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LEGAL MEMORANDUM

TO: CPAs, Clients & Associates

FROM: David L. Silverman, Esq.
Shirlee Aminoff, Esq.

DATE: April 2, 2010

RE: Prenuptial Agreements

Prenuptial agreements can provide for property, support, inheritance, and custodial rights in the event of divorce or death. Many persons, especially those remarrying, will insist upon such an agreement. NY Dom. Rel. Law § 236B addresses maintenance and the division of marital and separate property in the event of divorce. The section also explicitly provides that an agreement made before or during the marriage will be valid and enforceable in a matrimonial action if in writing and acknowledged. Superimposed upon these statutory requirements are common law requirements that the agreement not be unconscionable at the time of execution or be the result of fraud or duress.

Parties may waive rights to marital property to which they might otherwise be entitled, such as the right to appreciation in a family business. However, such waiver should be clearly articulated in the instrument. Prospective spouses are under a fiduciary obligation to one another. Therefore,

Any advice herein is not intended or written by our firm to be used, and cannot be used by any taxpayer, for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code. Advice from our firm relating to Federal tax matters may not be used in promoting, marketing or recommending any entity, investment plan or arrangement to any taxpayer.

a list of assets and how those assets were valued should be annexed to the agreement. If formal valuation of a business is waived, the agreement should so state. Similarly, parties may decide upon appropriate maintenance payments in the event of divorce, or may dispense with such payments entirely. A spouse may also waive the statutory right to elect against the Will of the other spouse or, in the event of intestacy, to 1/2 of the estate. Prenuptial agreements may also contain a choice-of-law provision and a tax payment provision. It is important that each party be represented by separate, competent counsel. Having one attorney represent both parties to a prenuptial agreement is an invitation to disaster. To prevent a later assertion of duress, the agreement should also not be executed on the eve of the contemplated marriage.

Retirement assets often comprise a significant portion of a spouse's estate. While IRA benefits may be waived in a prenuptial agreement, other retirement benefits which are subject to ERISA may not be waived prior to marriage. If waiver of ERISA benefits is sought, the agreement should contain a provision requiring the waiving party to execute a waiver after marriage. Prenuptial agreements should be negotiated and drafted with a degree of skill commensurate with the the legal rights and obligations they will govern in the event of divorce. New York courts have shown little inclination to void agreements resulting from a fair bargaining process with full financial disclosure.

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