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Drafting Cohabitation, Antenuptial, and Reconciliation Agreements

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DRAFTING COHABITATION, ANTENUPTIAL,
AND RECONCILIATION AGREEMENTS

By

Peter N. Swisher

I. DRAFTING MARITAL AGREEMENTS GENERALLY

A. Overview

Drafting marital agreements, like drafting other legal contracts, is analogous to creating a "private statute" between the parties which clearly enumerates their various rights and obligations. These agreements thus differ from court pleadings which attempt to persuade, but are not definitive legal instruments. R. Dick, Legal Drafting pp. 1-2 (1972).

B. Advantages and Caveats

1. Marital agreements pursuant to Va. Code Ann. § 20-109.1 and "Agreements otherwise valid as contracts, entered into between spouses prior to the marriage shall be recognized and enforceable." Va. Code Ann. § 20-107.3(H) (Repl. Vol. 1983).
2. Such agreements, by clearly defining the parties' rights and obligations, greatly lessen needless emotional strife, unnecessary attorneys' fees and court costs, and additional litigation.
3. Marital agreements must be fairly drafted, and should not promote divorce. Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957) and Cumming v. Cumming, 127 Va. 16, 102 S.E. 572 (1920). However, divorce planning per se would not, by itself, void the agreement. Capps v. Capps, 216 Va. 378, 219 S.E.2d 901 (1975); and Cooley v. Cooley, 220 Va. 749, 263 S.E.2d 49 (1980).
4. Thus, a poorly drafted marital agreement, or one based on mistaken or inadequate advice by counsel, may lead to unanticipated litigation or a legal malpractice suit.

C. Legal Drafting Techniques

1. Good legal drafting is as much a form of art as a science, and reasonable attorneys may differ regarding specific techniques of arrangement, structure, and content of any marital agreement.
2. Nevertheless, there are important legal drafting rules and techniques that will aid counsel in drafting better marital agreements.
3. For example, the following sequential legal drafting "checklist" can be applied equally well to cohabitation, antenuptial, reconciliation, or separation and property settlement agreements:

- a) Short Title of Document
- b) Statement of Purpose (Introduction, Preamble, or Recitals)
- c) To Whom the Document Applies (Identification of the Parties)
- d) Definitions, if any
- e) Each Provision or General Rule with:
 - (1) Subordinate Provisions or Rules, if any; and
 - (2) Exceptions, if any, to each provision.

(Examples: Various provisions re: property rights or support, if any; with any conditions or limitations. Note also the importance of providing full disclosure or fair provision with marital property agreements.)
- f) General Exceptions Related to the Entire Document
- g) Sanctions and Penalties for Non-compliance (including attorneys' fees for the non-breaching party)
- h) Temporary Provisions, if any
- i) Release Clauses (Examples: release of the distributive share in each other's estate; the mutual bar of dower and curtesy rights or their statutory equivalent; the surrender of the right of election to take against the will; the surrender of certain marital property rights; perhaps the surrender of limitation of support; and the transfer of property or money to the other party in consideration for this release or surrender.)
- j) Whether or not the Document is Assignable or is Binding on Other Parties
- k) Choice of Law that Governs the Document (certainty of the applicable law is always a factor since the average American family moves every 4 or 5 years.)
- l) Entire Agreement Clause (to guard against subsequent misunderstanding and the parol evidence rule)
- m) Modification of Agreement Clause, if any
- n) Effective Duration of Document
- o) Advice of Counsel Provision for both Parties (this is extremely important, since marital agreements may be later invalidated by the court for alleged fraud, duress, breach of fiduciary duty, or designed concealment)

- p) Severability Clause (especially important with questionable divorce planning provisions, so the entire agreement is not invalidated. Example: "If any provision of this Agreement shall be declared invalid by a court of competent jurisdiction, the rest of this Agreement shall nevertheless remain in effect.")
- q) Signature of the Parties
- r) Notarization
- s) Any other provisions that might best effectuate the intent of the parties, since significant facts will differ in each marital agreement.

See generally: Swisher, "Techniques of Legal Drafting: A Survival Manual," 15 U. Rich. L. Rev. 873-893 (1981) which is included as Appendix V of this Chapter.

II. DRAFTING COHABITATION AGREEMENTS

A. Validity of Cohabitation Agreements

1. Cohabitation Agreements--alternately called Non-marital Agreements, Non-marital Partnership Agreements, or Anti-Marvin v. Marvin Agreements--have become more common since the well-known decision of Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).
2. The purpose of such agreements, which are made between unmarried persons who are living together, is to clarify and define their respective rights in the property of the other; and to clarify and define any contractual support obligations.
3. Such property and support rights between unmarried cohabitants needs to be contractually clarified, since a recovery by one unmarried cohabitant against the other may be based on an express or implied contract to provide money or property in consideration for "home-making services." E.g. Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977); Beal v. Beal, 282 Ore. 115, 577 P.2d 507 (1978); Kozłowski v. Kozłowski, 80 N.J. 378, 403 A.2d 902 (1979); and Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592, 407 N.E.2d 438 (1980) (express agreements only recognized).
4. According to Foster and Freed, "Marvin v. Marvin: New Wine in Old Bottles," 5 Fam. L. Rptr. 4001 (1979), the following states allow unmarried cohabitants to sue each other for breach of contract based on proven homemaking services rendered: California, Connecticut, Kentucky, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Texas, Utah, Washington, Wisconsin, and Wyoming. For a pre-Marvin v. Marvin contractual recovery between unmarried cohabitants, see also Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973). And see recently Donovan v. Scuderi, 443 A.2d 121 (Md. App. 1982); and Bereman v. Bereman, 645 P.2d 1155 (Wyo. 1982).

5. "Homemaking Services" have included companionship, cooking, house-keeping, and other domestic services.
6. However, such "homemaking services" cannot be explicitly based on illicit, meretricious sexual relations. Marvin v. Marvin, 557 P.2d at 122, 134 Cal. Rptr. at 831. See also Annot., 3 A.L.R. 4th 13 (1981).

B. Invalidity of Cohabitation Agreements

1. A minority of states have expressly rejected the Marvin v. Marvin approach since the contract "in whole or in part" is based on illicit sexual intercourse, which is illegal consideration. See e.g. Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979); and Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977).
2. According to Foster and Freed, supra, 5 Fam. L. Rptr. 4001 (1979), the following states do not recognize a Marvin-type cohabitation agreement: Arizona, Arkansas, Florida, Georgia, and Illinois.

C. Cohabitation Agreements in Virginia

1. Although the cohabitation agreement question has not been directly addressed by the Virginia Supreme Court, it is quite likely that Virginia would allow recovery for the breach of an express agreement between unmarried cohabitants based on two analogous decisions: Cooper v. Spencer, 218 Va. 541, 238 S.E.2d 805 (1977); and Silverman v. Bernot, 218 Va. 650, 239 S.E.2d 118 (1977).
2. In Cooper v. Spencer, the parties had gone through an invalid marriage ceremony under a mistaken belief that their prior divorce decrees had become final. Some years later they separated, only to learn from legal counsel that they had never been legally married. The putative wife then attempted to recover certain monies and farm property from the putative husband based on a partnership theory.
3. Although the parties had taken title to the farm as tenants by the entirety, the Virginia Supreme Court held that there was no express agreement between the parties, and the putative wife had failed to produce evidence to support the existence of an implied partnership. This was just a family operation, stated the Court, rather than a commercial partnership. Cooper v. Spencer, 218 Va. 541, 238 S.E.2d 805 (1977).
4. Nevertheless, in Cooper v. Spencer, had the unmarried putative wife met her burden of proof in establishing an express or implied contract, recovery would probably have been awarded. And any sexual relations between the unmarried putative spouses was never mentioned in the opinion.
5. In Silverman v. Bernot, the Virginia Supreme Court affirmed a jury verdict of \$50,000 in a case involving an oral employment contract. The plaintiff's duties allegedly involved working full time at

defendant's business as an office manager; and acting as defendant's live-in housekeeper, which included cooking defendant's meals, and cleaning his house. After this "personal relationship" of the parties ended, plaintiff brought suit against the defendant, and the Virginia Supreme Court held that there was enough evidence presented to enforce the oral contract of \$50,000. Silverman v. Bernot, 218 Va. 650, 239 S.E.2d 118 (1977).

D. The Written Cohabitation Agreement

1. The basic purpose of an express, written cohabitation agreement is to negate any claim that an oral contract ever existed between unmarried cohabitants. Indeed, a written cohabitation agreement is most often a "nonpartnership" agreement which defines and segregates the parties' separate property, and discusses ownership of any jointly-held property.
2. Alternatively, a cohabitation agreement may expressly provide for monetary support or property in exchange for homemaking or other services rendered. Household expenses and contributions may also be agreed upon.
3. The cohabitation agreement therefore discusses the contingencies of how the parties' income and property are to be treated while the parties are living together, and upon separation.
4. But Caveat: Under either the majority Marvin rule or the minority Hewitt rule, absolutely no reference in the written agreement should be made to any sexual relationship between the parties, or this may be held to constitute illegal consideration and invalidate the contract.
5. Caveat also: Since a partnership theory proved unsuccessful under the Virginia case of Cooper v. Spencer, supra, counsel should remember that similar cohabitation contracts in other states have been upheld on theories of: joint venture; implied partnership; quasi-partnership; quantum meruit; constructive trust; or unjust enrichment. An express written contract, however, will alleviate this contractual uncertainty.
6. A Sample Cohabitation Agreement Form appears in Appendix I of this Chapter.

III. DRAFTING ANTENUPTIAL AGREEMENTS [PREMARITAL CONTRACTS]

A. Validity of Antenuptial Agreements

1. Antenuptial agreements are generally favored by the law when prospective spouses privately contract to vary, limit, or relinquish certain rights which they would otherwise acquire in each other's property, or in each other's estate, by reason of their impending marriage.
2. Traditionally, antenuptial agreements were typically made by widows and widowers who were about to be remarried, and who had acquired considerable property from a prior marriage that they wished to

control, and pass on to the children of their first marriage. Clark, Law of Domestic Relations 27 (1968). These agreements primarily dealt with property rights on the death of a spouse.

3. However, antenuptial agreements are now becoming more common among young professionals and first marriages. "With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss also--and agree upon, if possible--the disposition of their property and [spousal support] rights . . . in the event their marriage, despite their best efforts, should fail." Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970) quashed on other grounds, 257 So. 2d 530 (Fla. 1972).

B. Drafting Antenuptial Agreements: Property Provisions

1. Antenuptial agreements are valid in all jurisdictions with respect to certain property rights. Such contractual property provisions might include: release of the distributive shares in each other's estate; a mutual bar of dower and curtesy rights or their statutory equivalent; the surrender of the right of election to take against the other's estate; the surrender of certain marital property; and the transfer of money or property from one prospective spouse or a third party to the other prospective spouse, either before or after the marriage. Lindey, Separation Agreements and Ante-nuptial Contracts § 90-26 (1977).
2. So the prospective spouses in an antenuptial agreement may validly contract to limit their inheritance rights, defeat an election to take against a will, limit certain property rights and extinguish dower and curtesy rights. Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957) (quoting with approval Lindey, Separation Agreements and Ante-nuptial Contracts, supra.)
3. Antenuptial agreements may not limit child support; but the limitation of spousal support is still an open question in Virginia. See Section III C infra.
4. An antenuptial agreement will be held valid if there is a fair and reasonable provision made for the prospective spouse or a full and frank disclosure of the worth of the other prospective spouse and the antenuptial agreement is freely and voluntarily signed on the competent advice of independent legal counsel, Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957).
5. A disproportionately small provision made to a prospective spouse in the absence of full disclosure will lead to the presumption of designed concealment, and place the burden upon the party seeking to sustain the antenuptial agreement to show that it was a fair agreement. A provision of less than one-third of the spouse's

total worth at the time of contracting would raise this presumption of designed concealment. Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957). In light of the recent changes in Virginia's equitable distribution and intestate succession laws, however, this one-third figure may now be questionable.

6. Tactic: Always try to fully disclose the worth of both prospective spouses in an antenuptial agreement to avoid any possible problems with the designed concealment presumption.

C. Drafting Antenuptial Agreements: Divorce Planning Provisions

1. Although certain property rights may generally be limited or relinquished in antenuptial agreements (See Section III B supra); limiting or relinquishing spousal support or property rights in the event of divorce in antenuptial agreements is currently in a state of change. See Swisher, "Divorce Planning in Antenuptial Agreements: Toward a New Objectivity," 13 U. Rich. L. Rev. 175 (1979), which is included as Appendix III of this Chapter.
2. The traditional view, which is still the general rule in most jurisdictions, is that "an antenuptial agreement limiting the liability of the husband to the wife [or vice versa] for alimony, or fixing the property rights of the parties in the event of a separation or divorce is void as against public policy" since such an agreement tends to "promote" or "encourage" divorce. Swisher, supra pp. 175-183. See also Cumming v. Cumming, 127 Va. 16, 31, 102 S.E. 572, 576 (1920) ("even bona fide antenuptial and postnuptial contracts, valid in all other respects, cannot bind the action of the court on the subject of alimony") cited with approval in Casilear v. Casilear, 168 Va. 46, 190 S.E. 314 (1937).
3. The modern approach of many courts, however, recognizes the growing divorce rate in the United States and the need for divorce planning. Under this approach, divorce planning in antenuptial agreements is not invalid per se unless the agreement itself is shown to cause the divorce. Swisher, supra pp. 183-189. See also Note, "For Better or For Worse . . . But Just in Case, are Antenuptial Agreements Enforceable?" 1982 U. Ill. L. Rev. 531 (1982).
4. Contingent divorce planning provisions in antenuptial agreements under this modern approach might include: limiting or relinquishing the property rights of the respective spouses on separation or divorce; limiting or relinquishing the spousal support obligation on separation or divorce; and limiting any spousal support or property rights on separation or divorce to a certain stipulated amount of money. Swisher, supra p. 177 n. 7.
5. Although Virginia has not recently dealt with any spousal support divorce-planning provisions in antenuptial agreements, there are two recent cases dealing with divorce planning in marital agreements involving property that have both been upheld by the Virginia Supreme

Court. Capps v. Capps, 216 Va. 378, 219 S.E.2d 901 (1975); and Cooley v. Cooley, 220 Va. 749, 263 S.E.2d 49 (1980).

6. In Capps v. Capps, the Virginia Supreme Court observed that the phrase "public policy" is "vague and not susceptible to fixed rules," and "property settlements, when entered into by competent parties upon valid consideration for lawful purposes, are favored in the law." Thus:

The general rule is that agreements between husband and wife relating to the adjustment of property rights, even though in contemplation of divorce, are not violative of established public policy unless collusive or made to facilitate a separation or to aid in procuring a divorce.

Capps v. Capps, 216 Va. 378, 380, 219 S.E.2d 901, 903 (post-nuptial agreement).

7. And in Cooley v. Cooley, 220 Va. 749, 752, 263 S.E.2d 49, 52 (1980), the Virginia Supreme Court held that "agreements between spouses dealing with a division of property, even though in contemplation of divorce, are valid unless part of a scheme to effect a separation or to obtain a divorce by collusion." Id. (post-nuptial agreement).
8. It therefore appears that Virginia in the Capps and Cooley cases is moving toward the modern approach of allowing divorce planning in antenuptial agreements, and away from the earlier Cumming approach.
9. But caveat: Since certain divorce planning provisions may still be questionable in Virginia--especially spousal support provisions on divorce--the careful draftsman will always include a severability clause in his or her antenuptial agreement to avoid invalidating the whole agreement if one or more divorce planning clauses are subsequently declared to be invalid.
10. Caveat also: These provisions will also be scrutinized for fair provisions or full disclosure. See Section III B (4)-(6) supra.
11. But if counsel has drafted a severability clause, there is no reason to avoid using any divorce planning provisions in Virginia antenuptial agreements, as well as utilizing the traditional property provisions.
12. A Sample Antenuptial Agreement Form appears in Appendix II of this Chapter.

IV. DRAFTING RECONCILIATION AGREEMENTS

A. Validity of Reconciliation Agreements

1. Since the law and public policy promotes marriage and encourages the resumption of marital relations, reconciliation agreements have been upheld in furtherance of this policy. E.g. Whalen v. Whalen, 581 S.W.2d 578 (Ky. 1979); McClain v. McClain, 237 Ga. 80, 227 S.E.2d 5 (1976); and Hanner v. Hanner, 95 Ariz. 191, 388 P.2d 239 (1964).

2. Reconciliation agreements are particularly important in Virginia, because in the absence of a written reconciliation agreement, the intent of the parties must be closely scrutinized to determine whether or not a prior separation agreement would still be binding. E.g. Roberts v. Pace, 193 Va. 156, 67 S.E.2d 844 (1951) (reconciliation was not proved, so a prior separation agreement was not cancelled). See also Barnes v. American Fertilizer Co., 144 Va. 692, 130 S.E. 902 (1925).
3. A promise to resume living together as husband and wife is sufficient consideration for a reconciliation agreement, even though the divorce or legal separation suit is still pending. Clay v. Clay, 54 App. Div. 2d 647, 387 N.Y.S.2d 634 (1976). And a reconciliation occurs when the separated parties get back together and hold themselves out as husband and wife "in the ordinary meaning of that phrase." Hand v. Hand, 46 N.C. App. 82, 264 S.E.2d 597 (1980).
4. This consideration does not fail even though the reconciliation later fails, and a subsequent separation normally will not revive a prior separation agreement. McClain v. McClain, 237 Ga. 80, 227 S.E.2d 5 (1976) Hand v. Hand, supra.
5. A contract involving forbearance by one spouse to prosecute a valid divorce action against the other spouse for valuable consideration was upheld by the Virginia Supreme Court since such a contract promoted marriage, rather than divorce, and was therefore favored under the law. Upton v. Ames & Webb, 179 Va. 219, 18 S.E.2d 290 (1942).
6. It was also held in a 1979 Kentucky case that a reconciliation agreement which provided for the distribution of certain property if the reconciliation subsequently failed was not contrary to public policy, and was therefore a valid agreement. Whalen v. Whalen, 581 S.W.2d 578 (Ky. 1979).
7. Virginia would also arguably uphold the validity of reconciliation agreements that provide for property division if the reconciliation fails, if such an agreement promotes marriage and encourages the parties to live together as husband and wife. E.g. Capps v. Capps, 216 Va. 378, 219 S.E.2d 901 (1975).
8. A Sample Reconciliation Agreement Form appears in Appendix IV of this Chapter.

APPENDIX TO CHAPTER IV

- I. Sample Cohabitation Agreement Form, page IV-11
- II. Sample Antenuptial Agreement Form, page IV-16
- III. Swisher, "Divorce Planning in Antenuptial Agreements: Toward a New Objectivity" 13 U. Rich. L. Rev. 175 (1979), page IV-21
- IV. Sample Reconciliation Agreement Form, page IV-32
- V. Swisher, "Techniques of Legal Drafting: A Survival Manual" 15 U. Rich. L. Rev. 873 (1981), page IV-35

APPENDIX I

Sample Cohabitation Agreement Form

[Note: I would call this a "Nonmarital Agreement" rather than a "Nonmarital Partnership Agreement" to avoid any possible problems with Cooper v. Spencer, 218 Va. 541, 238 S.E.2d 805 (1977). The term "Cohabitation Agreement" also tends to imply illegal sexual connotations, and should be avoided.

This form is based on a Nonmarital Agreement appearing in the ABA Family Law Section publication entitled Marital and Non-Marital Contracts: Preventative Law for the Family, Joan M. Krauskopf, Editor (1979); and a Nonmarital Agreement form appearing in the ABA Family Advocate pp. 14-15 (May, 1979).]

NONMARITAL AGREEMENT

This Agreement is made this 1st day of December, 1983 by ALFRED ABLE (Alfred) and BETTY BAKER (Betty) of Richmond, Virginia; who are referred to as "the parties."

Preamble

This Agreement is made for the following reasons and with reference to the following facts:

- A. The parties have decided to share living quarters, and began living together on November 10, 1983. They intend to continue this living arrangement.
- B. The parties intend by this Agreement to define their property rights with one another, and intend that this Agreement supersedes any purported oral agreements, whether express or implied.
- C. The parties desire to enter this Agreement as independent persons. Each of the parties has, prior to the date hereof, achieved a measure of material independence, and by the execution of this Agreement, each party expresses his or her intention not to claim any interest in the property accumulated by the other party prior to subsequent hereto, or in any of the income or appreciation derived therefrom, except as expressly provided in this Agreement.
- D. Albert is a physician, and Betty is a corporate salesperson. Each party intends to continue in his or her present occupation.
- E. Each of the parties is an unmarried person and a legal resident of Virginia.

NOW THEREFORE IN CONSIDERATION of the mutual promises contained herein, and with the intention of being legally bound hereby, the parties agree as follows:

1. Effective Dates. This Agreement shall be effective as of December 1, 1983, and shall continue until the separation of the parties, or the death of either party. Separation shall be defined as living separate and apart without cohabitation or interruption.

This Agreement [shall] [shall not] continue in full force in the event the parties marry each other, except for the provisions of Paragraph[s] [9] which shall be deleted from this Agreement as of the date of the parties' marriage. [OR: This Agreement shall terminate on the marriage of the parties.]

2. Disclosure of Worth. A balance sheet of each party has been attached to this Agreement as Exhibit A and Exhibit B. Such balance sheets constitute a reasonable approximation of the parties' assets and liabilities. Each party represents to the other that he or she has fully disclosed to the other his or her financial situation, as contained in the balance sheets, subject only to the warning that the balance sheets were prepared informally and without reference to documentation.

[OR: Both parties to this Agreement have made to each other a full and complete disclosure of the nature, extent and probable value of all their property, estate and expectancies. Attached hereto as Exhibit A and Exhibit B are statements of the separate property of the parties as of the date hereof. It is understood that as a result of income from or increases in the value of their presently existing separate property each party may acquire other and different separate property in the future.]

3. Intent that Property Remain Separate. The parties desire that all property presently owned by either of them of whatever nature and wherever located, all income derived therefrom, and all increases in the value thereof, shall remain their respective separate property, except as herein otherwise provided. The parties agree that at no time during their relationship shall there be any transmutation of any of their separate property interests into jointly owned property except by an express written agreement. The following events shall under no circumstances be evidence of any intention by either party or of an agreement between the parties to transmute their separate property interests into jointly owned property:

- (a) The taking of title to property, whether real or personal in joint tenancy or in any other joint or common form;
- (b) The designation of one party by the other as a beneficiary of his or her estate;
- (c) The commingling by one party of his or her separate funds or property with jointly owned funds or property or with the separate funds or property of the other party;
- (d) Any oral statement by either party;
- (e) Any written statement by either party other than the express written agreement of transmutation;
- (f) The payment from jointly held funds of any separate obligation, including but not limited to the payment of mortgage, interest or real property taxes on a separately owned residence;
- (g) The joint occupation of a separately owned residence.

[OR: Each of the parties agrees that the property described hereafter shall remain the separate property of its titleholder:

- (a) All property, whether real or personal, owned by either party at the effective date of this Agreement.

(b) All property acquired by the other party out of the proceeds or income from property owned at the effective date of this Agreement, or attributable to appreciation in value of said property, whether the enhancement is due to market conditions or to the services, skills or efforts of its owner.

(c) All property hereafter acquired by either party by gift, devise, bequest or inheritance, or income from said property, or attributable to appreciation in value of said property, whether the enhancement is due to market conditions or to the services, skills or efforts of its owner.]

4. Provision for Payment of Living Expenses and Purchases Made. The earnings of each party while living together shall remain their separate property, and shall not be subject to division upon termination of the relationship.

The parties agree that Alfred shall pay _____ percent and Betty shall pay _____ percent of their living expenses while they are living together. Alfred shall deposit \$_____ and Betty shall deposit \$_____ monthly into a checking account on which either partner can draw. Any property purchased from this account and any balance in this account shall be owned in the same percentage as contributions to the account.

5. Disposition of Property to Other Party. Despite any other provision of this Agreement, either party may, by appropriate written instrument only, transfer, give, or convey any property to the other. Neither party intends by this Agreement to limit or restrict in any way the right to receive any such transfer, gift or conveyance, from the other, except as herein stated.

6. Transmutation. Except as otherwise provided herein, property or interests in property, now owned or hereafter acquired by the parties which by the terms of this Agreement are classified as the separate property of one of them, can only become the separate property of the other or the parties' joint property by a written instrument executed by the party whose separate property is to be reclassified.

7. Binding Agreement. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, administrators, personal representatives, and assigns.

8. Consideration for Agreement. The consideration for this Agreement is the mutual promise of each party to act as companion and homemaker to the other, in addition to the other promises contained herein.

[It is further agreed between the parties that any services which either party may provide to the other or for the benefit of the other are fully compensated by this Agreement.]

9. Support upon Separation or Death. Each of the parties waives the right to be supported by the other after their separation or after the death of either party.

10. Entire Agreement. This Agreement contains the entire understanding of the parties, and they shall not be bound by any understandings other than those expressly set forth in this Agreement.

11. Subsequent Modification. The parties may modify the terms of this Agreement, but any modification shall not be effective unless in writing, signed by both parties, with the same formality as this Agreement.

12. Governing Law. This Agreement shall be construed and governed according to the laws of the State of Virginia. [Note: The governing law must be of a state that has a significant relationship with the contract. E.g. Where the contract was executed or where the contract is to be performed. It cannot be any state law at random.]

13. Interpretation. No provision in this Agreement is to be interpreted for or against any party because that party or that party's legal representative drafted the provision.

14. Paragraph Headings. Paragraph titles of headings contained herein are inserted as a matter of convenience only, and for reference, and in no way define or describe the scope of this Agreement or any provision hereof.

15. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be an original, but all of which shall constitute one and the same Agreement.

16. Sanctions and Penalties. Should any party retain legal counsel for the purpose of enforcing this Agreement or preventing the breach of any provision hereof, or for damages for any alleged breach of this Agreement, the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorneys' fees and costs for the services rendered to the prevailing party.

17. Costs of Agreement. Each party shall pay his or her respective costs incurred in the negotiation, preparation, and drafting of this Agreement in accordance with Paragraph 4 of this document.

18. Severability. If any provision of this Agreement is declared invalid by a court of competent jurisdiction, the rest of this Agreement shall nevertheless remain in effect.

19. Advice of Counsel. Alfred and Betty declare that each has read and fully understands everything set forth in this Agreement; that each has obtained independent legal counsel of his or her choice, and has been fully informed of all legal rights and liabilities in this Agreement; that after such advice and knowledge each party believes this Agreement to be fair; and that each party signs this Agreement voluntarily.

[Note: This may also be drafted in separate provisions, one for each party, for additional emphasis.]

IN WITNESS WHEREOF, this Agreement is signed and sealed on the date first stated above at Richmond, Virginia

_____[SEAL]
ALFRED ABLE

_____[SEAL]
BETTY BAKER

STATE OF VIRGINIA
City of Richmond, to-wit:

This instrument was acknowledged before me this ____ day of _____, 1983 by ALFRED ABLE.

Notary Public

My commission expires: _____

STATE OF VIRGINIA
City of Richmond, to-wit:

This instrument was acknowledged before me this ____ day of _____, 1983 by BETTY BAKER.

Notary Public

My commission expires: _____

APPENDIX II

Sample Antenuptial (Premarital) Agreement Form

[Note: This Antenuptial Agreement form is based on Lindey, Separation Agreements and Ante-nuptial Contracts Vol. 2, Section 90; the ABA Section of Family Law book Marital and Non-Marital Contracts: Preventive Law for the Family, Joan M. Krauskopf, Editor (1979); and other documents. The facts and parties are fictitious.]

[Note also that an antenuptial agreement must be in writing to comply with the Statute of Frauds. See e.g. Va. Code Ann. § 11-2(5) (Repl. Vol. 1978). But an oral antenuptial agreement could be taken out of the Statute of Frauds by reliance and part or full performance. See e.g. In re Lord's Estate, 93 N.M. 543, 602 P.2d 1030 (1979) and Herr v. Herr, 13 N.J. 79, 98 A.2d 55 (1953).]

[For federal tax consequences of antenuptial contracts, see 53 Wash. L. Rev. 105 (1977).]

ANTENUPTIAL AGREEMENT

This Antenuptial Agreement is made this _____ day of _____, 19____ between ELMER T. JONES of Richmond, Virginia, (the Prospective Husband); and EUNICE L. GREEN of Petersburg, Virginia (the Prospective Wife); who are referred to as "the parties."

Preamble

- A. Elmer and Eunice plan and intend to marry each other in the near future.
- B. Elmer and Eunice both own substantial assets consisting of real and personal property which they desire to retain as separate property.
- C. Elmer and Eunice desire to define their financial rights and obligations by this Agreement; and, except as herein stated, each desires to retain and dispose of his or her separate property, free from any claim of the other by virtue of their contemplated marriage.
- D. Elmer and Eunice now desire to fix by this Agreement the rights and claims that will accrue to each of them in the estate and property of the other by reason of this marriage, and to accept the provisions of this Agreement in lieu of, and in full settlement of, all such rights and claims.

[Optional: Both parties have been married previously, and have children by their previous marriages.]

NOW THEREFORE, IN CONSIDERATION of the mutual promises contained herein, and with the intent of being legally bound hereby, Elmer and Eunice agree as follows:

1. Full Disclosure. Each of the parties has made a full disclosure to the other of his or her financial situation, and the approximate worth of each party. A summary of Elmer's financial statement, prepared by _____ CPA of Richmond, Virginia is attached hereto as Schedule A. A summary of Eunice's financial statement, prepared by _____ CPA of Petersburg, Virginia is attached hereto as Schedule B. [OR: the parties recognize that such schedules represent a reasonable approximation of the assets and liabilities, and

were prepared informally without reference to documentation.] The parties further acknowledge that they have had an opportunity to review such summaries prior to the execution of this Agreement.

2. Property to be Separately Owned. Each party, during his or her remaining lifetime, shall retain sole ownership of all of his or her respective separate property, and shall have the exclusive right to dispose of such separate property in a manner to be determined in the sole discretion of such owner thereof, by inter vivos or testamentary transfer, as if their forthcoming marriage had never taken place.

[Note: In lieu of full disclosure, a fair provision may be made from one prospective spouse to the other. See Section IIIB(4)-(6) supra. But caveat, this is a dangerous alternative!]

Any property, either real or personal, tangible or intangible, acquired by either party before, during, or after the marriage shall be the separate property of that party; and the other party shall make no claim or demand on that separate property.

(a) This separate property includes, but is not limited to, any property acquired by purchase, exchange, gift, or inheritance.

(b) For all purposes of this Agreement the term "separate property" shall mean, with respect to each party hereto, all of that party's right, title, and interest, legal or beneficial, in or to any property, real, personal, or mixed, wherever situated, and regardless of whether now owned or hereafter acquired.

3. Release of Marital Rights by Elmer.

(a) Except as specifically provided herein, Elmer waives and releases all rights to any of Eunice's separate property accruing to him, or in which he may be otherwise entitled as Eunice's husband, widower, heir-at-law, next of kin, or distributee; including but not limited to such rights as curtesy or its statutory equivalent; statutory or other allowances to the spouse of a decedent, intestacy distributions, and rights of election to take against Eunice's will.

(b) Also waived and released by Elmer are any property or support rights he may otherwise be entitled to as Eunice's husband based upon the termination of the forthcoming marriage by annulment, divorce, or dissolution of the marriage; except as specifically provided herein.

4. Release of Marital Rights by Eunice.

(a) Except as specifically provided herein, Eunice waives and releases all rights to any of Elmer's separate property accruing to her, or in which she may be otherwise entitled as Elmer's wife, widow, heir-in-law, next of kin, or distributee; including but not limited to such rights as dower or its statutory equivalent, statutory or other allowances to the spouse of a decedent, intestacy distributions, and rights of election to take against Elmer's will.

(b) Also waived and released by Eunice are any property or support rights she may otherwise be entitled to as Elmer's wife based upon the termination of the forthcoming marriage by annulment, divorce, or dissolution of the marriage; except as specifically provided herein.

5. Gifts not Prohibited.

(a) No provision of this Agreement shall prohibit either Elmer or Eunice from making a voluntary gift in any amount to his or her respective spouse, and that gift shall become the sole property of the donee spouse.

(b) Such gifts may be lawfully conveyed or transferred during the lifetime of Elmer or Eunice, or by will or otherwise upon death, and neither Elmer nor Eunice intend by this Agreement to limit or restrict in any way the right or power of any party to receive such voluntary transfer or conveyance.

(c) Any such voluntary transfer or conveyance shall be deemed to be a voluntary gift, and shall not be deemed in any way a waiver or abandonment of this Agreement or any part hereof.

6. Jointly Held Property. Despite any other provisions of this Agreement to the contrary, the parties may, during marriage, acquire property, or interests in property, in both their names, with or without rights of survivorship. In such an event, the signatures of both parties shall be required to acquire, sell, transfer, convey, pledge, or encumber any such jointly held property. Entry into this arrangement shall not in any way be deemed a waiver of or abandonment of this Agreement or any part hereof.

7. Rights of Children. The parties recognize the possibility that they might have children during the course of their forthcoming marriage, whether natural born or legally adopted. The parties hereby agree that the provisions of this Agreement are not intended to govern or affect the rights of any such children in or to the property of each party hereto; and the parties agree that such property or support for the children shall be governed by applicable law.

8. Intent of the Parties in the Event of Dissolution, Divorce, or Legal Separation. The parties contemplate a long and lasting marriage, terminated only by death; and it is the mutual intent of Elmer and Eunice to promote and encourage their marriage through this Agreement.

Nevertheless, the parties are cognizant of the fact that the ratio of marriages to divorces in America has reached a disturbing rate. Therefore, the parties mutually desire to agree upon (a) the disposition of their property; [and (b) the disposition of their support rights]; in the event that their marriage, despite their best efforts to promote it, should fail. Reference: Capps v. Capps, 216 Va. 378, 219 S.E.2d 901 (1975) and 13 U. Rich. L. Rev. 175 (1979). [For further authority upholding divorce planning in antenuptial agreements, see also Ivanhoe v. Ivanhoe, 397 So. 2d 410 (Fla. 1981); Osborne v. Osborne, 428 N.E.2d 810 (Mass. 1981); and Jackson v. Jackson, 626 S.W.2d 630 (Ky. 1982).]

9. Payments in Lieu of Spousal Support. In the event that the parties' marriage is terminated by dissolution, divorce, or legal separation--regardless of which party has initiated the action, and regardless of the jurisdiction or venue of such action--the parties hereby specifically agree as follows:

(a) Elmer shall not receive any spousal support from Eunice, periodic or lump sum, which otherwise might be available to him in accordance with applicable law.

(b) Eunice shall not receive any spousal support from Elmer, periodic or lump sum, which otherwise might be available to her in accordance with applicable law.

[OR: Limit any spousal support to a certain designated sum of money over a certain designated time period. Tax planning regarding spousal support may also be involved here.]

(c) In connection with the provisions in this Paragraph 9, each party further acknowledges that he or she:

(i) has fully and fairly advised the other, and been advised by the other, of their respective financial situations;

(ii) has a fair understanding of the financial status of the other as set forth in annexed Schedules A and B, which are made a part of this Agreement;

(iii) considers the proposed payments in limitation of spousal support as fair under the current and probable future circumstances of each party; and

(iv) in sum, considers and believes after full and fair examination of the other's finances and after the advice of independent counsel that each has made a full disclosure to the other, each has a reasonable approximation of the financial situation of the other, and each considers the payments in limitation of spousal support and in lieu of all further obligation to be more than fair.

10. Property Division Upon Dissolution, Divorce, or Legal Separation

[Provisions in this paragraph, similar to Paragraph 9, may be made to extinguish or limit certain property rights on dissolution, divorce, or legal separation. Alternately, this Paragraph may also be omitted.]

11. Binding Agreement. This Agreement shall be binding upon and inure to the benefit of the parties, their respective heirs, administrators, legal representatives and assigns except as it affects Paragraph 7 above.

12. Further Assurances. The parties shall take all steps to make and deliver any documents or other assurances that are reasonably required to give full force to this Agreement.

13. Entire Agreement. This Agreement contains the entire understanding of the parties, and they shall not be bound by any understandings other than those expressly set forth in this Agreement.

14. Subsequent Modification. The parties may modify the terms of this Agreement, but any modification shall not be effective unless in writing, signed by both parties, with the same formality as this Agreement.

15. Governing Law. This Agreement shall be construed and governed according to the laws of the State of Virginia.

16. Interpretation. No provision in this Agreement is to be interpreted for or against any party because that party or that party's legal representative drafted the provision.

17. Paragraph Headings. Paragraph titles or headings contained herein are inserted as a matter of convenience only, and for reference, and in no way define, or describe the scope of this Agreement or any provision hereof.

18. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be an original, but all of which shall constitute one and the same Agreement.

19. Sanctions and Penalties. Should any party retain legal counsel for the purpose of enforcing this Agreement or preventing the breach of any provision hereof, or for damages for any alleged breach of this Agreement, the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorneys' fees and costs for the services rendered to the prevailing party.

20. Severability of Provisions. If any provision or subprovision of this Agreement shall be deemed by a court of competent jurisdiction to be invalid, the remainder of this Agreement shall nevertheless remain in full force and effect.

21. Advice of Counsel--Prospective Wife. Eunice Green hereby declares and acknowledges that she has read and fully understands everything set forth in this Agreement; that she has sought and obtained independent advice from legal counsel of her own selection, and has been fully informed of all legal rights and liabilities with respect hereto; that after such advice and knowledge, she believes this Agreement to be fair, just, and reasonable; and that she signs this Agreement freely and voluntarily.

22. Advice of Counsel--Prospective Husband. Elmer Jones hereby declares and acknowledges that he has read and fully understands everything set forth in this Agreement; that he has sought and obtained independent advice from legal counsel of his own selection, and has been fully informed of all legal rights and liabilities with respect hereto; that after such advice and knowledge, he believes this Agreement to be fair, just, and reasonable; and that he signs this Agreement freely and voluntarily.

IN WITNESS WHEREOF, the parties have set their hands and seals to this Agreement as of the date first above written.

ELMER T. JONES (SEAL)

EUNICE L. GREEN (SEAL)

STATE OF VIRGINIA:
City of Richmond, to-wit:

This instrument was acknowledged before me this ____ day of _____, 19____
by ELMER T. JONES.

Notary Public

My commission expires: _____

STATE OF VIRGINIA:
City of Petersburg, to-wit:

This instrument was acknowledged before me this ____ day of _____, 19____
by EUNICE L. GREEN.

Notary Public

My commission expires: _____