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PRENUPTIAL AGREEMENTS: ACTS OF DISTRUST OR STRATEGIC WEALTH MANAGEMENT?

By: Carol Schrier-Polak

Romantics might see prenuptial agreements as evidence of distrust, but business-savvy brides and grooms recognize their value as wealth management tools. Marriage, after all, is a union that is legal and financial as well as emotional and religious.

Prenuptials protect assets such as family-owned businesses, gifts and inheritances, shield golden parachute clauses, help avoid estate problems, and set expectations on financial and non-financial responsibilities during the marriage. The Wall Street Journal recently reported that about 20 percent of people entering their second marriage get prenuptials while an estimated 5 to 10 percent of people marrying for the first time execute these agreements.

Under Virginia's divorce laws, premarital assets (including a business started before the marriage, a house, a retirement plan or an investment portfolio) lose their "separate" categorization if:

- they are commingled with monies earned during the marriage,
- asset-related debt is paid during the marriage, and/or
- there is active involvement of the other spouse in the appreciation of the asset.

Prenuptials, however, can change this outcome by stating that earnings during the marriage are separate, and that specified assets, such as a business, investment accounts and real estate, belong solely to the owner. Additionally, retirement plans and related survivor annuities earned partly before the marriage and partly during the marriage can be waived or apportioned based upon a specified formula.

In the unfortunate case of a spouse's death, prenuptials can define rights of spouses. For example, the agreement can state that a future spouse waives the right to the minimum bequest required by Virginia law. The agreement also can

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provide that one's will controls the distribution of assets or specify that a specific asset, such as the primary residence or deceased spouses' retirement account, belongs to the surviving spouse if the couple are still living together at the time of death.

In a divorce, Virginia courts may order spousal support, either for a specified length of time or until the death, remarriage and/or cohabitation of the recipient. By contrast, prenuptials can provide for a waiver of spousal support or specify the amount and length of time paid based upon predetermined amounts or formulas. Trusts also may be established setting different amounts and specifying beneficiaries based upon the length of marriage and resources of the parties. Prenuptials may also address financial and non-financial obligations for children and spouses from a prior marriage during the marriage and in the event of death.

Finally, prenuptials may also focus on a broad range of expectations of conduct during the marriage, such as:

- time off from work to care for children,
- payment of expenses and savings,
- career expectations/relocation,
- responsibilities of a spouse because of disability or incapacitation,
- requirements for obtaining disability, long-term care and/or life insurance,
- agreements to permit a religious divorce or annulment, or
- resolutions of problems during the marriage, such as counseling, and in the event of a divorce, i.e. mediation or arbitration.

Even the care of pets is increasingly being addressed.

Virginia has a statute that recognizes the validity of prenuptial agreements provided they are in writing, signed by both parties and voluntarily executed. Full disclosure of assets and liabilities is essential and separate representation of both parties is strongly recommended to avoid legal challenges alleging the agreement was unconscionable, involuntarily executed or the result of duress or fraud.

The enforcement of prenuptials will depend on the wording of the agreement. The provisions should be clear and comprehensive and precisely drafted to avoid challenges of ambiguity and varying interpretations. Begin discussing the terms of a prenuptial early in the engagement to avoid any accusations of undue influence. Execute the agreement before setting a wedding date. And finally, of utmost importance, identify early on the financial and non-financial expectations that will build the foundation for a satisfying and enduring relationship.

This article is reprinted with permission of Virginia Business magazine, where it appeared in the December 2007 issue.

NEW CHANGES LIKELY FOR AREA HOMEOWNERS' ASSOCIATIONS

By: Arianna S. Gleckel

If your neighborhood has a homeowners' association, you are probably all too familiar with the problems that arise from the requirements and regulations that many associations impose on homeowners. And finding relief from a dispute with your HOA can be difficult, as these associations are privately operated, with the developer controlling the association and later turning over operation to the homeowners elected to the association once a percentage of homes in

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the development have been purchased.

But some relief for homeowners may be right around the corner. The Virginia General Assembly is considering regulating condominium and homeowners associations by requiring management companies and their community managers to be licensed. House Bill 516 and Senate Bill 301 are before the General Assembly and if passed, will become effective July 1, 2008. This legislation was prompted after two million dollars was stolen from a homeowner association in Fairfax by a management company's executive. The effect of the legislation will be to create state oversight in the day-to-day operation of homeowners' associations through a new statewide Board.

The Board members will be appointed by the Governor and will consist of eleven members, including three representatives of Virginia common interest community managers, one attorney whose practice includes the representation of associations, one certified public accountant, one representative of the time-share industry, two developers of Virginia common interest communities, and three Virginia citizens.

A similar bill was introduced in the Maryland General Assembly in February and a hearing on this bill is scheduled for mid-March. In the District of Columbia, community managers are already required to be licensed as real estate agents or brokers.

DEFAMATION AND PUBLIC OFFICIALS

By: James V. Irving

There is no place in the country where the legal remedies available to a public figure whose job performance has been criticized is more pertinent than in the home of the federal government in the Washington Metropolitan area. However it was a Portsmouth, Virginia Circuit Court Judge who recently summarized the Virginia and Constitutional law on this free speech issue. The case is *Carroll et al. v. Jones*. Judge Dean W. Sword's letter opinion is dated January 23, 2008.

The leading case on this subject remains *New York Times v. Sullivan*, decided in the U.S. Supreme Court in 1964. In that case, the Supreme Court held that Sullivan, the police commissioner for Montgomery, Alabama, could not sue the New York Times for writing that Sullivan implicitly approved certain racially prejudicial activities by his police force. The Supreme Court reasoned that the professional behavior of a public official like Sullivan must be subject to scrutiny and criticism, provided the offensive statement isn't made with "actual malice" - that is, with knowledge that the statements is false, or with reckless disregard as to whether or not it is false.

The issue in *Carroll* was whether one of the Plaintiffs, Richard Ydoyaga, who was employed by the U. S. Navy as "Director of Contracting of the Southeast RMC," was barred from suing for defamation because he was a public official.

Judge Sword noted that the definition of "public official" is vague under both federal Constitutional and Virginia state law, but he cited *Rosenblatt v. Baer*, another Supreme Court precedent for guidance on the issue. Under *Rosenblatt*, "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to have, substantial responsibility for or control over the conduct of government affairs." Additionally, Judge Sword ruled, the statements are immune from suit only if the public has "an independent interest" in how

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the person performs his or her duties, and if there is "a relationship between the alleged defamation and [the public official's] position."

Judge Sword found that Ydoyaga had "almost unbridled authority to spend millions of dollars of navy money. He also had considerable authority to determine who received and who did not receive government contracts." Since the allegedly defamatory statements accused him of improprieties in the performance of his duties, the statements were protected as long as they weren't made with "actual malice" as the Supreme Court has defined that term.

In this election season, Judge Sword reminds us that as Americans, we are free to criticize the performance of our public officials, provided we do not speak or write with knowledge that what we say is false, or with reckless disregard for the truth.

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