provisions:

MSAs often contain many “boiler plate” provisions that only arise in the event of a dispute. A common provision requires the parties to execute any document necessary to effectuate the MSA. Another common provision provides for attorney fees in favor of a party who has to go back to court to enforce the MSA. Another common provision states that all assets and all debts have been disclosed and that there are no side agreements.

II. Parenting Plan and Child Support Obligation

Custody:

Joint legal custody is the presumption under New Mexico law. Joint legal custody does not mean 50/50 time share, or imply anything similar. Joint legal custody means joint decision making on all major events of the child's life, such as school, religion, medical procedures and extracurricular activities. Joint legal custody also means that each parent has well defined and substantial periods of time with the child and that each parent is capable of meeting the child's needs when with that parent. NMSA § 40-4-9.1

Sole legal custody is not defined, except by negative inference to what it is not (it is not joint legal custody). Sole legal custody is awarded rarely when one parent is unable or unfit to take care of the child's daily needs, to spend significant time with the child, or to make appropriate decisions for the child.

Parenting Plan:

The court is required to establish a parenting plan whenever joint custody is awarded, which, as stated above, is nearly always. The statute provides in relevant part, NMSA § 40-4-9.1(F): When joint custody is awarded, the court shall approve a parenting plan for the implementation of the prospective custody arrangement prior to the award of joint custody. The parenting plan shall include a division of a child's time and care into periods of responsibility for each parent. It may also include:

- (1) statements regarding the child's religion, education, child care, recreational activities and medical and dental care;
- (2) designation of specific decision-making responsibilities;

- (3) methods of communicating information about the child, transporting the child, exchanging care for the child and maintaining telephone and mail contact between parent and child;
- (4) procedures for future decision making, including procedures for dispute resolution; and
- (5) other statements regarding the welfare of the child or designed to clarify and facilitate parenting under joint custody arrangements.

I have had many clients who have suggested a parenting plan that merely states that they will have 50/50 timeshare, and will be flexible and work things out. I have always refused to submit such a plan. First, it is not clear whether such a provision even complies with the statute that requires a “division of a child’s time and care into periods of responsibility.” Joint legal custody requires that each parent have “significant, *well-defined* periods of responsibility.” NMSA § 40-4-9.1 (J)(1) (emphasis added). Second, a provision like that, assuming a judge signs off on the Parenting Plan, is just delaying the difficult analysis until later, because a plan without boundaries or standards is not really a plan. Conflicts will arise, and the parties will often be back to court. Finally, and most important, children need and deserve predictability.

Child Support:

Because the Child Support Guidelines will be followed, absent some truly unusual circumstances, that issue is actually one of the easiest parts of many divorce settlements because the standards are very clear and there is not much to settle.

However, the parties are free to vary from the child support amounts, but two things are required: (1) The court is required to make a finding that the guideline amount

is “unjust or inappropriate.” NMSA § 40-4-11.2; and (2) The child support worksheet showing the amount of child support provided by statute must be attached to every decree. NMSA § 40-4-11.6.

Child support lasts until the child turns eighteen, or until the child graduates from high school if the child is nineteen. NMSA 40-4-7(B)(3)(b).

Extraordinary Expenses:

Disputes often arise over the payment of extraordinary expense, such as private school, club sports activities, or medical procedures not covered by insurance. These expenses are typically factored into the child support worksheet and paid proportionally to the parents’ income. Extraordinary expenses may also provide a basis for deviation from the child support guidelines.

Relinquishing Parental Rights:

This cannot be done in a Parenting Plan. It can only be done in an adoption proceeding. Sometimes a parent wants to relinquish his or her rights, and the other parent will agree, so that the estranged parent will not have to pay child support and the custodial parent does not have to deal with the estranged parent. Unless another adult is willing to step up and become an adoptive parent, no-one can walk away from his or her responsibility to provide for his or her biological child.

Health Insurance:

If either of the parents has health insurance available through his or her employment, the child is required to be covered by health insurance. NMSA § 40-4C-1 *et. Seq.* Deductibles or co-pays are normally paid in proportion to income under child

support guidelines, but divorcing parents often divide deductibles and co-pays 50/50 for the sake of administrative convenience.

Wage Withholding:

If payee desires wage withholding, it will be ordered. However, often the parties waive wage withholding.

Other Provisions:

The Parenting Plan does not have to be extremely detailed, but many are. Holidays and summer, spring break and winter break are usually determined in the Parenting Plan, and it is a good idea to do so.

The Parenting Plan may include an agreement to pay for college expenses, but only if the parties agree to that provision. It cannot be ordered without an agreement. NMSA § 40-4-7(C).

A good provision to have in a parenting plan is one that provides for mechanisms of out-of-court dispute resolution, so that the parties do not have to bear the expense and added tension of returning to lawyers and to court when conflicts arise.