

## NJSBA Annual Meeting

### Seminar: Navigating Landmines in Negotiating and Drafting Agreements

#### Dealing With Equitable Distribution (Cary Cheifetz, Esq.)<sup>1</sup><sup>2</sup>

##### General Equitable Distribution Provision

In consideration for all of the provisions as set forth in this Agreement, including but not limited to the Parties' mutual complete, total, final and irrevocable and non-modifiable waiver of past, present or future alimony, and in full and final satisfaction of any and all claims the Husband and Wife may each have against the other relating to equitable distribution of the marital estate pursuant N.J.S.A 2A:34-23, and any other right to share in the property acquired during the marriage, the Husband and Wife do hereby agree as follows:

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<sup>1</sup> Cary B. Cheifetz, Esq. is a founding member and partner of Ceconi & Cheifetz, L.L.C., in Summit, New Jersey, where he devotes his practice to matrimonial and Family Law related matters, Mediation, Arbitration, and serves as an expert witness on Family Law. Mr. Cheifetz is a Diplomat of the American College of Family Trial Lawyers and a Past Chair of the New Jersey State Bar Association's Family Law Executive Committee, and Past President of the New Jersey Chapter of the American Academy of Matrimonial Lawyers. He currently serves as a Director of the American Academy of Matrimonial Lawyers Foundation. Mr. Cheifetz is a member of the American, New Jersey State, Essex County and Bergen County bar associations. He also is Past President of the Essex County Bar Association and a recipient of its Family Law Achievement Award. He is a Former Chair of its Family Law Executive Committee and a member of the Essex County Judicial Selection Committee. He is a former member of the Supreme Court Board of Attorney Trial Certification (Matrimonial Law Committee), as well as a former member of the New Jersey Supreme Court Committee on Family Part Practice. Mr. Cheifetz is former Co-Managing Editor of the *New Jersey Family Lawyer*. He also has qualified as an expert on Family Law issues in the federal and New Jersey state courts. A former Adjunct Professor of Law at Seton Hall University Law School, Mr. Cheifetz is a co-author of *New Jersey Family Law* (Lexis-Nexis 2009), *Valuation Strategies in Divorce* (2nd Edition, John Wiley & Sons), and *Valuing Professional Practices and Licenses: A Guide for the Years Matrimonial Practitioner* (2nd Edition, Prentice Hall Law & Business). Mr. Cheifetz has lectured on family law matters for ICLE, the American Law Institute, the American Bar Association, the Association of Trial Lawyers of America, the American Institute of Certified Public Accountants and other organizations. Mr. Cheifetz was the recipient of the Distinguished Service Award for Excellence in Continuing Legal Education, which was presented to him from the New Jersey Institute of Continuing Legal Education, and the recipient of the 2008 Saul Tischler Award from the New Jersey State Bar Association for lifetime achievement in Family Law. Mr. Cheifetz also is a Fellow of the Litigation Counsel of America. Mr. Cheifetz received his B.A. degree from George Washington University; his J.D. degree from New York Law School; and was law clerk to the Honorable June Strelecki, former Presiding Judge of Family Part, Essex County. He is listed in *Best Lawyers in America* (Family Law), was selected as one of the Top 10 Super Lawyers in New Jersey by *New Jersey Monthly Magazine* and one of the New York area's Best Lawyers in the area of matrimonial law by *New York Magazine*. He also was named as one of Ten Leaders of Northern New Jersey Matrimonial Divorce Lawyers.

<sup>2</sup> The author wishes to thank his associate, Christina V. Kolevich, Esq. for her assistance in the preparation of the article.

## 1. Security for Equitable Distribution Payments

### **Notice of *Lis Pendens***

In an effort to protect one party's right in assets that are subject to equitable distribution, a spouse may file a Notice of *Lis Pendens*. This applies when real property exists that is subject to equitable distribution and a claim is being asserted against the property. A *Lis Pendens* could be used by consent as a security device in a Property Settlement Agreement.

During the negotiations in drafting the Agreement, the parties can include language that indicates:

1. Husband/Wife has an equitable interest in the land and premises described as \_\_\_\_\_, State of New Jersey, more particularly described in the attached Schedule, and made a part hereof, hereinafter referred to as "the Property", as the Wife/Husband's interest in that property is subject to equitable distribution in the foregoing lawsuit.

2. Pursuant to the terms of this Agreement, the Wife claims as part of the Wife's claim for relief an assignment of all or part of the Property. The above Property is titled in the name of the Wife, \_\_\_\_\_.

3. Any person hereafter acquiring an interest in said properties is hereby given notice of the pendency of said claim and each person whose conveyance or encumbrance is hereafter executed or hereafter recorded or whose interest is hereafter obtained by descent or otherwise, shall be deemed to be a subsequent purchaser with record notice of encumbrances and shall be bound by all proceedings taken after the recording of this notice to the same extent as if he/she were made a Party to said complaint.

### **2<sup>nd</sup> mortgage**

Following execution and delivery of this Agreement, Husband/Wife shall obtain a Home Equity Line of Credit (HELOC) or provide other party with a 2<sup>nd</sup> mortgage in the minimum amount of \$500,000 to satisfy/secure his obligation for equitable distribution payments.

## **Life insurance/Constructive Trusts**

### *Life Insurance*

The Husband shall maintain life insurance in a minimum amount of \$1,000,000 designating the Wife as beneficiary of one-hundred percent (100%) until such time as his equitable distribution payout is satisfied. Wife shall be provided with a copy of the requisite life insurance policy, proof of beneficiary designation and proof of payment of premium on an annual basis.

Alternatively, Husband hereby authorizes the life insurance carrier, or any other affiliated companies, to provide dual notification to Wife. Wife shall be provided with full and complete access to all of the information/documentation involving Husband's life insurance policy, including, but not limited to (a) proof of renewal, termination of policy or nonpayment of premium; (b) verification of face value, designation and/or change of beneficiaries; (c) access of annual report; (d) policy death benefit payable to authorized party; (e) proof of last premium payment date; (f) proof of next premium payment date; (g) proof of current policy; and, (h) proof of premium paid and/or due.

Husband further authorizes the life insurance carrier, or any other affiliated companies, to directly notify the Wife in the event of the following: (a) any changes that are made to the life insurance policy (whether existing or new policies); (b) any change of designation of beneficiaries; (c) any change in plan coverage and/or reduction in plan coverage; (d) any change in address on existing and new policies; (e) any changes of assignments, loans or encumbrances against any existing or new policies; and, (f) failure to maintain the plan consistent with the terms of Paragraph \_\_ of the Marital Settlement Agreement.

Wife is hereby designated the owner of Husband's life insurance policy in the amount of \$1,000,000 until such time as equitable distribution payout is satisfied.

In the event that the Husband fails to have to requisite amount of life insurance for the benefit of the Wife at the time of his death, that amount shall constitute a primary lien of the Wife against the Husband's Estate.

The Husband shall be solely responsible for the payment of premiums on his life insurance policy(ies) and shall provide the Wife with proof of his compliance within sixty (60) days of the execution of this Agreement, and on the anniversary date of this Agreement each year hereafter. The Husband shall not encumber any such insurance, use it as collateral, or otherwise compromise the benefits payable to the Wife. In the event that Husband violates any provision of this Paragraph so that the Wife receives less than that to which she is entitled hereunder, his Estate shall be liable for any amounts not paid to the Wife.

Constructive Trust (Life Insurance and Bank/Investment/Retirement Accounts)

In consideration of the terms and conditions of this agreement, as and for security of the Lump Sum Payment/Buyout Payments set forth in Paragraph(s) \_\_\_ of this Agreement, Husband shall hold in Constructive Trust for Wife the \_\_\_\_\_ Life Insurance Policy ending in \_\_\_\_, titled in Husband's name, with a cash surrender value of approximately \$\_\_\_\_\_ as of March 18, 2016 and the Bank/Investment/Retirement Account(s), titled in Husband's name, with an approximately value of \$\_\_\_\_\_ as of March 18, 2016 to secure the balance of security.

This Agreement shall authorize the insurance company and/or banking institution to freeze the Policy and/or Account until such time that Husband either (1) redeems and/or liquidates the Policy and/or Account if Husband decides to surrender the policy and/or liquidate the account to pay the remaining amount due to Wife as set forth in Paragraph(s) \_\_\_\_\_, or (2) has paid the Lump Sum Payment/Buyout from other resources and the payment has cleared. If Husband exercises Option 1 above, the liquidated funds from the insurance Policy and/or Account shall be paid directly to \_\_\_\_\_ on behalf of Wife up to amount under this Agreement at the time of liquidation. Following Husband's payment to Wife of \$\_\_\_\_\_, plus interest, the Constructive Trust over such asset shall immediately terminate and no additional action shall be required to free the asset from any and all claims by Wife against Husband and/or Husband's estate. Upon the Husband's timely payment of \$\_\_\_\_\_, plus interest, the Wife shall have no further claims of any kind whatsoever against Husband or Husband's estate for equitable distribution pursuant to Paragraph(s) \_\_\_ of this Agreement. In the event that Husband

does not timely pay Plaintiff the \$\_\_\_\_\_, plus interest, then Wife shall have the right to file an application to the Court for an immediate liquidation of the Policy and/or Account held in Constructive Trust as set forth in this Agreement to pay the balance of the Lump Sum Payment/Buyout Payment to Wife. The Court shall direct the respective institutions to immediately liquidate the Policy and/or Account and to tender the amount due directly to Wife.

In the event the liquidation of the Policy and/or Account is insufficient to tender the full amount of \$\_\_\_\_\_, plus interest to Wife, then Husband shall be compelled to immediately liquidate and/or borrow funds sufficient to meet any shortfall. Husband shall be solely responsible for any and all tax liability incurred as a result of the liquidation of the Policy and/or Account or any other asset necessary to meet the \$\_\_\_\_\_ plus interest, payment to Wife. The balance shall be used to satisfy the Lump Sum Payment/Buyout Payment to Wife and reasonable counsel fees that Wife incur as a result of any application, and any surplus shall be paid to Husband so Wife shall not receive a windfall from same.

## **2. Marital Residence**

*Marital Residence.* The Parties represent that they are joint owners of real property located at \_\_\_\_\_ ("Marital Residence"). The Parties further represent that the Marital Residence has a fair market value of approximately \$\_\_\_\_\_ with an outstanding mortgage balance of \$\_\_\_\_\_ as of March 18, 2016 ("Mortgage"). Neither Party shall further encumber the Marital Residence without the other Party's prior written consent.

*Sole Occupancy.* The Wife shall continue to have exclusive use and occupancy and possession of the Marital Residence until such time that it is sold [Does remarriage or cohabitation trigger a sale?]. Until the sale of the Marital Residence, the Parties shall equally share the cost of the mortgage, HELOC, real estate taxes, homeowners' insurance, utility charges and other expenses associated with the home such as landscaping, snow removal, for the Marital Residence. Notwithstanding the foregoing, the Parties shall equally share any repairs needed for the Marital Residence which cost in excess of \$200 and any

improvements made to the Marital Residence recommended by the Parties' real estate broker in order to list the Marital Residence for sale.

*Joint Occupancy.* Until the Marital Residence is sold/refinanced, both parties shall continue to share use and occupancy of the Marital Residence. Except as provided herein, the parties shall continue to be responsible to share all expenses pertaining to the Marital Residence with Husband paying fifty percent (50%) and Wife paying fifty percent (50%) of same. The foregoing applies regardless of whether either party voluntarily vacates the Marital Residence. These expenses shall include, without limitation, the mortgage payments, HELOC, real estate taxes, homeowners insurance, and utility bills, including, but not limited to, electric and gas, water and sewer, lawn care, maintenance/repairs, cable television, internet and home telephone, and plumber/electrician costs. Notwithstanding the foregoing, in the event that there is a major repair in excess of \$500 required for the Marital Residence, it shall be equally shared by the parties.

In order for each party to pay his/her share of the foregoing expenses, on or about the first (1<sup>st</sup>) and fifteenth (15<sup>th</sup>) of each month following the execution and delivery of this Agreement, the parties shall meet and the parties shall review the foregoing bills for the Marital Residence. Following review of the bills, the parties shall each cut checks in the amount of their respective share made payable to the vendor/service provided at the time the parties meet. In the event one party fails to pay their respective share, the other party shall have the option, although shall have no obligation to do so, to pay the full amount of the bill in order to preserve his/her respective credit. If any bill is satisfied in full by one party, then the paying party shall maintain an itemized list, together with proof of payment, which shall be reimbursed to them inclusive of interest, at a rate of five percent (5%) monthly compounded, from the non-paying party's share of net sale proceeds as set forth herein.

*Capital Improvements.* Any capital improvements to the Marital Residence shall be agreed to by the Parties in writing and said cost shall be equally shared by the Parties, or if either Party layouts the cost of same, said amount shall be refunded to him or her from the proceeds of sale of the Marital Residence before distributing same to the Parties so that said costs would have been equally shared by the Parties.

*Sale Proceeds.* The proceeds of the sale of the Marital Residence shall be used to pay:

(a) the real estate commission;

(b) attorneys' fees pertaining to sale of the Marital Residence;

(c) reasonable closing costs required to be paid by the Parties in connection with the sale of the Marital Residence;

(d) the balance of the outstanding mortgage at the time of sale;

(e) all taxes incurred as a result of the sale, including, without limitation, real estate transfer taxes, capital gains taxes, and all other closing costs incurred as a result of the sale;

(f) The balances of the Wife's Car Loan, if any, and the Husband's Car Loan, if any, at the time of sale as set forth in Paragraph \_\_\_\_ of this Agreement;

(g) The balance of the Marital Credit Card Debt, if any, at the time of sale as set forth in Paragraph \_\_ of this Agreement.

After the foregoing payments are made from the remaining proceeds of sale, the balance of the net sale proceeds shall be equally divided between the Parties.

#### *Premarital Property*

The Parties acknowledge that the real property located at \_\_\_\_\_ ("Marital Residence") is titled solely in Husband's name. The Wife acknowledges that the Marital Residence was premarital and Husband's sole and separate property under the terms of the Premarital/Antenuptial Agreement, and is exempt from equitable distribution. The Wife waives any and all interest in same and the Husband shall indemnify and hold Wife harmless from any liability that may arrive from this property and/or his ownership interest.

#### **Refinance of Property (Husband refinancing)**

On or before \_\_\_\_\_, 2016, Wife shall advise Husband whether or not she wishes to exercise her option to buyout Husband's interest in the Marital Residence. If Wife elects not to buyout Husband's interest, then Husband shall have the option to buyout Wife's interest in the Marital Residence. Husband shall notify Wife of whether or not he will exercise said option on or before \_\_\_\_\_, 2016. Upon a buyout, the Wife/Husband shall pay the Husband/Wife fifty percent (50%) of the fair market value, less the Mortgage referenced herein, as neither Party shall place an additional lien(s) on the Marital Residence.

In the event of the buyout, the Husband/Wife shall relinquish to the Wife/Husband all right, title and interest of any kind, or any claim of any nature whatsoever, that he/she has or may have to the Marital Residence and the Husband/Wife shall retain the Marital Residence, subject to the Mortgage which will have to be refinanced to remove the Wife/Husband's name, as his/her sole and separate property, free and clear of any and all claims by the Seller.

#### If unable to Refinance

In the event the Husband is unable to effectuate transfer of title and refinance the mortgage and/or remove the Wife as an obligor from the mortgage within ninety (90) days from the date of execution and delivery of this Agreement, and/or no later than January 1, 2016, then Husband shall immediately list the Marital Residence for sale.

#### **Recording of deed timely**

##### Option 1:

Contemporaneous with the Husband notifying the Wife that he/she is exercising their option, the Wife shall execute any and all documents necessary or recommended to memorialize the Husband's sole right, title and interest in the Residence, including but not limited to a Bargain and Sale Deed with Covenants Against Grantors Acts, Affidavit of Title and any related documents necessary to transfer the Husband's interest in the Marital Residence to Seller. Upon transfer of the Marital Residence solely to Husband, the Husband will indemnify and hold the Wife harmless from any liability resulting from the Mortgage. The Husband shall take any and all actions necessary to remove the



Wife's name from the Mortgage within ninety (90) days of the transfer of the Residence in accordance with this Paragraph. The Husband shall represent that he/she has not placed, caused to be placed or suffered any liens or encumbrances of any kind to be placed on the Residence other than the Mortgage. The deed shall be held by the Husband in escrow and not recorded until he/she demonstrates that the existing mortgage and the amount to be paid to the Wife have been satisfied.

Option 2:

The Husband shall receive the Marital Residence by way of equitable distribution. The Wife shall receive an equalizing amount of \$\_\_\_\_\_ for her 50% share of the Marital Residence. Following the execution and delivery of this Agreement, the Wife shall transfer to the Husband all rights, title and interest in and to the Marital Residence by way of a Bargain and Sale Deed with Covenants Against Grantor's Acts, prepared by the Husband's attorney, which shall be a non-taxable event to Wife. The Wife shall execute any and all documents necessary and/or required to memorialize the Husband's sole right, title and interest in the Marital Residence, free and clear of any and all claims by Wife, including, but not limited to a Deed, Affidavit of Title and any related document necessary for same at the Husband's expense.

Option 3:

Within ninety (90) days of this Agreement, Husband shall refinance the mortgage to remove Wife's name from this liability. Provided Husband is exercising due diligence and should extenuating circumstances arise that are out of his control, reasonable extensions to the deadline for refinancing outlined in the previous sentence shall not be unreasonably denied by Wife. Should the lending institution require a Deed in order to effectuate the refinance, Husband shall provide and prepare a Deed that Wife shall sign upon presentment within fourteen (14) days. Said Deed shall be held in escrow and released simultaneously with the refinance transaction which removes Wife's name from the obligation. Husband shall be solely responsible for all costs associated with the transfer of title, ownership and maintenance of said real property and shall indemnify and hold WIFE harmless from same.

**Provisions if marital residence cannot be sold**

Following execution and delivery of this Agreement, the Parties shall immediately list the Marital Residence for sale with a Multiple Listing Service with a reputable real estate broker agreed to by both Parties at a price to be agreed upon by the Parties based upon the recommendations of their real estate broker, which shall not be less than \$\_\_\_\_\_ (the "Listing Price"). In the event that the Parties cannot agree on a reputable real estate broker, then the Parties shall use a real estate broker jointly selected by the Parties' matrimonial attorneys.

If the Parties have not received any offers to purchase the Marital Residence within ten percent (10%) of the Listing Price within forty five (45) days after the Marital Residence is listed for sale, then the Listing Price shall be reduced by the mutual agreement of the Parties based upon recommendations from the real estate broker. Thereafter, if the Parties have not received any offers to purchase the Marital Residence within ten percent (10%) of the Listing Price within sixty (60) days from the date of the first Listing Price reduction, then the Parties shall reassess the Listing Price based upon the recommendations from the real estate broker. Thereafter, the Parties shall review the Listing Price with the real estate broker monthly and they shall follow the realtor's reasonable recommendations as to any changes/adjustments to the Listing Price and as to repairs to be done to the Marital Residence in preparation for sale. Neither Party shall unreasonably withhold or delay his or her consent to further reduce the Listing Price. Both Parties shall receive all information concerning the sale of the Marital Residence.

### **3. Pensions**

*Retirement Assets.* The Husband and/or the Wife owns certain accounts for retirement (including pension, 401 (k) plans, Individual Retirement Plans, and other deferred savings/contribution plans). Those accounts are as follows:

- \_\_\_\_\_ Pension Plan issued to Husband through his employment at \_\_\_\_\_ titled in the Husband's sole name which had a value of \$\_\_\_\_\_ as of March 18, 2016 and a balance of \$\_\_\_\_\_ as of April 1, 2016 ("Husband's Retirement Account). The Parties acknowledge that Husband's Retirement Account contains portions of Husband's premarital contributions.

- \_\_\_\_\_ Pension Plan issued to Wife through her employment at \_\_\_\_\_ titled in the Wife's sole name which had a value of \$\_\_\_\_\_ as of March 18, 2016 and a balance of \$\_\_\_\_\_ as of April 1, 2016 ("Wife's Retirement Account). The Parties acknowledge that Wife's Retirement Account contains portions of Wife's premarital contributions.

*Representations.* Except as otherwise set forth herein, the Wife represents that there are no other retirement accounts of any kind (IRA, Pension, 401K, Profit-Sharing) which she owns or has any type of direct or indirect interest in whatsoever, including a beneficial interest, and Wife acknowledges that Husband is relying upon said representation as a basis for entering into this Agreement. Except as otherwise set forth herein, the Husband represents that there are no other retirement accounts of any kind (IRA, Pension, 401K, Profit-Sharing) which he owns or has any type of direct or indirect interest in whatsoever, including a beneficial interest, and Husband acknowledges that Wife is relying upon said representation as a basis for entering into this Agreement.

#### **Qualified vs. Non-Qualified plans**

Qualified plans require Qualified Domestic Relations Order, while non-qualified plans may permit a Domestic Relations Order.

##### Option 1:

The parties shall share equally (50/50) in the above pension benefits. The parties acknowledge that said distribution serves as a survivorship benefit to Wife. So as to effectuate this distribution, the parties shall jointly retain \_\_\_\_\_ to prepare Qualified Domestic Relations Orders for the qualified plans outlined above and Domestic Relations Orders for any non-qualified plans outlined above. The Husband shall cooperate with providing any and all documentation required to determine the nature of each plan.

In the event that any plans permit tax shifting, each party shall receive one half (1/2) of the gross monthly benefit from each pension, and each party shall be responsible for any and all income taxes attributable to their 50% gross share, payable in their respective tax brackets. In the event that any of the plans not permit tax shifting, Husband shall pay to Wife 50% of each monthly pension payment, net of all verifiable tax consequences to Husband, within seven (7) days of his receipt of same. The parties' shall annually "true

up" the amounts paid versus taxes paid within thirty (30) days of filing their tax return(s). Until the Qualified Domestic Relations Orders or Domestic Relations Orders are executed and enforceable, Husband shall pay to Wife 50% of each monthly pension payment, net of verifiable tax consequences to Husband, within seven (7) days of his receipt of same.

Option 2 (Non-Qualified Plan):

The Husband has a Pension Plan which is a non-qualified plan. The plan shall be divided with the Wife receiving 50% of the marital portion as defined in Marx, with the marital portion being determined by multiplying the final pension benefit by the coverture fraction: with the numerator being expressed as the number of months of the parties' marriage during the plan participation, from the date of marriage until the date of the Complaint, and the denominator being the number of months of the total plan participation at retirement. The Wife shall be entitled to her portion only if the Husband is entitled to collect under the plan and only for so long as the Husband collects same. The plan shall be held in a constructive trust whereby the Husband shall act as a constructive trustee and will provide the Wife with the monthly benefit. In order to provide the Wife her share of the benefit of the plan tax free and to account for the tax which the Husband will have to pay on the distributions, the Husband shall pay the Wife her marital portion after 45% is deducted for taxes (as an initial estimate of the actual marginal tax attributable to such income). The initial tax percentage estimate of 45% will be adjusted up or down based on the actual marginal taxes paid by Husband on his income, based on his tax rate at the time of the distribution of the plan. Same will be accomplished within 30 days of the Husband's tax return being filed, which may be on extension.

Miscellaneous:

In the event Husband is found to have any other pension benefits which were not disclosed in his Case Information Statement or throughout the negotiations of this matter, Wife shall have receive 50% of the gross monthly benefit subject to a Qualified Domestic Relations Order or Domestic Relations Order as outlined above. Should Wife be forced to petition the Court to receive this relief, Husband shall be responsible for 100% of her legal fees associated with the claim.

**When to get the QDRO done**

QDRO's are necessary to divide qualified retirement plans without paying a penalty, given that they are incident to a divorce. Pursuant to the Retirement Equity Act (ERA), lump sum distributions from a qualified plan can be rolled into another qualified retirement plan or IRA. QDROs can be utilized for dividing contributory retirement plans.

Cost of QDRO

Within ten (10) days after the entry of the Judgment of Divorce, the Parties shall jointly retain \_\_\_\_\_ to prepare the Qualified Domestic Relations Order(s) ("QDRO") and the Parties agree to be jointly responsible for the expense of the retention and preparation of the QDRO equally. Each Party will cooperate in a timely manner with any request for information by \_\_\_\_\_.

Option 1:

With respect to the Husband's Retirement Pension Income Plan, the Parties shall retain \_\_\_\_\_ to prepare a Qualified Domestic Relations Order based upon the Marx formula which they shall thereafter execute and submit to the Court for filing. Specifically, the Wife shall receive a fifty (50%) percent interest in the marital portion defined as the number of months of the participant's participation in the plan earned from the date of the marriage to the date of this Agreement divided by the number of months of the participant's participation in the plan defined as the number of months from participant's commencement of benefits in the plan until the benefit ceases accruing for participant. The Wife shall be entitled to a *pro rata* share of any cost of living increase and any pre-retirement subsidiaries on her share. The Wife shall be entitled to a separate interest with a pre-retirement survivorship annuity up to the amount of her entitlement, if available. If a pre-retirement survivorship annuity is not available, then Husband shall retain Wife as surviving beneficiary for 50% of the value of the Pension. Any loans against the pension shall be deducted from Husband's share of same.

Option 2:

Within thirty (30) days of the date of the execution of this Agreement, the Pension shall be divided equally pursuant to a Qualified Domestic Relations Order. Pursuant to the Retirement Plan, the QDRO shall ensure that, in the event Wife predecease Husband, her

50% share of the benefit shall revert to Husband, so that he shall receive 100% of the benefit upon her death. The Parties shall jointly retain \_\_\_\_\_ to prepare said QDRO and shall equally share the costs thereof. Until the Qualified Domestic Relations Order is effective, Husband shall pay to Wife 50% of each monthly pension payment, net of all normal and reasonable tax consequences to Husband, within seven (7) days of his receipt of same.

No QDRO necessary for Individual Retirement Accounts

Within ten (10) days after entry of the Judgment of Divorce, Husband/Wife shall execute all necessary documents to transfer from Husband/Wife's IRA to Wife/Husband's IRA fifty percent (50%) of the marital portion of the Husband/Wife's IRA.

**Pre/Post Retirement Contributions**

Marital Portion

Husband is entitled to fifty (50%) percent of the marital portion of Wife's Retirement Account, and Wife is entitled to fifty (50%) percent of marital portion of the Husband's Retirement Account. The Parties shall equalize the value of the marital portion of each retirement account set forth above, plus or minus investment experience. The marital portion shall be defined as all funds deposited in the account from the date of the marriage (\_\_\_\_\_) through the date of Complaint (\_\_\_\_\_), plus or minus investment experience through the date of distribution, but not subject to any loans.

Premarital Portion

In order to determine the marital portion of the Parties' retirement assets, within thirty (30) days following execution and delivery of this Agreement, the Parties shall exchange statements reflecting the premarital portion of the foregoing retirement accounts, if any. The premarital portion shall be the value prior to the marriage plus or minus a prorated investment experience portion of all earned/lost in the account. If either Party fails to timely provide proof of the premarital portion of any of his/her retirement accounts, then that Party shall waive his/her right to seek a credit for any premarital contributions to his/her retirement accounts and all said retirement assets shall be deemed marital. In order to equalize the values of the marital portion of both Parties' retirement assets, the Parties shall determine the marital share of the Husband's

Retirement Account(s) and subtract the marital portion of Wife's Retirement Account(s) and divide by two.

No Survivor Benefits

The parties acknowledge and represent that they have been advised by the \_\_\_\_\_ that their pension plans do not afford a survivor benefit to spouses in the event of a divorce. Accordingly, so as to secure Wife's direct and indirect interests in the \_\_\_\_\_ Pension, the Husband agrees that, within thirty (30) days of the date of this Agreement, he shall execute a Last Will and Testament providing therein a specific bequest to Wife in the amount of \$\_\_\_\_\_. This specific bequest shall remain in full force and effect for a period of three years, at which time Husband may revise his Last Will and Testament to provide a specific bequest to Wife in the amount of \$\_\_\_\_\_. The \$\_\_\_\_\_ bequest shall remain in full force and effect for a period of three years after the first revision, at which time Husband may revise his Last Will and Testament to provide a specific bequest to Wife in the amount of \$\_\_\_\_\_, which shall not be modified unless and until Wife predeceases Husband. If Husband fails to comply with this provision and does not name Wife as beneficiary to his estate in the amounts provided herein, upon Husband's death any unprovided for portion shall be a priority lien against Husband's estate. The Husband shall provide Wife with proof of his compliance with this Paragraph each year on the anniversary date of this Agreement, in the form of a redacted copy of his Last Will and Testament evidencing that this provision is in place.

Waiver of Survivor Annuity

Except as set forth in the preceding paragraphs, the Wife hereby consents as to the amount of retirement funds held by each Party post-distribution and passive growth thereon:

- A. to the election by the Husband to waive a qualified joint and survivor annuity form of benefit and qualified pre-retirement survivor annuity form of benefit under any plan of deferred compensation to which Section 401 (a)(11) of the Internal Revenue Code of 1986 as amended from time to time (hereinafter "the Code") or Section 205(b)(1) of the Employee Retirement Income Security Act of 1974 as amended from time to time (hereinafter "ERISA) shall apply and in which the Husband currently is or

hereafter may be deemed a vested participant within the meaning of Section 417(f)(1) of the Code and Section 205(h)(1) of ERISA; and

- B. to the current and future designation by the Husband of beneficiaries other than the Wife under any of such plans (and to any revocation or modification of such designation), including, any of such plans referred to in Section 401(a)(11) of the Code or Section 205(b)(1) of ERISA. The Wife hereby acknowledges that she understands the effect of such elections by the Husband and her consent thereto. To the extent that the law shall require any additional documentation to confirm the consents set forth herein, the Wife agrees to execute and deliver the same in a timely fashion at the request of the Husband.

Except as set forth in the preceding paragraphs, the Husband hereby consents as to the amount of retirement funds held by each Party post-distribution and passive growth thereon:

- A. to the election by the Wife to waive a qualified joint and survivor annuity form of benefit and qualified pre-retirement survivor annuity form of benefit under any plan of deferred compensation to which Section 401 (a)(11) of the Code or Section 205(b)(1) of ERISA shall apply and in which the Wife currently is or hereafter may be deemed a vested participant within the meaning of Section 417(f)(1) of the Code and Section 205(h)(1) of ERISA; and
- B. to the current and future designation by the Wife of beneficiaries other than the Husband under any of such plans (and to any revocation or modification of such designation), including, any of such plans referred to in Section 401(a)(11) of the Code or Section 205(b)(1) of ERISA. The Husband hereby acknowledges that he understands the effect of such elections by the Wife and his consent thereto. To the extent that the law shall require



any additional documentation to confirm the consents set forth herein, the Husband agrees to execute and deliver the same in a timely fashion at the request of the Wife.

### **Death of participant prior to entry of QDRO**

In the event that the QDROs have not been executed by the Court prior to the death of the participant, the nonparticipant shall be entitled to the amount that should have been distributed by the QDRO as a primary lien of the non-participant against the participant's Estate.

Death of Participant. With respect to the portion of the Participant's accrued benefit under the Plan assigned to the Alternate Payee under the QDRO and to the extent payment of this portion of the benefit to the Alternate Payee had commenced at the time of the Participant's death, payment of this portion of the benefit shall continue to the Alternate Payee without regard to the Participant's death.

With respect to the portion of the Participant's accrued benefit under the Plan assigned to the Alternate Payee under the QDRO and to the extent payment of this portion of the benefit to the Alternate Payee had not commenced at the time of the Participant's death, the Alternate Payee shall continue to be eligible to commence receiving this portion of the benefit.

Death of the Alternate Payee. If the Alternate Payee predeceases the Participant prior to commencement of his benefits, the Alternate Payee's portion of the Participant's benefits shall be payable to the Alternate Payee's designated beneficiary (or her Estate), but only to the extent permitted under the terms of the Plan. If the Plan does not permit the Alternate Payee to designate a beneficiary (her Estate) for such purposes, then her share of the benefits shall revert to the Participant.

If the Alternate Payee dies before the Participant and after payment of the Alternate Payee's benefit has begun or before a total distribution has been made from her account, then any remaining benefits in the Alternate Payee's account will be payable based upon the options elected by the Alternate Payee at the time of her commencement.

#### **4. Callahan Trust Agreements for Restricted Stock Units/Stock Options and Non-Qualified Plans**

##### Option 1:

The Wife shall receive an interest by way of construct trust of certain stock options as set forth on Schedule A of this Agreement. The parties wish to establish a constructive trust for the benefit of the Wife as it relates to various stock options granted by Husband's employer (hereinafter referred to as the "Company").

The Husband shall establish a constructive trust for the benefit of the WIFE in the amount of fifty percent (50%) of the stock options which have been granted to him from the Company from the date of Marriage to the Date of Complaint, namely, September 27, 2012 which have not been exercised prior to execution and entry of this Agreement.

1. The specific stock options in which the Wife shall have an interest pursuant to this constructive trust are set forth on the attached Schedule A of this Constructive Trust.

2. The Wife recognizes that her interest in the Husband's stock option grants under this constructive trust, are subject to the provisions of the plans (hereinafter referred to as the "Plans") under which they were granted.

3. Federal securities law may prohibit the transfer, sale or purchase of these securities on the basis of material, undisclosed information about the operations of the Company. Other legal restrictions and/or company restrictions relating to the transfer, sale or purchase of these securities may also apply in some situations. Due to the nature of Husband's position at the Company, the Husband may be required to obtain the internal authorization of the Company before exercising his stock options, or transferring, purchasing or selling Company stock. The Wife recognizes and acknowledges that the Husband may be prohibited from exercising stock options, purchasing, transferring and/or selling Company stock due to federal securities laws and/or company restrictions. The Wife recognizes and acknowledges that any such prohibitions or restrictions placed on the Husband shall also apply to her rights and interests granted under this constructive trust.

4. In the event the Husband were to die prior to the exercise of his options or the vesting of his restricted stock, the Wife would be entitled to her share of the benefit set forth on Schedule A as a debt against the Husband's Estate for the Wife's benefit, net of any taxes attributable to the Wife's interest.

5. In the event the Wife were to die prior to the exercise of her rights to the options or the vesting of her interest in the restricted stock as set forth on Schedule A, the Husband would be obligated to the Wife's Estate for her interest, net of any taxes attributable to the Wife's interest.

6. In the event there are any changes to the plans affecting those options subject to this trust, the Husband shall have the obligation to notify the Wife of any such changes upon notification of same.

7. Subject to the above provisions and conditions, the Wife shall provide to the Husband written notice of her intention to exercise any of her vested stock options. The notice shall contain the chosen method of exercise and any cash payments or stock that is required as set forth below. The Wife must accompany her notice with the funds or shares required under paragraphs 8, 10, or 11 below, and instructions as to the brokerage account (including the account title and account number) to which she wishes any shares she will be receiving to be transferred. Upon receipt of said notice, the Husband shall follow the Wife's instructions within twenty (24) hours or as soon as practical if the Husband is unable to do so based upon such prohibitions or restrictions or his good faith unavailability to do so.

8. If the Wife chooses to exercise her options by a same-day sale, the Husband shall exercise the options on her behalf within the time limits set forth above and provide the Wife with the net proceeds from a same-day sale of the stock after deducting broker's fees and withholding 42.5% on the taxable gain, attributable to such exercise and sale, with any adjustments to be made in accordance with paragraph 14 below.

9. The Husband shall have a right of first refusal to retain the Wife's share of stock options by providing the Wife with cash equivalent to what she would have received from the same-day exercise and sale of the stock after withholding 42.5% on the taxable gain, with any adjustments to be made in accordance with paragraph 14 below.

10. If the Wife chooses to exercise an option by paying cash to purchase the related shares and hold same for her benefit, the Wife shall supply the Husband with the funds necessary to purchase the shares as well as the income taxes attributable to the exercise, calculated at a rate of 42.5% on the taxable gain, with any adjustments to be made in accordance with paragraph 14 below.

11. If the Wife chooses to exercise an option using existing stock she owns to purchase the related shares, the Wife shall supply the stock to the Husband. The Husband shall provide the Wife with the net shares after deducting broker's fees and withholding 42.5% on the taxable gain, with any adjustments to be made in accordance with paragraph 14 below.

12. The Wife shall notify the Husband in writing of her intention to exercise any option at least seven (7) days prior to its expiration date. In the event the Wife fails to do so, the Husband shall exercise the option on the Wife's behalf and revert proceeds to the Wife less applicable taxes, provided that the Wife's share of the stock options has a value (wherein the value of the stock exceeds the strike price) after deducting any brokerage fees, and estimated taxes at the rate of 42.5%.

13. The Husband will notify the Wife on the same day he has exercised any stock options from the grants in which she retains an interest under this Agreement. The Husband shall notify the Wife in writing by either fax or email within two (2) hours of when he has exercised a stock option (whether his or her interest) relating to any of the grant dates subject to equitable distribution.

14. The Wife's entitlements set forth herein shall not be extinguished in the event Husband terminates his employment. In such case, Wife shall receive her benefit as if his employment had not been terminated.

15. In any year in which money is withheld by the Husband or paid by the Wife as and for taxes pursuant to paragraphs 8, 9, 10 and/or 11, above, and as soon as practicable after the Husband files his income tax return for such year, the Husband shall calculate the combined effective tax rate ("Actual Rate") applicable to his income in such year. The Actual Rate shall be calculated by determining the total of the Federal, State, local and other tax rates applicable to his gross W-2 Medicare wages and any unearned

income for the year in question, after giving effect to the deductibility of State, local and other taxes from his Federal taxable income for the year in question and any other deductions from which the Husband can benefit. Once calculated, the Husband shall provide written notice to the Wife of the Actual Rate. To the extent that there is a differential between the funds withheld by the Husband or paid by the Wife and the funds that would have been withheld or paid using the Actual Rate, either the Husband or Wife, as appropriate, shall make payment within 5 days of the Wife's receipt of the notice from the Husband, for any amounts due. By way of example, if the Husband withholds 42.5%, and the Actual Rate is 32%, then the Husband shall pay the Wife an amount equal to the 10.5% differential. By way of further example, if the Husband withholds 42.5%, and the Actual Rate is 48%, then the Wife shall pay the Husband an amount equal to the 5.5% differential.

Option 2:

The Husband maintains an interest in Restricted Stock Units granted to him through his employment, which were granted to the Husband during the marriage are to be divided between the Husband and the Wife, pursuant to a coverture formula. Accordingly, the Wife shall receive the benefits of ownership as an assignee in her share of any of the aforementioned assets accredited to the parties and/or the Husband, which otherwise are non-transferrable.

This Agreement shall serve as a Callahan Trust (pursuant to Callahan v. Callahan, 142 N.J. Super. 325 (App. Div. 1976)) under the terms of which they acknowledge that the Husband shall hold the Wife's designated interests of the aforesaid assets that cannot otherwise be divided in trust for the Wife.

The Husband shall provide the Wife with all information and documentation that the Husband receives regarding the assets, and the Wife's rights as to same.

Upon the vesting of the Restricted Stock Units, the Wife shall provide the Husband with written notice of her intention to exercise any of her vested Restricted Stock Units. The Husband shall sell and/or transfer to the Wife the Wife's share of the Restricted Stock Units within twenty (24) hours of said notice Husband. The Husband shall provide the

Wife with the net sale proceeds from the sale of her Restricted Stock Units and documentation regarding same.

If any impediments arise pertaining to the implementation of this Constructive Trust, both parties shall consent to any reasonable changes required by law or by either party in order to carry out the intent of the parties and ensure that the Wife shall receive the economic equivalent of her beneficial interest in the assets under the terms of this Agreement.

The Wife's interest in the restricted stock units shall be calculated, subject to a coverture formula, whereby the number of shares the Wife shall maintain an interest shall be calculated by multiplying the number of shares vesting by the fraction of the number of months from the date of the grant to the date of the filing of the Complaint for Divorce to the vesting date of the stock options.

The Wife shall be solely responsible for the costs, commissions, taxes, and/or fees specifically related to the subsequent sale or other disposition of the interest in the aforesaid assets she receives through the Husband. The Husband may have to report the income arising from same on his Federal and State (if applicable) tax returns because the assets that were otherwise undistributable will continue to be held in his name. The Husband shall be responsible to advance the taxes and fees for any transaction attributable to the Wife's interest in any of the assets, and shall be reimbursed the expenses for same by the Wife.

### **5. Debts and Obligations and Taxes**

*Past Due Obligations.* The parties represent and agree that neither has incurred nor shall incur any debt, or made or entered into any transaction that has or will bind the other directly or indirectly, unless provided for in this agreement. Each party agrees to hold the other harmless and to indemnify the other against the payment of any monies and obligations or expenses in connection therewith which the party shall be obligated to pay to third parties by virtue of any party's failure to comply with the terms of this paragraph, including reasonable counsel fees and disbursements.

*Credit Cards.* Except as provided in this Agreement, each party shall be responsible for his or her own credit cards after the date of the filing of the complaint for divorce. Both parties represent that they shall not cause to use or charge any bills to the other's account. The Wife shall remove Husband's name from any of the Wife's credit card accounts and the Husband shall remove Wife's name from the Husband's credit card accounts. Nothing herein shall prevent the Husband and Wife from obtaining their own separate accounts.

*Past Tax Liability:* In the event of an audit for any year in which the parties filed joint income tax returns, the parties shall share said expense and additional tax liability equally, unless said liability is attributable to a party's intentional failure to report income or fraud, in which case the liable party shall be solely responsible for all costs, taxes, interest, penalties and other expenses attributable to same. In the event of a refund for any year in which the parties filed joint income tax returns, the parties shall equally share same.

*Income Tax Returns:* The parties shall file joint income tax returns for the year 2015. The parties shall file individual income tax returns for the year 2016 and thereafter, and each party shall be responsible for taxes incurred on their income in their individual tax returns.

*Income Tax Deductions.* Until the Marital Residence is sold/refinance completed, the parties shall be entitled to claim on their income tax returns all permitted tax deductions associated with the Marital Residence, including without limitation real estate taxes and homeowner's insurance. The Husband shall be entitled to claim fifty percent (50%) and the Wife shall be entitled to claim fifty percent (50%) of said deductions.