BOVE&LANGA
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Ten Tremont Street, Suite 600 | Boston, MA 02108
www.bovelanga.com | p 617.720.6040 | f 617.720.1919

BOVE & LANGA REPORT: MARRIAGE

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Marriage – the ultimate leap of faith. Promises are made, vows taken. And what at first blush may appear to be a very private undertaking, is in reality a very public event, with serious, significant legal consequences regarding property, finances, debt, earnings, retirement, support, and children. So it is in this month of June, derived from Juno, the Roman goddess of love and marriage, that we turn our attention to the role of marriage within a Massachusetts estate plan.

WILL YOU OR WON'T YOU TAKE UNDER MY WILL?

"My grandmother was a very tough woman. She buried three husbands and two of them were just napping."

-Rita Rudner

Marriage gives spouses inherent rights in each other's probate estates. As a quick reminder, the probate estate includes anything left in a decedent's individual name after death. To get the property out of the decedent's name, a court must appoint someone as a personal representative. The personal representative transfers the probate property to new, living owners, such as the surviving spouse or children.

If one spouse dies and doesn't leave a Last Will, the surviving spouse takes part of the deceased spouse's probate estate under state "intestacy" law. The exact amount of the surviving spouse's share depends on who else is living at the time. For example, if the deceased spouse does not have any surviving children or parents, the surviving spouse receives the entire estate. If there are no children but a parent survived the decedent, the surviving spouse receives the first $200,000, plus three-fourths of the rest of the estate. If the married couple has surviving children and neither spouse had any children outside the current marriage, then again, the surviving spouse receives the entire estate. If either spouse (the deceased spouse or the surviving spouse) has a child from outside the current marriage, the surviving spouse receives the first $100,000, plus half of the rest of the estate. Got that?

Of course, the share a spouse receives can be changed by a Last Will, but one cannot completely disinherit a surviving spouse. Under the Massachusetts Uniform Probate Code, a surviving spouse will still be entitled to $10,000 of "exempt property" including household furniture, automobiles, furnishings, appliances, and personal effects. (Any debt secured by that property would be paid first.) Additionally, the surviving spouse may receive a "discretionary family allowance" of up to $18,000 during the year following the decedent's death. The exempt property and discretionary family allowance would not reduce any other share passing to the surviving spouse, unless the Last Will provided otherwise.

Finally, even if there is a Last Will, the surviving spouse may reject its terms and instead take an "elective share." The value of the elective share has been the subject of recent proposed legislation, but right now the longstanding law remains. The most a spouse can receive under the elective share is $25,000 plus one half of the remaining property in the estate, and this applies if the decedent left no children or "kindred." The least a spouse can receive under the elective share is $25,000 plus a life estate in one-third of the decedent's property. Or, if there is no probate property from which to satisfy the elective share, the surviving spouse may receive nothing if the statute is read literally. Proposed legislation would clarify a surviving spouse's right to a share of non-probate property as well as probate property.

WESTWARD HO! MARITAL RIGHTS AND THE PIONEER SPIRIT

Arnold and Marie, a married couple, live and work in California, and own a home titled in Arnold's name alone. He owns it, right? The idea that "things are not always what they seem; the first appearance deceives many" (Roman poet Phaedrus) in many ways sums up the oft-confusing paradigm of "community property" a law effective in California and elsewhere (not Massachusetts) which informs us that, in fact, Arnold and Marie own equal interests in the home even though the property is titled in Arnold's name alone. Reality diverges from appearance.

The concept of community property was born from the notion that wealth acquired by the joint efforts of spouses is common property, and marriage is a community of which each spouse is a member. Alternatively, most states, Massachusetts included, are "common law" states, and in these states, property's title – e.g., Arnold individually, or Arnold and Maria as joint tenants – dictates who owns it. Putting aside the rights a spouse might have upon divorce or death, the common law system of property ownership is mostly straightforward and intuitive. Community property states are a bit more complicated (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin, in addition to Alaska which allows spouses to affirmatively elect such treatment). Without further agreement to the contrary (such as through a prenuptial agreement), earned income, accumulation on savings and investments, and debts incurred by either spouse during marriage are considered "community property" that is owned equally by spouses regardless of how the property is held.

So, if all of Arnold and Maria's wealth is titled in Arnold's name individually, then at Arnold's death, absent an agreement to the contrary, only half of the value of the accounts would pass according to Arnold's Last Will. Furthermore, an attempt by Arnold during his life to gift "his" assets without Maria's consent would only dispose of half the assets. A Massachusetts advisor who only examines title without understanding a couple's domicile history may be misled. If a client ever resided in a community property state while married, then the income earned, assets accumulated, and debts incurred carry that community property character even if the clients moved to a common law state like Massachusetts. In spite of the confusion community property can cause, there are redeeming tax benefits it offers, which should not be lightly ignored. Whether examining this issue for estate planning, divorce planning, or simple clarity of ownership, community property's appearance has deceived many and will probably continue do so, advisors and laypersons alike.

WHEN WORDS ALONE ARE NOT ENOUGH – AND WHEN THEY ARE

In Massachusetts, two people cannot simply announce "We're married!" and make it so. The filing of a "marriage intention" form begins the process, followed by a three day waiting period for the issuance of the "marriage license", ending with the "marriage ceremony, which can take many configurations, but must always include the couple's assent to be married. For "I do" to mean you did in Massachusetts, the legal formalities must be followed.

In relatively few jurisdictions, the law is otherwise. For example, Alabama, Colorado, District of Columbia, Iowa, Kansas, Montana, New Hampshire, Rhode Island, South Carolina, Texas, and Utah, permit what is known as a "common law marriage." This is a legally recognized marriage evidenced by the parties' verbal and physical conduct within the community, without the requirement of a state issued license and formal ceremony. Five states previously recognized common law marriages, but now only do so for such marriages that existed as of a certain date (Pennsylvania – 2005; Ohio – 1991; Indiana – 1958; Georgia – 1997; and Florida – 1968). New Hampshire has an interesting twist to its recognition of common law marriage in that New Hampshire only recognizes the common law marital state when it ends! When the first spouse dies, if the surviving common law spouse can show that for the three years prior to death the parties (i) cohabitated; (ii) acknowledged each other as spouses; and (iii) were generally reputed as spouses within their community, then the survivor may elect a "spousal share" of the decedent's property.

What if common law spouses move to Massachusetts? As a general rule, Massachusetts will recognize a marriage as valid if valid in the state in which it was entered into. But here, even if the general rule was applied rather than abandoned for public policy reasons (i.e., Massachusetts does not recognize common law marriages as valid), the cost and time required to obtain a Massachusetts judgment of validity pales in comparison to the relative ease of formalizing the relationship under Massachusetts civil law: intention, license, and ceremony.

While Massachusetts does not recognize common law marriage, since 1998 Massachusetts does recognize the ability of cohabitants to enter into "relationship contracts," sometimes known as "cohabitation agreements," in which the parties agree to economic rights within the relationship: "I'll pay 2/3 of the mortgage and you pay 1/3 plus the dog walker." Relationship contracts are in some regards like any other contract, they are governed by the rules of contract law, they can be oral or written, implied or explicit, can be among several twenty-somethings sharing an apartment or long term partners. But there are two important distinctions from traditional contract law. First, an agreement to maintain a sexual relationship may not form the basis for the contract; sex cannot be what is known as the legal "consideration" for the binding agreement – the bargained for exchange between the contracting parties. Second, the relationship agreement cannot be against public policy. In one case, a relationship agreement was held to be against public policy and therefore void because it was premised upon the woman agreeing to abandon her husband.

Marriage is not for everyone – it is a personal decision. Where long term partners chose to live outside the civil confines of matrimony, a relationship agreement can give economic peace of mind to each member of the relationship.

THE HEART OF THE MATTER: WHAT MAKES A MARITAL AGREEMENT TICK

Congratulations, you are engaged. Planning for the rest of your life with your partner can be a daunting task, especially given the high divorce rate in the US. You know what people say: 50% of marriages end in divorce and the rest end in death. To protect your assets and your family's assets, you may want to consider entering into a prenuptial agreement before marriage. Prenuptial agreements may establish the rights of the parties in the event of divorce, death, or both, but cannot alter the parties' obligations with respect to their children. Such agreements allow the parties to craft their own entitlements in the event of death or divorce, instead of leaving them up to the court.

Due to the fact that these agreements may alter basic marital rights, they are scrutinized by the court. To be upheld a prenuptial agreement must meet several factors. It must be *fair and reasonable* both at the time of execution and at the time of enforcement. It may be extremely one sided, but cannot not allow the contesting spouse to surrender all marital rights. The parties must make financial disclosures regarding their income and assets (more on that below). They must have the opportunity to consult independent counsel. Additionally, they must understand the rights that they are signing away. In order to ensure that the parties know which rights they are waiving, the prenuptial agreement must specifically state such rights (such as alimony). Furthermore, the court may invalidate any prenuptial agreement that would lead to an unfair or unreasonable result at the time of enforcement, such as leaving the contesting spouse impoverished. This issue often arises when one spouse becomes disabled during the marriage, leaving a prenuptial agreement that was fair and reasonable at the time of execution, unenforceable due to the disabled spouse's inability to amass income or assets.

We understand that broaching the subject of prenuptial agreements is not the most romantic way to approach your life with your partner. These agreements, however, often lead to financial protection for you and your family. When considering entering into a prenuptial agreement, it is important to know the requirements so you can determine whether it is in your best interest.

SIT DOWN I THINK I LOVE YOU

We'd thought we'd write a bit here about how you, as a parent, might have a prenuptial discussion with your child without turning a time of love and hope for the future into one of despair and doomed failure. Guess what? If you waited too long, you can't! Especially if you are broaching the topic for the first time after promises to wed have been exchanged, and you have failed to integrate the term "prenuptial" into long ago bedtime stories (surely Rapunzel had one, right?) or more recent Thanksgiving dinners. The marriage is on, the time for the "talk" is now or never, and while you think you are focusing on protecting the child's inheritance, providing for your child and future grandchildren, all coming from a place of love for your child, all the child hears is your belief that the marriage will fail. Unless the child's intended is already on board, and has wealth to protect, it may be too late for an easy conversation.

If the parent-child sit down is not going to happen, sit down with your lawyer. Focus on your own estate plan. Rather that placing the inheritance in the child's pocket at your death, well within reach of the family court judge, consider certain carve-outs that can insulate an inheritance in the event of divorce. Your revocable estate planning trust can allocate all or a portion of a child's inheritance into a trust where a disinterested trustee (and not the child) controls distribution decisions for the child's benefit. This can keep that trust's property out of the ex-spouse's pocket (but may be considered when allocating actual marital assets). Or your estate plan might specifically carve out an amount for future grandchildren – clearly not your child's asset.

It may be too late to begin educating your child as to the responsibilities of wealth on the eve of marriage, but is never too late to add protective measures to your own plan.

SECOND THOUGHTS? CONSIDER THE POST-MARITAL AGREEMENT

What if you got married without signing a prenuptial agreement, but now you are thinking you should have: maybe you have received an inheritance that you want to keep separate, maybe you have some family business interests that ought to remain in your family. Whatever the reason, you may now want an agreement in place that defines your rights in the event of termination of the marriage. Luckily for you, in 2010, the highest court in Massachusetts determined that post-marital agreements were enforceable and not contrary to public policy.

Like a prenuptial agreement, a valid post-marital agreement must be fair and reasonable both at the time of execution and at the time of enforcement. In order for a court to hold that a post-marital agreement is fair and reasonable, the court must consider the same factors as it considers in a prenuptial agreement with one addition. The court must also carefully scrutinize whether the agreement was signed as a result to fraud or coercion. There exists great potential for coercion in post-marital agreements, because of the ability of one spouse to threaten the other with divorce if the agreement is not signed. Therefore, the court applies a stricter fair and reasonable standard to post-marital agreements than it applies to prenuptial agreements. Although these agreements may be used to protect assets, both in the event of divorce and in the event of death of a party, their use in Massachusetts is relatively new and the law may still evolve.

There is some debate as to whether a prenuptial agreement that has been amended during the marriage becomes a post-marital agreement (by virtue of the amendment after marriage). This determination will affect the standard applied by the courts when determining enforceability. Therefore, it is important to keep in mind the requirements for both prenuptial and post-marital agreements when thinking about amending the former.

FINANCIAL DISCLOSURE: WHEN BARING ONE'S SOUL IS NOT ENOUGH

One of the most important requirements for a prenuptial or a post-marital agreement is a full and fair financial disclosure from each party. Whether disclosure is full and fair is based on the facts and circumstances of each individual case, decided by the court at the time a party is seeking enforcement. Because court involvement does not occur until after the agreement has been signed, and memories are often not entirely reliable, it is important that the disclosure is documented. Courts, however, have been known to hold that a constructive disclosure is adequate in certain circumstances (e.g., if one spouse worked for the other as a bookkeeper prior to the engagement), but this is a risky approach to take.

Although there are many methods of making a financial disclosure, the one preferred is a written itemized statement that may or may not have schedules attached with documentation justifying the valuation. Having such a statement as part of the agreement is the best evidence for proving that a party made such a disclosure. Parties may also exchange raw data such as bank and investment statements as a means of disclosure. However, this may not accurately reflect the actual financial station of the parties (e.g., one party has a particularly low bank account at the time of the statement). Occasionally, an oral exchange of financial information will be adequate, but without documentation, an oral exchange is harder to prove at the time of enforcement and is not recommended.

When making a financial disclosure, the parties do not have to (and may not be able to) precisely value their assets. If that is the case, they must make a good faith effort to do so. It is a good idea to get an appraisal when possible. One tricky asset is an inheritance. A party is not required to disclose the wealth of its family and technically the expectancy is not an asset of that party until it is realized. However, if there is a reasonable expectation of a substantial inheritance, even if the party does not know what it will be, the party should (but is not required to) list it in the disclosure. This disclosure may be beneficial down the road, after the inheritance is received and the spouse is trying to challenge the agreement based on grounds of non-disclosure. As making a financial disclosure can be complicated and cumbersome, it is important to have a knowledgeable professional at your side during this process.

AFTER THE SIGNING CONFERENCE (AND THE HONEYMOON)

The successful negotiation and signing of a prenuptial agreement or post-marital agreement are milestones for spouses addressing the issue of marital property rights. The strength of such agreements, however, can be diminished to the extent spouses don't maintain their accounts consistently with the agreement. For example, an agreement might provide, among other things, that the assets with which each spouse entered the marriage remain "separate property", whereas assets the couple accumulates during the marriage are "marital property" divided upon divorce. If one spouse inadvertently mixes separate property and marital property, the protection afforded to the then-tainted separate property might be reduced if not lost altogether. Further, it is common for parties to such an agreement to execute related documents such as a change of beneficiary of a life insurance policy (removing or adding the spouse, depending on the terms of the agreement), or a spousal waiver of retirement plan benefits.

Additionally, agreements often call for each party to execute an estate plan for the benefit of the other. Failure to do so violates the agreement. Where the estate plan is implemented, it is prudent to state clearly the existence of the agreement, and that the estate planning documents aren't an attempt to modify rights and obligations of either spouse under the agreement. The lesson learned? A prenuptial or post-marital agreement is a powerful document, but its effectiveness requires diligent implementation and a continued awareness of what is necessary to carry out its terms.

"I'LL HUFF AND I'LL PUFF . . . !" –THE MARITAL ESTATE AND CREDITORS

One of the rewards of married life is working together over the years to build a marital "estate" to provide security and enjoyment on retirement. Many know the great feeling of finally seeing their home mortgage paid or almost paid off. Unfortunately, many also know that sinking, devastating feeling of having their home and the rest of their marital estate suddenly threatened by a creditor. In such cases, the couple typically runs to their lawyer to see what, if anything, they can do to protect what they have.

One of the first and most important questions to consider is, who is the debtor? If it is only one of the spouses, for example, then only that spouse's assets are at risk, and the other's assets are not. The next important point to remember is that transferring assets for less than fair value in order to remove them from a creditor's reach is considered a "fraudulent transfer" and may be reversed by a court. And the third important point to note is that some assets, such as those in qualified retirement plans, may not be reached by a creditor while such assets remain in the plan. (In Massachusetts, special limitations apply to non-rollover IRA accounts.)

For many married couples, their most valuable asset is the home. Massachusetts law allows a couple special protection of the home if it is their principal residence and if they own it as "tenants by the entirety," a form of joint ownership for married couples. Homes held this way cannot be subject to a forced sale by a creditor of either spouse, regardless of value, although a creditor may place a lien on the property. If the debtor spouse should pass away first, the lien would expire, but if the couple divorces or sells, it must be dealt with, although the "homestead exemption" might help.

The homestead exemption is a declaration that is made and recorded by any homeowner on the principal residence and has the effect of protecting up to $500,000 of equity (twice that for married owners each over age 62) from seizure and sale by a creditor. Although in some states the protection is absolute, in Massachusetts, the creditor can place a lien on the property, and the protection only continues until the home is no longer the principal residence. Therefore, the creditor may ultimately collect on the lien. In fact, if the couple's equity in the residence exceeds their homestead exemption (and they don't own it as tenants by the entirety), the creditor could force a sale. The exemption amount is set aside to provide the spouses a roof over their heads, and the excess would go to the creditor.

Still another, lesser known option for a married couple where one of them faces or is concerned about a possible claim is to consider a creative use of a post-marital agreement (the basic concept of this type of agreement is discussed above). Here, the spouses will actually proceed to divide the property as agreed in the post-marital agreement, even though they remain married. In return, each agrees that the property division and transfers will satisfy all their respective marital rights on death or divorce. The separate assets now owned by the debtor spouse continue to be vulnerable to the creditor, while the non-debtor spouse's separate assets should be creditor free.

There is no case law on whether a post-marital agreement would withstand a creditor attack, but the only basis for such an attack would be that the transfer of marital property to the non-debtor spouse was a fraudulent transfer. We believe that a defense to such an attack would be that the transfer was for fair value, that being the release of marital rights by the non-debtor spouse. In any event, the post-marital agreement would present a formidable obstacle to a creditor and there is no penalty for entering one even at a late date.

CLOSE TO HOME

Finally, what about the marriage of talents that is Bove & Langa? Our family-of-choice has grown with the addition of Molly R. Soiffer, who has gone from a staff attorney to an associate following her graduation from Boston University School of Law's Graduate Tax Program. Dave has been busy fine tuning his analysis of same sex marriage rights across the United States, culminating with an article published in the American Bar Association's *Probate & Property* magazine. The extended family of Boston advisors who engage in trusts & estates work, otherwise known as the Boston Estate Planning Council, has wisely elected Ruth to a three year term on its Board of Directors. Our founding partner, Alexander, recently followed his family roots back to Italy, first stopping in Vaduz where he presented an analysis of international asset protection jurisdictions at the Liechtenstein 2015 Trust Conference. As for Melissa? As the managing partner, she's married to the Firm. For better or worse.