Drafting Settlement Agreements – The "Why" You do the Things You Do.

By Susan Amato and Ann Vatterott

Most dissolution of marriage proceedings, even those that begin in an adversarial manner, eventually end in an agreement rather than a trial and court ordered judgment.[1] Therefore, an understanding of how to draft an effective divorce settlement agreement is as important for a family law attorney as an understanding of trial practice. The goal of a settlement agreement is to thoroughly address and resolve all of the necessary issues in the proceeding clearly, without ambiguity and in a manner that accurately reflects the intentions and understandings of the parties to the agreement. This article is not meant to take the place of a good form separation agreement from which to start drafting or even to provide a thorough checklist.[2] It is intended to explore some of the reasoning and law behind common settlement agreement terms and clauses, and areas of concern in drafting agreements.

General Background

The authority to resolve a dissolution of marriage or legal separation by way of a written separation agreement is set out in section 452.325 of the Missouri Revised Statues.[3] The terms of the agreement, except those relating to custody, support and visitation of children are binding upon the court unless the court finds that the agreement is unconscionable.[4] Provided the separation agreement does not state otherwise, it is set out in the court's judgment and the parties are ordered to perform its terms. All remedies available for the enforcement of a judgment are available to enforce an agreement that is set out in the decree. While one may come across older agreements that make reference to contractual or decretal provisions of a judgment, the only language needed at this time to ensure that the separation agreement has the full force of a judgment is to reference that its terms are to be incorporated into the judgment. It is possible to exclude portions of a

1. 2012 Table 23 - 24, CIRCUIT COURT STATEWIDE SUMMARY: Statewide totals and cases disposed by manner of disposition (January 23, 2013 A.M.), http://www.courts.mo.gov/file.jsp?id=58691 (reflects that state wide, of all domestic relations cases (which includes all family court matters, not just dissolutions and modifications) only 18.9% of the cases filed were resolved by court trial).

2. Sources for sample language, other than the source of an experienced family practitioner willing to share their form, which should not be overlooked as an option, are MO CLE Family Law Chapter 7 and Missouri Practice Series; 6A Mo. Practice *Legal Forms* § 18.25 (2012) and 21A Mo. Practice *Family Law* § 29 (2012).

3. Mo. Rev. Stat. § 452.325 (2003) grants the authority to resolve legal separations and dissolutions of marriage by way of a written separation agreement. In practice, these agreements are sometimes referred to as a "Settlement Agreement" or a "Marital Settlement and Separation Agreement". In order not to conflict with the provisions of Mo. Rev. Stat. § 452.325 (2003), the agreement should at least be titled to include the term "Separation Agreement". In this article the terms "settlement agreement" and "separation agreement" are used interchangeably.

4. Unconscionability is an inequality so strong, gross and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." *Peirick v. Peirick,* 641 S.W.2d 195, 197 (Mo. Ct. App. 1982).

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separation agreement from the decree by specifically so stating, however in most situations, the full force of a judgment is preferred. In order to protect against the concern that a provision of an agreement may for some reason not be enforceable as a judgment, a "severability clause" can be included allowing the agreement to also be enforced as a contract. Other than terms relating to custody, support or visitation of children, the decree may preclude or limit modification of its terms if the agreement so provides. The terms of an agreement relating to children, particularly those that are intended or required to be modifiable, belong in the parenting plan not in the separation agreement. The requirements of a parenting plan are set out in section 452.310 of the Missouri Revised Statutes. More specific details on how to draft the parenting plan is a separate topic for another day.

Oral Agreements

It is always advisable when a settlement is reached, to confirm all of the terms in a detailed agreement in order to avoid misunderstandings and challenges to the agreement. It is not an unusual occurrence however to reach an agreement on the date of trial. In this situation, it is preferred to have an agreement in your briefcase ready in draft form, which can be edited with the remaining details by hand at court. In practice, there are times when this does not occur. While section 425.325 of the Missouri Revised Statues addresses written agreements, an oral stipulation of the parties is as binding as a written agreement when entered into in open court by parties and spread upon the record. *Carter v. Carter*, 869 S.W.2d 822, 829 (Mo. Ct. App. 1994); *Thompson v. Thompson*, 673 S.W.2d 126, 506 (Mo. Ct. App. 2000). In this circumstance, care should be taken to review and set out all of the details of the agreement thoroughly on the record at court. Oral settlement agreements must be sufficiently spread upon the record in order to be enforceable. *Freeland v. Freeland*, 256 S.W.3d 190, 915 (Mo. Ct. App. 2008). In addition, judgments must be definite and certain in order to be enforceable. *Morgan v. Ackerman*, 964 S.W.2d 865, 871 (Mo. Ct. App. 1998). A draft agreement and a checklist of clauses to be sure to cover in this circumstance should be part of a standard trial binder. This will ensure that you are as well prepared for "hallway negotiations" as you are for presentation of evidence and trial.

Terms Contingent Upon Entry of Judgment

Settlement agreements are unique in that the court must review the agreement and find it not unconscionable before it takes effect. There are actually three parties who must approve of the terms of the agreement before it may be enforced. The husband and wife must jointly, while in agreement, come before the court and present their proposed settlement for the court's approval. *In re Marriage of Brinell,* 869 S.W.2d 887, 888 (Mo. Ct. App. 1994) (quoting *O'Neal v. O'Neal*, 673 S.W.2d 126, 127–28 (Mo. Ct. App. 1984)). As a practical matter, this appearance before the court may be at a non-contested hearing or may be by submission of the agreement by way of affidavits for judgment pursuant to local rules. A "condition precedent" to the court's consideration of a separation agreement is that the parties be 'presently in agreement' at the time the agreement is submitted to the court. Even where an agreement is signed, if one party seeks to rescind the agreement before it is approved by the court, the agreement is not enforceable. *Wakili v. Wakili,* 918 S.W.2d 332, 339 (Mo. Ct. App. 1996). If the parties are not in agreement at the time the separation agreement is presented to the court, the trial court cannot approve it, and, thus, the separation agreement was never enforceable. *Reynolds v. Reynolds,* 109 S.W.3d 258, 279 (Mo. Ct. App. 2003). See also *O'Neal,* 673 S.W.2d at 128 (reversing the trial court's enforcement of a separation agreement when the parties did not agree to it).A standard provision included in many separation agreements confirms that the agreement is effective only upon entry of the judgment approving the agreement. At times however, other boilerplate clauses may indicate that terms are effective upon execution of the agreement. In order to avoid confusion all boilerplate in the agreement should be consistent, that the agreement is effective upon entry of the judgment in accordance with the agreement.

Confirmation of Full Disclosure

A standard paragraph in many settlement agreements confirms that the parties have made full disclosure of their assets and that all assets and debts are set out in the settlement agreement. The purpose of including this provision is to allow parties to prosecute or defend against a fraud claim in the event there is an allegation the agreement was based upon a fraudulent misrepresentation. A fraud victim may elect to stand upon the contract and sue for damages in a tort action at law or may elect to rescind the contract and sue in equity to set aside the contract. *Alexander v. Sagehorn*, 600 S.W.2d 198, 200 (Mo. Ct. App. 1980). The elements to set aside a divorce settlement agreement are the same as in any action for fraud: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of the falsity (or the speaker's awareness that he/she lacks knowledge of its truth or falsity); (5) the speaker's intent that the statement be acted upon by the other party in the manner contemplated; (6) that party's ignorance of the falsity; (7) reliance on the truth; (8) the right to rely thereon; and (9) injury. *Hewlett v. Hewlett*, 845 S.W.2d 717, 719 (Mo. Ct. App. 1993); *Grasse v. Grasse*, 254 S.W.3d 174, 178 (Mo. Ct. App. 2008). The language in the paragraph confirming full disclosure should include language confirming the understanding of the parties that could potentially set up a fraud claim should the disclosures be inaccurate. This includes language that each has fully and accurately disclosed and valued their assets and debts as set out in the agreement, the acknowledgement of the parties of the materiality of these representations, the intention that the other party rely on the representations in entering into the agreement and the right of each party to rely on these representations. Of course,

the representation of full disclosure in the agreement is not worth much if the agreement is not drafted to include the specific representations of the parties as to the identity and value of each asset and liability. As noted by the court in *Curtis v. Kays*, 670 S.W.2d 887, 889 (Mo. Ct. App. 1984), there is potential for added expense and litigation when these details are omitted from the agreement. It should also be noted that a statement as to the value of property is ordinarily considered an "opinion," not a statement of fact, as required to establish fraud. *Mitchell v. Mitchell*, 888 S.W. 2d 393, 397 (Mo. Ct. App. 1994). This is not the case however, if the representing party has special knowledge as to the value, the other party is ignorant with respect to the value, and the representing party, knowing of the ignorance of the other, makes a false representation intending that it be relied upon. *Hewlett,* 845 S.W.2d at 720; *Alexander*, 600 S.W.2d at 200. Therefore, those with special knowledge of the value of assets, for example, owners of businesses which are marital property, should be alerted to the importance of a full and honest disclosure and accurate valuation of their asset.

Real Estate Terms

There are many terms that must be included in your separation agreement relating to the award of real property. The agreement may award the property to one party or may order its sale immediately or at some time in the future. The full legal description of the real property should be included in the agreement. While section 452.330.6 of the Missouri Revised Statutes does not explicitly require the inclusion of the legal description, this requirement is clear in the case law. See *Ricklefs v. Ricklefs*, 39 S.W.3d 865 (Mo. Ct. App. 2001); *Douglas–Hill*, 1 S.W.3d 613, 621–22 (Mo. Ct. App. 1999), (citing *Lance v. Lance*, 979 S.W.2d 245, 248 (Mo. Ct. App. 1998)). If property is to be sold, all of the details relating to the mechanics of the sale, including who will reside in the real property pending the sale, how repairs will be made, how the realtor will be selected and the sale price determined, and how all costs relating to the property, such as the mortgage, taxes and insurance, utilities, and costs to maintain the property pending the sale will be paid. The distribution of the sale proceeds, or payment of any deficiency following the sale should be detailed, as well as the obligation to pay any capital gains taxes associated with the sale, if any.

If the property is not to be sold, but is to be awarded to one party, the drafter should consider whether or not to require a quit claim deed to be executed by the party relinquishing the property under the terms of the agreement. Language in the agreement that one party is vested in all right, title and interest in the real property and the other party is divested of all right, title and interest in the real property is sufficient to pass title to the property. Section 511.280 of the Missouri Revised Statutes provides that "In all cases where judgment is given for the conveyance of real estate or the delivery of personal property, the court may, by such judgment, pass the title of such property, without any act to be done on the part of the defendant." Without the quit claim deed however, the judgment must be recorded with the office of the recorder of deeds and the parties may prefer their divorce judgment not be recorded in this public forum. See Mo. Rev. Stat. § 511.320 (2003). If a quit claim deed is executed and recorded the need to record the entire judgment is avoided. Mo. Rev. Stat. § 511.330 (2003). The concern arises however, if an agreement requires a party to execute a quit claim deed and then, for whatever reason, the deed is not executed. Without the requirement in the agreement that the deed be executed, the judgment alone will be sufficient to pass title to the property. If the requirement to execute a deed is included however, and the deed is not executed, additional court action may be required in order to affect the transfer of the property per the judgment. See *Dewitt v. Am. Family Mut. Ins. Co.*, 667 S.W. 2d 700, 706 (Mo. *en banc* 1984).

Remember also, that at times real estate may be held in the name of a trust rather than in the names of the parties. It is not uncommon for parties to forget that this is the case. Therefore, it is important that the drafting lawyer review the most recent transaction recorded relating to the real property and draft the requirements regarding execution of deeds in conformity with how the property is presently titled. For example the drafter may want to require execution of a trustee's deed or a general warranty deed rather than a quit claim deed under some circumstances.

Personal Property Terms and Particularly Retirement Accounts

All assets and liabilities of the parties should be specifically described, valued and awarded in the separation agreement. This facilitates effecting the terms of the agreement after the judgment is entered and ensures that the understandings and intentions of the parties are clear in the event there is a claim relating to fraud or to an allegedly undisclosed or undivided asset after the agreement is finalized. Special attention should be given in drafting a separation agreement relating to the division of retirement accounts. It is not unusual to come across an agreement that simply states that a given retirement account is to be divided one-half to each party per the terms of a Qualified Domestic Relations Order, with the details of the division left to address in the QDRO after the judgment is entered. There are pitfalls associated with putting off fully understanding the retirement plan and the drafting of the QDRO until after the agreement is finalized. One such pitfall is that some plans, such as military plans, church plans and government plans are not qualified plans under ERISA Section 206(d)(3) and Section 414(p) of the Internal Revenue Code. As such these plans are not required to be divisible by way of a Qualified Domestic Relations Order, and the terms of the plan may or may not allow for division pursuant to a Judgment of Dissolution of Marriage.

Mistakes can occur if the clarification by the lawyer as to whether or not the plan can be divided by way of a QDRO does not take place until after the judgment has been entered. Another pitfall is that there are many important details in QDROs that should be addressed at the time the judgment is entered. For example, with respect to the division of defined benefit plans (generally plans with benefits to be paid in a monthly amount upon retirement), whether the award of benefits under the plan is 50% as of the date of the judgment or whether the award is per the terms of a coveture formula; whether the alternate payee is awarded pre and post survivor benefits in the event of the participant's death, whether the award to the alternate payee is per the separate interest approach or shared payment approach, whether cost of living adjustments are awarded, whether early retirement subsidies are awarded and whether benefits will revert to the participant in the event of the death of the alternate payee, are all terms that should be addressed. Regarding the division of a defined contribution plan (generally a plan with an account balance such as a 401k), whether the division is on a pro-rata basis from each of the investment accounts in the plan, including both pre and post tax accounts, the date an account balance is assigned, whether the award is a definite amount or a percentage, whether there is an award of investment interest, gains and losses from date of assignment to the alternate payee, how loan balances will be treated, how contributions made after assignment date attributable to periods prior to assignment date are awarded, whether the alternate payee will be treated as the surviving spouse until the division of the account has been made and how any administrative fees associated with the QDRO will be paid, should be addressed. The easiest way to be certain that each of the important issues is addressed and agreed upon in a manner that will also be approved by the plan administrator, is to prepare the QDRO, have it pre-approved by the plan administrator in advance of finalizing the separation agreement and attach it to the agreement to be incorporated therein. If this does not occur, care must be taken to include these important details in the settlement agreement.

Maintenance Terms

If an award of maintenance is agreed upon, the separation agreement should state the dates on which maintenance payments will be made, the amount of the maintenance payments, the method by which the payments will be made (such as by wage withholding and through the Family Support Payment Center, by direct payment or by payment to a third party), the circumstances under which the maintenance payments terminate and whether or not the obligation is subject to modification. Section 452.325.3 of the Missouri Revised Statutes specifically requires that a maintenance order must state whether or not the terms are subject to modification.The presumption under Missouri law is that unless otherwise agreed in writing or expressly set out in the judgment, the obligation to pay maintenance terminates upon the death of either party or the remarriage of the party receiving maintenance. Mo. Rev. Stat. § 452.370.3 (2003). An agreement silent on these issues will fall to the presumptions under Missouri law. The best practice however is to state these terms explicitly in the agreement. See *Simpson v. Simpson*, 352 S.W.3d 362, 364 (Mo. *en banc* 2011) (agreement that maintenance terminates only upon death of either party interpreted to allow maintenance to continue after wife's remarriage). The terms under which a maintenance payment may be tax deductible by the payor and included in the taxable income of the recipient are set out in the Internal Revenue Code, 26 U.S.C. § 71(b).[5] The code requires in part, that maintenance must terminate upon death of the payee spouse. The code does not require however, that maintenance end upon remarriage of the payee or upon death of the payor. Provided this is expressly stated in the agreement, termination upon remarriage is not a condition precedent under 26 U.S.C. § 71(b) for maintenance to be tax deductible. Also, the drafter may want to include provisions requiring a life insurance policy or other arrangements in order to insure the maintenance payment in the event of the early death of the payor. Under some circumstances, the payment of life insurance premiums may also be considered as tax-deductible maintenance. If it is the intention that the life insurance premium payments not be taxable as income to the beneficiary/payee spouse, it is best to specifically state this in the agreement. When drafting waivers of maintenance, whether the waiver is non-modifiable or whether the court is retaining jurisdiction in order to modify the award in the future and award maintenance should also be clearly stated. Historically, modifiable waivers were drafted to include a $1.00 per year maintenance obligation in order to allow the court to maintain jurisdiction over the maintenance issue for purposes of modification if appropriate. See *Jones v. Jones*, 724 S.W.2d 680, 682 (Mo. Ct. App. 1987) (where wife had a medical condition that could render her unable to support herself in the future, an award of nominal maintenance of $1.00 per year was awarded so that the court could retain jurisdiction to award maintenance in the future as circumstances might require). This technicality of an award of nominal maintenance in order to retain jurisdiction to modify the judgment to award maintenance in the future may no longer be necessary if it is clear in the judgment that the court is to retain jurisdiction over the issue. See *Givens v. Givens*, 599 S.W.2d 204,

5. See Christopher C. Melcher, *Make the Tax Code Your Friend – And Alimony More Palatable*, Family Advocate at 16-19 (Winter 2010),for a clear discussion of the terms of 26 U.S.C. § 71(b).

207 (Mo. Ct. App. 1980); *Farley v. Farley,* 51 S.W.3d 159, 167 (Mo. Ct. App. 2001); *Bushhammer v. Bushhammer,* 815 S.W.2d 271, 274 (Mo. Ct. App. 1991). However, there is no harm in including the $1.00 nominal maintenance award as has been done historically, if a present waiver of maintenance is intended to be modifiable, and this may be the better practice as there remains some support in the law for doing so. *Maniger v. Maniger,* 106 S.W.3d 4, 12 (Mo. Ct. App. 2003) (if there is substantial evidence of the potential for a future inability to work the court can award a nominal amount of maintenance that can be modified when the change occurs).

Modification Terms

Most settlement agreements contain a "catch all" paragraph reflecting that the terms of the agreement are not subject to modification. Care must be taken with this paragraph to specifically except the terms intended to be modifiable. Distributions of marital property, once made a final order, are not subject to modification, except that orders intended to be qualified domestic relations orders, are modifiable to establish or maintain the order as a qualified domestic relations order or to revise or conform its terms to effectuate the intent of the order. Mo. Rev. Stat. § 452.300.5 (2003). This exception to allow modification of the QDRO should be noted. Of course if maintenance is modifiable this should also be noted as an exception from the non-modification clause. All of the terms relating to children which are intended to be modifiable, including terms such as the award of dependency exemptions and any agreement to maintain life insurance, should be drafted in the parenting plan rather than in the settlement agreement, so that all of the modifiable terms can be clearly excepted from this general non-modification paragraph by simply noting that the parenting plan is subject to modification. Terms relating to the custody and support of children are subject to modification. Mo. Rev. Stat. § 452.325.6 (2003).

Waiver of Rights of Survivorship

During a marriage, spouses may execute wills or trusts in favor of one another, may name each other as beneficiaries on life insurance policies, annuities and retirement accounts and may designate other accounts or assets such as automobiles or bank accounts to transfer on death to the other spouse by way of non-probate transfers. Some of these beneficiary designations are automatically revoked upon the divorce judgment. For example, the terms of a will in favor of a testator's spouse after divorce, are automatically revoked and the will is construed as though the spouse died on the date of divorce. Mo. Rev. Stat. § 474.420 (2003). Further, beneficiary designations in favor of a former spouse or a relative of the former spouse, are revoked on the date of the dissolution of marriage and the beneficiary designation is to be given effect as if the former spouse had disclaimed the revoked provision. Mo. Rev. Stat. § 461.051 (2003). There are several exceptions to this provision set out in section 461.073 of the Missouri Revised Statutes, including an exception that § 461.051 does not apply to life or accidental death insurance policies, annuities, contracts, plans or other products sold or issued by a life insurance company unless the provisions of § 461.003 to 461.081 are incorporated into the policy or beneficiary designation in whole or in part by express reference and an exception that § 461.051 does not apply to employee benefit plans governed by 29 U.S.C. § 1001 et seq. Beneficial terms of a trust in favor of the settlor's former spouse or the former spouse's relatives may also be automatically revoked upon dissolution of the marriage, unless there is a binding contract or settlement agreement providing otherwise. Mo. Rev. Stat. § 456.001-112. Parties to a divorce agreement may also specifically agree, contrary to the automatic revocations, to maintain each other as beneficiaries on life insurance policies or as survivor beneficiaries on particular assets or retirement accounts. Given the complexity and nuances of the policies, statutes and estate plans that may be in place, and as it is not unusual for some time to pass before parties to a divorce get around to changing their beneficiary designations after the judgment it is best, to clearly specify in the separation agreement that all beneficiary rights of any nature are waived. This should include but not be limited to beneficiary rights under any policy of life insurance, individual retirement account of any nature, qualified retirement plan or any other pension or retirement plan of any nature and any rights under any trust or non-probate transfer of any nature. If there is an intention to maintain beneficiary rights on any asset or policy of insurance, this should be specifically stated in the agreement and excepted from the waiver. Further, there should be a requirement that the beneficiary designation be re-executed within a short time frame following entry of the judgment.

Drafting With Definiteness

One advantage to negotiating a settlement is that the parties may craft their agreement to fit their particular needs, with more flexibility than what is available in a court-imposed judgment. However care must be taken, when parties enter into more "creative" terms, that the agreement is drafted with sufficient definiteness to be enforced. In general the language of an agreement must be definite and certain in that the language must not be too vague to be enforced. *Glassberg v. Obando,* 791 S.W.2d 486, 488 (Mo. Ct. App. 1990). Vagueness has been an obstacle for cases with agreements ordering such imprecise terms as "medical expenses" or "college expenses." See *McGowan v. McGowan,* 42 S.W.3d 857 (Mo. Ct. App. 2001); *Glassberg,* 791 S.W.2d at 490; *Lay v. Lay,* 912 S.W.2d 466 (Mo. *en banc* 1995). While it is important to ensure the language of an agreement is clear, Missouri courts

have found provisions are sufficiently definite to be enforced, if the court, upon a hearing, could ministerially determine the obligations of the parties. *DeCapo v. DeCapo*, 915 S.W.2d 343, 347 (Mo. Ct. App. 1996); *Morgan*, 964 S.W.2d at 865; *Bryson v. Bryson*, 624 S.W.2d 92, 97 (Mo. Ct. App. 1981). After this extrinsic evidence is presented, the court must be able to determine with certainty, the exact amount to be paid. Many family lawyers are familiar with this rule from the well known case of *Echele v. Echele*, 782 S.W.2d 430 (Mo. Ct. App. 1989), which provided a now frequently used example of how to draft provisions that are enforceable relating to children's college costs. Remember however, that this is only an example and the drafter may deviate from this language provided that the principles of definiteness are still followed. It is essential that language of the agreement include some kind of criteria from which the court may order an enforceable support amount. See *Lay*, 912 S.W.2d at 469 (Mo. *en banc* 1995).

A Good Form is the Beginning

It's time to draft your settlement agreement. Hopefully you have coffee, enough time to accomplish your task, a good form to start from, and all of the supporting documents to review in connection with your drafting, allowing you to confirm the details of each asset and debt as you list it in the agreement, including where assets and debts are held, how they are titled and accurate legal descriptions. This is just the beginning. You'll draft and edit your form carefully, to reflect the specific facts and details of your case and clear intentions of your parties. You'll pay attention to the boiler plate as well as the main paragraphs. So let your drafting and editing begin, now that you know a little more about "why" you do the things you do.

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