

CHECKLIST for Divorce Settlement Agreement / Judgement

Every practitioner/client can benefit from a checklist of provisions that may need to be included in a settlement agreement and judgment of divorce. The following is a general checklist. Each case may require less or more.

Custody/parenting issues

- Legal custody
 - Joint or sole
 - If joint, define what the parties mean
- Parenting time
 - Regular weekly schedule
 - Holiday/special days schedule
 - Summers and school vacations
 - Conflicts between regular parenting time, holiday/special days schedule, and summers and school vacation schedule
 - Contact with children when with other parent
 - Transportation,
 - Who will provide
 - Drop off and pick up points
 - Right of first refusal to provide child care for other parent
 - Make-up parenting time
 - Provisions for compensation to a parent when the other parent fails to exercise scheduled parenting time
 - Provisions for move-away by either party
- Other parenting issues
 - Religious upbringing
 - Private/public schooling
 - If public, which parent's school district
- Communication between parents
 - Frequency and designated time
 - Mode – e-mail, by telephone at work, at home, face-to-face meetings
 - Emergency contact information
 - Notice of out-of-town trips
- Dispute resolution around parenting issues
 - Commitment to discuss issues with each other before initiating formal procedures
 - Mediation, privately or through FOC, and sharing of cost
 - Use of parenting facilitator (special master, parenting coordinator)
 - Automatic referral to FOC to investigate and make a binding recommendation

Child support

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

Health care for children

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

Other child-related issues

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

Alimony/spousal support

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

Alimony in gross

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

Section 71 payments

Personal property

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

Marital home

- If to be sold immediately
 - Provisions for attempts to sell “by owner” – time limit
 - Determination of selling price and listing agent
 - Engagement of real estate attorney to jointly represent the parties
 - Responsibility for fix-up costs and other sale-related costs such as appraisal and attorney fees
 - Responsibility for carrying costs (mortgage, property taxes, insurance, utilities, and maintenance) while on the market
 - Allocation of sale proceeds
- If delayed sale with sole occupancy by one party and continued co-ownership pending sale
 - Triggers for sale. Ex, term of years, remarriage, cohabitation, children no longer live at the home, default on underlying mortgages, etc.
 - Responsibility for capital improvements
 - Responsibility for carrying costs (mortgage, property taxes, insurance, utility bills and routine maintenance)
 - Provisions for later sale – see above
- If awarded to one party with immediate buy-out of equity
 - Requirement for recordable deed stating consideration of less than \$100 from relinquishing party in exchange for any necessary payment from the other party (best not to tie this in directly or it may trigger an increase in Taxable Value for property tax purposes to retaining spouse) MCL 211.27a(7)(g).
 - Assumption of mortgages by party retaining the property and hold harmless of relinquishing party
 - Requirement that retaining party obtain release of relinquishing party from mortgages
 - Amount and deadline for equity payoff
 - Requirement that relinquishing party turn over all papers and records in connection with the home
- If awarded to one party with delayed buy-out of fixed equity-in addition to above provisions
 - Provisions for lien on home to secure delayed payment
 - Triggers for payoff. Ex, term of years, remarriage, cohabitation, sale of home, children no longer live at the home, default on underlying mortgages, etc.
 - Terms of payment - interest rate, monthly interest only payments with later balloon, single balloon payment with accrued interest, amortized monthly payments
 - Requirements for retaining party to maintain property and insure relinquishing party’s interest as mortgagee
 - Provision for relinquishing party to subordinate lien to allow for refinancing
 - Provision for recording release of lien upon payment

- Requirement that relinquishing party turn over all papers and records in connection with the home
- Include complete and accurate legal description in body of agreement or as attachment (obtain old deed or title policy, or order title search if needed – do not use property tax description)

Other real property interests

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

Liquid assets

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

Investments

- Government savings bonds
 - If to be divided, by redemption dates?
- Stocks or corporate bonds
 - If to be transferred or divided, consider requirements of broker (Ex. guaranteed signatures, etc.)
- Partnerships, LLC's, closely held corporations
 - If to be transferred or divided, consider requirements of governing document (partnership agreement, articles, etc.) and specify documents to be signed (Ex. endorsement of stock certificate, etc.)
 - Assign responsibility for debts associated with the entity
 - Provide for resignation of relinquishing partner from position as officer, director, etc.

Stock options

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

Deferred bonus/restricted stock

- Provisions for sharing proceeds
- Responsibility for income taxes

Business interests

- Transfer of ownership documents, stock certificate, etc.
- Indemnification by owner spouse
- Resignations by non-owner spouse

After acquired property

Miscellaneous

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

Retirement benefits

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

- State how the drafter will be paid
- Indicate if the alternate payee can elect to receive the assigned benefits at the earliest time allowed under the plan, even if the participant has not retired
- Commit the parties to cooperate to amend any order not accepted by the plan administrator (not infrequently the case, even if drafted by a specialist) *nunc pro tunc*
- For “defined contribution” type plans (Ex. 401k, 403b, profit sharing) indicate
 - Division date
 - If the assigned benefit is a percentage of the entire account at the division date, a percentage of the marital portion at the division date, or a fixed dollar amount
 - If the award is a percentage of the account balance, indicate if the account balance is net of any outstanding loan
 - If the assigned benefit is a percentage of the account balance, indicate if the account balance should include forfeitures and plan contributions after the division date which are attributable to the period prior to the division date
 - If the assigned benefit is a fixed dollar amount, indicate if the alternate payee receives investment income and gains or losses which are attributable to the award between the division date and the distribution
- For “defined benefit” type plans (Ex. pension, many state and local government plans) indicate
 - Division date
 - If the alternate payee’s benefit is a *fixed monthly amount*
 - If the alternate payee’s benefit is a *percentage* of the participant’s accrued benefit at the division date, and if so if it is a percentage of the entire benefit or only a portion
 - If the alternate payee’s benefit is a percentage of only a portion of the accrued benefit (Ex. the period attributable to the marriage), is the portion of the benefit determined by the tracking method, accrued coverture method, or the prospective coverture method
 - If the alternate payee will receive a portion of early retirement subsidies
 - If the alternate payee will receive a portion of disability retirement benefits paid prior to earliest (non-disability) retirement age
 - If the alternate payee will receive a portion of post-retirement cost-of-living increases or other plan enhancements
 - If the alternate payee can receive benefits in any form allowed by the plan
 - What rights the alternate payee will have if the participant dies before the alternate payee but before the alternate payee’s benefits begin
 - What rights the alternate payee will have if the participant dies before the alternate payee but after the alternate payee’s benefits begin
- IRA’s are not qualified plans and do not require a special court order
- 457’s are government plans that are not qualified and may or may not be divisible - consult your specialist before attempting to draft for the division of such a plan
- If the parties have agreed to liquidate a portion of a defined contribution plan and are assigning it to the non-participant spouse to make it available prematurely and/or to avoid the 10% early withdrawal penalty, indicate
 - How the alternate payee’s tax liability will be covered if it exceeds the amount withheld by the plan
 - The alternate payee’s responsibility to disburse the funds as agreed immediately upon receipt
- Include standard waiver of rights to all benefits accrued after the division date and include a reminder for the parties to change beneficiary designations

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

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

Unsecured Debt

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

Insurance

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

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

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

Tax provisions

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

Miscellaneous provisions

- Dower – include waiver of dower and obligation of each party to cooperate by signing any additional documents needed by other party (Ex. Mortgage, not note) to acquire real estate prior to judgment
- Waiver of claims
- Do not allow if a possible tort claim is unresolved
- Incorporation of agreement into judgment, without merger
- Implementation of executory provisions (such as transfer of title to real estate) by recording agreement, filing with Secretary of State, etc.
- Payment of professional fees – attorneys, mediator, CPA, retirement plan specialist, appraisers, etc.