HOW DO I LOVE THEE? LET ME DOCUMENT THE WAYS: A FRESH LOOK AT PRE- AND POST-NUPTIAL AGREEMENTS

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I. INTRODUCTION

A. Prenuptial Agreements

(1) Definition

Prenuptial agreements (also known as premarital agreement and antenuptial agreements) are contracts entered into between prospective spouses prior to their marriage to determine the rights of the parties upon the termination of their marriage. Some prenuptial agreements are limited to the respective rights of the parties only upon divorce, and others only at death. However, the vast majority of such agreements attempt to govern the parties' rights upon death or divorce. The consideration for such contracts is the parties' marriage. All such agreements also contain choice of law clauses to govern the interpretation of the parties' agreement.

(2) Purposes

In entering into prenuptial agreements, parties contemplating marriage wish to substitute their individualized contractual arrangements in place of state and federal mandates for disposition of assets at death and for payment of alimony and division of property at divorce. In effect, such agreements are attempts by either or both parties to narrow the range of contested issues between them (or their successors in interest) at the termination of their marriage. Parties may wish to dispose freely of property without constraint during or after marriage. Examples of limitations on rights to dispose of property at death include intestate claims, rights to elect against the will of the deceased spouse and the surviving spouse's statutory allowance. At divorce, parties attempt to avoid court-imposed obligations to pay spousal support and court-ordered division of assets.

Prenuptial agreements may be appropriate in the case of a second marriage, first marriage between older parties, marriage in which one spouse is in a high risk occupation, marriage in which one of the spouses is a partial owner of a family business, and marriage between individuals of disparate stations in life.

Possible topics to be covered in such agreements are contained in the Prenuptial Agreement checklist attached hereto. The subjects of child support, custody, visitation, and lifestyle issues (such as frequency of sexual relations and other daily activities) do not belong in such agreements. Courts often consider any issues relating to children to be sacrosanct, and judges are loathe to insert themselves into the day-to-day activities and living arrangements of an intact marriage.

Some couples reason that it is preferable to confront difficult termination issues before they arise. Others value financial certainty over romantic notions of courtship and

fervently believe that airing these issues in advance will improve the quality of their future relationship.

(3) Impact on Estate Planning

When an estate planning attorney is representing an individual who has entered into a prenuptial agreement, that attorney must obtain a copy of the signed agreement and abide by its strictures in drawing documents and advising the client. For example, if the client is required by the terms of the prenuptial agreement to maintain life insurance for the benefit of his or her spouse, the attorney should confirm the amount of insurance in place for the beneficiary before proceeding with the plan. The prenuptial agreement serves to guarantee a minimum level of benefits for the surviving spouse, but such a minimum may be exceeded by a generous testator in his or her will or other estate planning documents. Similarly, most prenuptial agreements contain provisions regarding inter vivos gifts (1) by the parties to each other during marriage to encourage such gifts and (2) to third parties to permit such gifts, at least in certain limited amounts. Such provisions should be reviewed carefully before rendering advice about lifetime giving.

B. **Postnuptial Agreements**

(1) Definition

Postnuptial agreements are contracts entered into by married parties who wish to set forth their rights upon a termination of their marriage, even though they are not contemplating a separation in the immediate future. Postnuptial agreements differ from separation agreements in that they are not prepared in anticipation of an impending divorce. Postnuptial agreements include agreements initially entered into during a marriage, as well as amendments made during a marriage to a previously executed prenuptial agreement. The enforceability of postnuptial agreements is currently uncertain in many states, including Massachusetts.

(2) Purposes

Like prenuptial agreements, the purpose of a postnuptial agreement is to narrow the range of contested issues between married spouses (or their successors in interest) upon a termination of their marriage. Postnuptial agreements may govern the parties' rights upon the occurrence of death and/or divorce.

Divorcing spouses may decide to incorporate the terms of a postnuptial agreement into their separation agreement at the time of their divorce. Problems concerning the enforceability of postnuptial agreements disappear as long as the divorcing spouses continue to agree to adhere to its terms. Alternately, the divorcing spouses may decide to partially incorporate some of the terms of a postnuptial agreement into their separation agreement while abandoning other portions, or to negate the postnuptial agreement in its entirety. Should the parties to a divorce dispute the enforceability of a postnuptial agreement, a judge will be required to resolve any contested issues.

Possible topics to be covered in such agreements are contained in the Postnuptial Checklist attached hereto. As in the case of prenuptial agreements, subjects of child support, custody, visitation, and lifestyle issues (such as frequency of sexual relations and

other daily activities) do not belong in postnuptial agreements.

II. ENFORCEABILITY

A. Prenuptial Agreements

(1) In General

Traditionally, prenuptial agreements were not legally enforceable, because it was believed that they encouraged or facilitated divorce. As such, they were considered against public policy. *See Wyant v. Lesher*, 23 Pa. 338 (Pa. 1854); *Cumming v. Cumming*, 102 S.E. 572 (Va. 1920); *Cohn v. Cohn*, 121 A.2d 704 (Md. 1956); *Crouch v. Crouch*, 385 S.W.2d 288 (Tenn.Ct.App. 1964). As divorce became more widespread and as no-fault divorces became common in the 1970s and 1980s, attitudes toward prenuptial agreements changed. Numerous states now recognize the validity of such contracts. *See Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962); *Hartz v. Hartz*, 234 A.2d 865 (Md. 1967); *In re Broadie's Estate*, 493 P.2d 289 (Kan. 1972); *Volid v. Volid*, 289 N.E.2d 42 (Ill.App. 1972); *Unander v. Unander*, 506 P.2d 719 (Or. 1973); *McHugh v. McHugh*, 436 A.2d 8 (Conn. 1980); *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (N.Y. 1983); *MacFarlane v. Rich*, 567 A.2d 585 (N.H. 1989); *McAlpine v. McAlpine*, 679 So.2d 85 (La. 1996).

Courts in various states have each developed their own criteria in order to determine the validity and enforceability of prenuptial agreements, which can vary greatly from jurisdiction to jurisdiction. In general, courts will require the following: (a) voluntariness, (b) absence of fraud or deceit, (c) full disclosure of assets, and (d) fairness at the time the contract was signed (and possibly at the time of divorce). Many courts have also required that each party knew and understood what he or she was doing at the time he or she signed the contract. This requirement is fulfilled if each party is represented by an attorney who explains the law to him or her.

Many states place limitations on the ability of the parties to excuse themselves from certain statutory obligations under law. For example, most states place a legal obligation on both parents to financially support their children until the children are at least age 18. This cannot be contracted away. Likewise, most states place a legal obligation on both spouses to support each other during the marriage.

Many states have statutes specifying how assets are to be divided upon a divorce and/or the amount of alimony or maintenance that a spouse is required to pay to his or her former spouse. Some states allow a spouse to waive or limit his or her legal right to alimony in a prenuptial agreement. *See Unander v. Unander*, 506 P.2d 719 at 721; *Cary v. Cary*, 937 S.W.2d 777 (Tenn. 1996); *In re Marriage of Pendleton and Fireman*, 5 P.3d 839, 846 (Cal. 2000); *Hardee v. Hardee*, 585 S.E.2d 501, 503-505 (S.C. 2003).

(2) Massachusetts

Massachusetts has long recognized the validity of prenuptial agreements. *See Rosenberg v. Lipnick*, 377 Mass. 666, 389 N.E.2d 385 (1979). A prenuptial agreement may be presented to a court in the context of a divorce action or by a surviving spouse as the basis for a claim against a deceased spouse's estate. *See Osborne v. Osborne*, 384 Mass. 591, 592, 428 N.E.2d 810, 812 (1981) (divorce); *Eaton v. Eaton*, 233 Mass. 351, 124 N.E.2d 37 (1919) (executors); *Massachusetts Divorce Law Practice Manual* ch. 23 (MCLE, Inc. 2000, Supp. 2003 & 2nd Supp. 2005). A prenuptial agreement must be in writing, and derived through full disclosure, good faith and honesty. *Osborne v. Osborne*, 384 Mass. at 599, 384 N.E.2d at 816; *Rosenberg v. Lipnick*, 377 Mass. at 671, 389 N.E.2d at 388. Full disclosure requires that each party to a prenuptial agreement be made aware of the other party's assets, liabilities, incomes and obligations. A party should reveal his or her prospective inheritance, if any, with some estimate of value.

A court will enforce a properly executed prenuptial agreement if it finds that the agreement was "fair and reasonable" at the time of execution and not "unconscionable" at the time of enforcement. *DeMatteo v. DeMatteo*, 436 Mass. 18, 26, 30–34, 34–38 (2002); *Moore v. Moore*, No. 00-P-627, 2002 WL (Mass.App.Ct. 2002); *Mirabito v. Mirabito*, No. 00-P-145, 2002 WL (Mass.App.Ct. 2002); *see Upham v. Upham*, 36 Mass.App.Ct. 295 (1994). The court need undertake a "second look" at the agreement at the time of enforcement only if it finds that the agreement was valid when executed. *DeMatteo v. DeMatteo*, 436 Mass. at 34. The Supreme Judicial Court analyzed the agreement at issue in *DeMatteo* under both of these standards and concluded that it should be upheld. *DeMatteo v. DeMatteo*, 436 Mass. at 34, 38.

Alimony waivers have been upheld as enforceable in cases where the agreement was valid at the time it was executed and fair and reasonable at the time of divorce. *See Austin v. Austin*, 443 Mass. 1107 (2005); *Rosenblatt v. Kazlow-Rosenblatt*, 39 Mass.App.Ct. 297 (1995); *Vakil v. Vakil*, 66 Mass.App.Ct 526 (2006); *Korff v. Korff*, 64 Mass.App.Ct. 94 (2005).

B. Postnuptial Agreements

(1) In General

Common law once provided that a husband and a wife merged into one identity upon their marriage. It was thus held that spouses could not make a legally binding contract among themselves. *See Butterfield v. Stanton*, 19870 WL 2873 (Miss. Oct. Term 1870). While some states abolished the unity of husband and wife as early as the 1800s, other states persisted as late as the 1950s. *See Adams v. Adams, 113 A. 279 (N.H. 1921); Bendler v. Bendler*, 69 A.2d 302 (N.J. 1949). Long after the validity of contracts between a married husband and wife has been recognized, courts continue to void postnuptial contracts. Often they do so on the basis of public policy reasons, believing that such contracts encourage divorce.

Several states have recognized postnuptial agreements as valid, as long as such agreements fulfill the same tests for validity required for prenuptial agreements. *See Lipic v. Lipic*, 103 S.W.3d 144 (Mo.App.E.D. 2003); *Button v. Button*, 131 Wis.2d 84 (1986); *D'Aston v. D'Aston*, 808 P.2d 111 (Utah App. 1990); *Peirce v. Peirce*, 2000 UT 7, 994

P.2d 193 (2000); *Flansburg v. Flansburg*, 581 N.E.2d 430 (Ind. App. 1991).

(2) Massachusetts

Unlike prenuptial agreements, postnuptial agreements are not based upon statutory authority in Massachusetts. It is uncertain whether such agreements are in fact enforceable in this jurisdiction. The Massachusetts Supreme Judicial Court has opted to "leave to another day" the question of "whether agreements made after the parties have been married, and not in anticipation of an immediate divorce, are valid." *Fogg v. Fogg*, 409 Mass. 531, 532 (1991). Lower Massachusetts courts have similarly resisted the opportunity to rule clearly on the legitimacy of such agreements. *Rubin v. Rubin*, 29 Mass.App.Ct. 689 (1991) (regarding an agreement setting forth the financial terms of a divorce should an attempted reconciliation between a husband and a wife not succeed).

Massachusetts courts generally prefer to respect the right of parties to freely enter into contracts, as long as adequate safeguards are present. *DeCristofaro v. DeCristofaro*, 24 Mass.App.Ct. 231 (1987). In order to be enforceable in Massachusetts, a postnuptial agreement must certainly meet the following standards: (a) a full and voluntary disclosure by both parties (possibly including an exchange of Rule 401 Probate Court Financial Statements prior to signing), (b) representation by separate counsel, (c) the absence of coercion or duress, (d) terms that are fair and equitable both at the time the agreement was signed and at the time that enforcement is sought, and (e) significant present consideration. Consideration should also be given to the eight factors enunciated in *Dominick. Dominick v. Dominick*, 18 Mass.App.Ct. 85, 92 (1983).

As postnuptial agreements are subject to contract principles, significant present consideration will be likely necessary in order for such agreements to be enforceable. Massachusetts courts are likely to be mindful of the weakened bargaining position a spouse may find him or herself in attempting to save a long existing family relationship to which he or she may have committed his or her best years, and may therefore hold postnuptial agreements to a higher standard than prenuptial agreements. Should only the façade of significant present consideration be provided for in a postnuptial agreement, such consideration is likely to be considered illusory. In negotiating a postnuptial agreement, the parties will likely be considered to stand in a fiduciary relationship to one another.

III. PRENUPTIAL AND POSTNUPTIAL AGREEMENTS AND ESTATE PLANNERS

Whatever the motivation for and the process involved, once either a prenuptial or postnuptial agreement has been formalized, the parties should assume it to be enforceable and govern themselves accordingly. An estate planner representing either party to such an agreement must obtain a copy of the agreement, analyze and advise the client to begin with the obligations set forth therein to the spouse as a basis for the estate plan. If an estate planner genuinely feels the agreement to be unenforceable, it might be wise to request that the client obtain legal advice elsewhere and advise that the client authorize the estate planner to arrange for the disposition of the client's estate in contravention of the marital agreement. No departure from the satisfaction of the client's obligations under the agreement should occur unless the client has executed a written release of the estate planner for such divergence.

IV. FEDERAL ENTITLEMENTS

Many federal laws form the basis for rights asserted by spouses or form the backdrop for rights bargained for by the parties. A few such entitlements are discussed below.

A. Social Security

(1) Full Retirement Age

The "full retirement age" for workers born before 1938 is age 65. Upon attaining full retirement age, workers are entitled to full old age benefits under social security upon retirement. Because of longer life expectancies, full retirement ages are increasing for workers born in 1938 or thereafter.

A worker can retire prior to attaining full retirement age, as long as he or she is age 62 or older. However, benefits payable to the worker are reduced by a fraction of a percent for each month that the time that the worker retired precedes the time that he or she would have normally attained full retirement age.

Notwithstanding the above, a worker born in 1929 or later will need to have worked for at least 10 years in order to be eligible for retirement benefits.

(2) During Marriage

During a marriage, the husband or wife of a worker is entitled to a spousal benefit if the worker is entitled to either old age or disability benefits. The spouse must have been married to the worker for at least one year prior to filing for benefits, or the worker and spouse must be the natural parents of a child who is entitled to child's benefits from the worker. The spouse also may collect benefits if he or she were entitled to (or actually collected) spouse's, widow's, parent's or disabled child benefits in the month preceding the marriage to the worker.

The claimant spouse must be at least 62 years of age in order to collect benefits and must be at least full retirement age in order to receive full spousal benefits, unless the claimant spouse has in her or his care a child who is entitled to child's benefits from the worker and the child is under age 16 or disabled.

The spouse will not collect if he or she is entitled to his or her own benefits based on a primary insurance amount (PIA) that is equal to or larger than the worker's full benefit. In general, the spouse's benefit is one-half of the worker's PIA.

For detailed criteria and a definition of PIA, see 42 U.S.C. §§ 402(b) (wife's insurance benefits), 402(c) (husband's insurance benefits); 20 C.F.R. §§ 404.201–404.204; 20 C.F.R. §§ 404.303, 404.332.

A spouse's benefits terminate upon the first of the following events:

- the spouse becomes entitled to his or her own benefits based on a PIA larger than the spouse's full benefit.