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Improve Recitals and Consideration Clauses with Plain Language

David Spratt

American University Washington College of Law, dspratt@wcl.american.edu

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BY DAVID H. SPRATT
PROFESSOR, AMERICAN UNIVERSITY

Improve Recitals and Consideration Clauses with Plain Language

During much of last year, most of us were atypically hyper-connected. We were glued to our smartphones, computers, tablets, and other personal devices, as we sought to make sense of and communicate with the outside world. As the parent of a now 14-year-old son who had just finished eighth grade, I, like many others, faced the unenviable challenge of having to motivate and guide a child through online ungraded education. At first, I judged and compared myself to other parents who immediately posted on Facebook detailed daily “homeschool” schedules, lessons, and craft and exercise activities. I felt inadequate, as if by taking less of a drill sergeant approach, I was failing my son. But thankfully, these feelings were temporary. I soon realized that there is no parenting manual from which one can cut and paste. There is no one-size-fits-all method to raising a child, no tried-and-true method handed down from generation to generation that works perfectly and the same for every child. Instead, each parent (in theory) should know and implement what best addresses his or her child’s individual personality and needs, despite what might work or have worked for other parents.

Just like there is no perfect guide for parenting a child, there is no one fail-safe, perfect legal recipe for drafting contract boilerplate. One can and should adapt and change. Here is the second column in the ongoing series on how to improve upon and tailor contract boilerplate.

RECITALS

Recitals come before the operative provisions and are often referred to as “WHEREAS” clauses. Below is an example of a recital that usually appears in a Virginia custody agreement:

WHEREAS, there was one (1) child born of the marriage, to wit: John Jones, born January 1, 2010 (“the minor child”).

As used in a “WHEREAS” clause, the term “whereas” simply means “considering that” or “that being the case.” There is no legal effect to the word “whereas.” It, like many other words used in standard contract boilerplate, is left over from some long-forgotten era of legal writing when lawyers used big words and legalese to impress clients with their intelligence and to justify their bills. These times have (or at least should have) passed. Today, documents must be accessible to those who use them: in most cases the clients for whom such documents are drafted.

Recitals act as a preamble to the contract and provide the reader with general information about the parties involved, its major subject matter, and why the parties have executed the contract. Recitals should not contain any obligations or legal substance and should explain only the reason, foundation, and scope of the contractual relationship. Regardless, take care when drafting the recitals, as

they can and often are used by courts when substantive contractual language is ambiguous and the court seeks to discern the parties' intent in executing the contract.

So, time to deconstruct the above example. First, delete the word "WHEREAS." If you are wary, try it. Wait a few seconds. Did your computer self-destruct? Did your law school diploma come crashing off the wall? Doubtful. Removing the word "WHEREAS" does not cause mass destruction or change the meaning of a recital, and it brings your writing into the contemporary world of plain language.

Next, look at the phrase "there was one (1) child born of the marriage." There are two problems with this phrase. First, there is no need to cloud up the writing with including the number in parentheses after spelling out the number. What? But lawyers do it all the time in recitals and elsewhere. Historically, this practice arose to prevent fraudulent alterations to a contract. Bewigged lawyers of yesteryear thought it would be harder for someone to convincingly alter both a word and number. Today, however, including both the word and number in parentheses potentially invites an ambiguity on the face of the document (if the number and word do not match) and implicates the parol evidence rule. Did you just tremble and flash back to your 1L contracts class?

Second, let's look at the entire phrase, now revised as "there was one child born of the marriage." It sounds stilted. Simply write "The parties had one child." If the child was illegitimate or born to one party but not both, then clarify, but typically such scenarios do not need to be addressed. Exercise the KISS principle in everything you write. Before you think I am calling you stupid, the term as I use it means "Keep It Simple, Solicitor."

Finally, the phrase "to wit." This expression basically means "that is." Unless you are one who still handwrites letters with a quill pen and seals them with candle wax, banish this expression from your contract. Replace "to wit" with the word "namely" or even better, simply use a colon, a punctuation mark that means (you got it) —"namely." Accordingly, as revised, this recital would now read: "The parties had one child: John Jones, born January 1, 2010 ("the minor child")."

CONSIDERATION CLAUSE

No matter how long you have been practicing law or whether you draft contracts for a living, you remember the three basic elements of contract formation: offer, acceptance, and consideration. Well, there

might actually be four elements in some cases — the contract must be in writing if it is covered by the Statute of Frauds (sorry, I teach contracts to 1Ls, and I can't control myself).

Oversimplified, consideration means that each party must have given and received something from the other party. There must be a mutual give and take on each side of the bargain; each party must undertake a detriment and receive a benefit.

To wit: Unless you are one who still handwrites letters with a quill pen and seals them with candle wax, banish this expression from your contract.

Look at your contract boilerplate or any contract that you have drafted. Does it contain a provision like this one?

NOW, THEREFORE, in consideration of the mutual promises and covenants herein set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, each party by his or her signature below do contract and agree to be bound by the terms herein.

I would guess your answer was yes. Most standard contracts contain this type of provision, known as a "consideration clause." Historically lawyers were taught to expressly state that consideration existed in a contract. But such a provision is superfluous. The presence of this clause does absolutely nothing to enforce a contract if there is no mutual give and take. All that is needed to satisfy consideration are mutual promises and obligations in the contract. Still, if you can't bring yourself to relinquish a consideration clause, simply state "The parties agree as follows:" at the end of the recitals.

Once again, I must bid you adieu. Stay tuned for the next column where I will finally get to the actual contract boilerplate provisions. ■