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

To: Clients and Friends
From: The Attorneys at Bove & Langa
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THE BOVE & LANGA REPORT

IT'S SUMMER: EVERYONE INTO THE (GENE) POOL!

Summer's here, and you know what that means! Beach trips, vacations, cook outs, and the occasional adult beverage. It's the time of year to let loose, relax, and spend some quality time with friends and family. After all, in the words of Dr. Joyce Brothers, "when you look at your life, the greatest happinesses are family happinesses," so let's contemplate the meaning of family. And what better way to do so than in the Bove & Langa Report. In this Report, we discuss some of the ways family is defined in different legal contexts. We also raise thought-provoking issues relating to the continuing evolution of societal views regarding what exactly a "family" consists of, as well as the related technological and scientific developments in the medical field. We hope you enjoy it!

Kissing Cousins. What a blessing it is to have a loving family. But how far can that love go? Can first cousins marry? In half the states, including Massachusetts, the answer is yes. All but three of the states that answer that question "no" enacted their prohibitions before 1930, and the laws were typically premised on the mistaken assumption that genetic problems arise should first cousins procreate. The modern trend, adopted by the National Conference of Commissioners on Uniform State Laws which recommends the repeal of "no cousin" laws, is to recognize that first cousins are no more likely to run into difficulty (genetic or otherwise) than other couples. Just ask Charles Darwin and Emma, his wife and first cousin.

Can a Man Legally Marry His Widow's Sister in the Commonwealth of Massachusetts? No, he's dead! But surprisingly there are still laws on the books in Massachusetts that differentiate between whom a man may marry, and whom a woman may marry. Since 1983, a man may marry his son's former wife, but a woman may not marry her daughter's former husband. A woman may marry her

husband's father, but a man may not marry his wife's mother. Why? Who knows! But as one eye said to the other eye, "Between you and me, something smells!"

Just How Far Does Family Go? If we ask Ted to name his children, we're likely to hear a list of names and ages and maybe some accomplishments. What we may not hear is, "John, my oldest, belongs to my wife Nancy. He's nineteen and technically I haven't adopted him but I think of him as my son. The second and third, Anne and Amy, are mine from my first marriage. The youngest, Bob, is from this marriage but we had some fertility problems so he doesn't have any of my genes." These things may not matter in conversation, but they can make a big difference in an estate plan. Ted and Nancy's estate plans and beneficiary designations should be carefully drafted to define their children. In Massachusetts, the parent-child relationship is first determined on a baby's birth certificate, which lists the mother and may list a second parent. If the mother is married at the time of birth, her spouse is presumed to be the parent of the child. If the mother is unmarried at the time of birth, the other parent can sign a voluntary acknowledgment to be named as the child's parent on the birth certificate. (Buyer beware! It may be difficult or impossible to rescind the acknowledgment later.) As long as there is no dispute, the birth certificate determines the child's parents.

- Bob (no genetic material): Since Ted and Nancy were married when Bob was born, Bob would inherit as Ted's son even though he shares none of Ted's genes.

- John (stepson): Although Ted thinks of John as his son, he is not named on John's birth certificate as the father, he wasn't married to Nancy at John's birth, and he hasn't adopted him. This means that John would not inherit as Ted's "child" under the laws of intestacy (leaving no will) in Massachusetts. John also would not receive property under a beneficiary designation naming Ted's "children," "descendants," or "issue."

- Anne and Amy (previous marriage): Anne and Amy would inherit from Ted because they are his daughters. But just as Ted's stepson would not inherit as Ted's child, Anne and Amy would not inherit from Nancy unless she takes additional steps.

Even adoption may not resolve every issue, though! In Massachusetts, an adopted child has a right to inherit from the adopting parent under intestacy. If Nancy adopts Anne and Amy, they can inherit through her and through Ted. Anne and Amy can still inherit through their birth mother under Massachusetts law if they are adopted by a stepparent. However, some estate planning documents and assets with beneficiary designations override the law and define the term "child" to exclude a person adopted after reaching age 18.

In contrast to stepchildren, who have no automatic inheritance rights in a stepparent's estate, a half-sibling has the same rights of inheritance as a full sibling. In the distant future, if Ted's daughter Anne dies leaving all her estate to her "siblings," Amy and Bob will take equally. This will be true even though Amy is a full sibling to Anne and Bob is a half-sibling. (John, a stepbrother, would be excluded.)

In addition to considering the definition of a child in one's estate plan, some parents consider naming their children's spouses as trust beneficiaries. A trust can provide that upon a child's death, the child's share (or part

of it) will be held in trust for the child's surviving spouse, and will pass to the grandchildren after the surviving spouse dies. Most clients would never admit it, but they might like a child's spouse better than the child!

Millennials, *Yeah…What Are They Good For? Absolutely Nothing.*

Millennials (also known as Generation Y) were born between 1982 – 2000, and we've all heard the complaints about them: they can't hack it in the real world and can't abide by the traditional notions of courtship, decorum, and property ownership. They live (and even buy homes) with their significant others years before marrying; they have kids out of wedlock; they buy real estate with friends; etc. But there are many valid reasons why Millennials are doing these things. Financially, many Millennials are racked with debt from higher education as they enter one of the most difficult and competitive job markets in the country's history. It's no surprise that building a nest egg for a wedding, a down payment, or a child (never mind all three at the same time), takes an additional few years (or decades). But just because many Millennials do things differently doesn't mean they aren't ready for the real world. In a sense, Millennials are redefining the modern form of family – whether it be committed significant others living together and having children, often before marriage, or close friends who combine savings to buy property together.

For many Millennials, starting families before marriage or owning property with friends is a smart financial decision. However, as estate planning attorneys we see risk because friends and unmarried couples are not afforded the same level of legal protection as spouses. Regarding children before marriage, we recommend having (at the very least) Wills that provide for the disposition of assets and the nomination of guardians for minor children. Regarding joint ownership of real estate, whether between friends or significant others, we recommend entering into a legally binding contract specifying what will happen to jointly owned assets in the event the relationship breaks down. In addition to these documents, we believe every adult should have a durable power of attorney and health care proxy with a living will and HIPAA authorization. These documents appoint loved ones to make financial and health-related decisions in the event of an accident or incapacity. The point is – we can't stop a generation from living the best way they can, but we can help by preparing basic estate planning documents and legally binding contracts because, from our experience, in case things don't work out, it's always better to have a plan in place.

And Just Like That, They Were Gone. Family can disappear within a blink of the eye. One moment you think a child will never be self-sufficient, and the next the child is driving, graduating, and turning 18. You may still feel like you are in charge (the bills still come your way) but the law thinks differently. In some ways, your 18 year old is a family of one. Your ability to receive information about your child ends, and this right can only be extended by the child alone granting you continued access by executing a health care proxy (for health care matters) and a durable power of attorney (for financial matters). To paraphrase the pioneering comic Phyllis Diller, "It is inevitable that children will grow up and leave home, in fact it is the only thing that keeps some parents going," but if you want to go along, you'll need permission.

In God We Trust. Some of us are fortunate enough to recognize a "calling" to a certain career or profession. People who, from their early lives, have always wanted to be a nurse, a teacher, an attorney, a musician, or a pilot, typically dream of having the opportunity to fulfill their calling. And, a child's calling may well impact how a parent crafts an estate plan. Perhaps one of the more dramatic examples is a child called to a career in religion, since in some cases that calling requires sacrificing many of the material things in life and even the opportunity to have a biological family. How can this impact an estate plan?

Certainly, such individuals never cease to be a part of their original family, but in light of their spiritual commitment, many clients believe it is not a good idea to leave the nun, priest, monk, rabbi, preacher, or guru, an outright inheritance in an estate plan, since, possibly, the ultimate destination of the gift will be dictated by the child's definition of family (the religious order), rather than the parent's definition of family. For those who do not wish an inheritance to be dictated by a religious child's beliefs, a trust could provide benefits for the child's lifetime and thereafter be held or distributed to other siblings or to grandchildren. Some want the spiritual child to have all the income to dispose of as the child wishes even if that includes the advancement of the child's faith, some want the trust to be fully discretionary and within the sole control of the trustee, and some want all or a portion ultimately at the control of the spiritual child, either at some age or at death, to do good as that is defined by the child. The choices are as infinite as the world's religions, and the flexibility of the trust structure permits a family to craft a solution that works best for them. What would produce the best results in any given situation, only God knows. (But we pray that Bove & Langa can help!)

The Ultimate Mystery – Solving for "X" (or "Y"). With rapid and prolific innovations in science and technology, the concept of what constitutes a family has become somewhat elusive. While the word connotes a myriad of ideas and emotions, it is virtually undeniable that the concept itself is evolving. Soldiers going to war, patients about to undergo cancer treatment, older couples unsure of the decision to parent – the number of people storing eggs, sperm, and fertilized embryos is on the rise. The logical question that follows is "who controls such property at the time of death?" If a couple chooses to store an embryo, is such property jointly held property which automatically passes to the survivor? What happens if the couple divorces? A contract with the storage facility may answer these questions, but if not, the law in Massachusetts remains unclear. Generally speaking, *property* passes on death in one of three ways: by operation of law (a jointly held bank account passes to the survivor), by contract (proceeds of an insurance policy pass to the named beneficiary), or by one or more legal documents (a last will or trust). But, is genetic material actually considered property? Some might take issue with the idea that an embryo is someone's property, as such a term seems clinical and devoid of familial ties. Whether you agree or disagree, the problem as to rights to disposition of genetic material at the time of the donor's death remains. What to do?

Though a Genetic Bill of Rights was introduced before the Massachusetts state legislature in January 2011, it has not yet been enacted. Massachusetts law is generally silent as to the inheritance, divisibility, and transferability of genetic material. Many states have enacted legislation to address such issues, in addition to

the privacy rights related to such material. Some facilities ask or permit the individual or couple whose material is being stored to sign a contract. Anyone who signs such a contract should revisit its terms periodically to ensure they remain consistent with the wishes of the individual (or couple, as the case may be). In a 2005 case, a Massachusetts court upheld a contract involving gametic material, finding that the character of the property controlled by the agreement – frozen sperm – does not prevent it from being an enforceable contract. The contract, revocable during depositor's life, allowed him four choices as to disposition in the event of his death: destruction; release of the specimens to the executor or administrator of his estate; release of the specimens to a designated individual; or "other," where depositor could make alternative arrangements. If you have stored such material, its existence and any related contracts should also be communicated to your estate planning attorney, as the terms of a contract may bypass the dispositive provisions of your estate planning documents.

With regards to posthumous *birth* (where conception occurs before the death of a parent), Massachusetts law puts the posthumous child on equal footing with a child born while both parents were alive. With regards to posthumous *conception* (where a child is conceived after a parent's death with that deceased parent's genetic material), the Supreme Judicial Court of Massachusetts decided in the Woodward case that a child can be the legal heir of a deceased parent as long as there is a genetic relationship between the child and the decedent, and there is sufficient evidence that the decedent unequivocally consented to posthumous conceptions and to support any resulting child. Ultimately, it is wise for anyone who has stored such material to clearly articulate his or her wishes in an estate plan – in addition to considering such estate planning documents in the purview of any contracts that may have been signed – in order to eliminate potential contradictions, ambiguity, or claims against the estate.

No Minor Issue – Deciding Who Will Care For Your Children. Perhaps the question of "Who is family?" is no more dramatically framed than when deciding who will care for your young children if you are unable to do so. Mom and Dad did a good job with you, so why not name them? Unfortunately sometimes age or geography makes this a bad choice. A sibling? Certainly a major player in this decision process, but if the sibling is to be the trustee of the trust holding the assets for the children's benefit, it is best to choose someone else. The trustee must account to the child's guardian each year as to how the trust was managed, and if the same person is wearing both hats – guardian and trustee – then the fox is watching the hen house. There is nobody to ask the hard questions regarding asset management, trustee fees, and distribution schedules. Sometimes a good choice is to name a sibling of one spouse as one fiduciary (guardian or trustee) and a sibling of the other spouse as the other fiduciary. Nice and neat – everyone is involved. But don't have blinders on when making these important decisions. Don't forget to look at more distant relatives, and to also look in your own backyard. Some of us have very close friends who may well be the best choice – family you choose, rather than family you inherit. In Massachusetts, the Probate and Family Court will give your choice great deference, and will uphold a non-family member's appointment unless proven unfit, or, in the case of an older minor child, the child itself offers strong objections. If you do name a non-family member in your Will as guardian of your minor child(ren), it is a good idea to write a private side letter explaining your reasons and sign it in front of a notary public. The judge will be very interested in hearing your thoughts.

Morbid But Makes Sense. Some families do not reflect the usual make-up (parents and children). As a result of circumstances beyond their control, families may be made up of other parties, sometimes related, sometimes not. For instance, where an unfortunate accident strikes, leaving children without parents, the children may go to live with an aunt or uncle, or grandparents, or just neighbors. As mentioned in the previous discussion, perhaps the most fundamental element of "Who is family?" is when nominating a guardian for minor children because, in addition to being emotionally dependent on such people, the children are often financially dependent on them. If another disaster struck, who would then provide for the children? For this reason it is not uncommon to apply for life or disability insurance on the caregivers, so the children's financial support would continue. But is it "legal" for someone to take out insurance on a person to whom they are not related? Could a person, for example, take out a huge life insurance policy on an aged, not so healthy neighbor so the person could have a windfall when the neighbor passed away?

To avoid such ghoulish planning, the law requires that the person applying for the insurance have an "insurable interest" in the person to be insured. An insurable interest is presumed, for example, where the parties are closely related, such as spouses or parent and child, but in other cases, the party must be in a relationship where there is an economic or other dependency on the insured person, and the loss of the insured party would cause the dependent individual to suffer a financial or other loss. Clearly that definition would apply to someone raising and caring for a child (or an adult for that matter), and thus the child or adult would have an insurable interest in the caregiver, just as if the individual were a member of the family. Normally in such a situation, the insurance would be purchased on the caregiver's life using the minor's assets. In such cases, it may be wise to consider the establishment of a trust to acquire the insurance so that the proceeds would be received by the trustee, who could manage the fund for the benefit of the child or adult. In a sense, the trustee then becomes a part of the extended "family."

Dynasty Trusts: The Never-Ending Family. Like the 1980s TV show, a dynasty trust sounds like the ultimate luxury. It is funded with enough assets to provide for many generations of descendants – the settlor's "dynasty." The dynasty trust is not just an ego-boost; it is also a tax-efficient vehicle. It can be funded using the settlor's generation-skipping tax exemption and can provide for an unlimited number of future generations, free of gift tax, estate tax, and generation-skipping tax. However, to provide for an unlimited number of generations, the trust must be formed in a state that allows trusts to continue in perpetuity. Massachusetts has a "rule against perpetuities" that forces a trust to end after a certain time. To simplify the rule, we'll say a Massachusetts trust must end 90 years, or approximately three generations, after its creation. If a settlor creating a trust already has grandchildren, the trust likely would last long enough to provide for her great-great-great grandchildren, who would have only 1/32 of shared genetic material with her (unless there is a lot of inter-marriage among her descendants, as discussed earlier). Genetically speaking, that is the equivalent of providing for fourth cousins, so it may well be that even though a Massachusetts trust must end approximately 90 years after creation, it lasts long enough to provide for a dynasty of descendants.

Cut Him Out! Considering who is included in your definition of family also means considering who is not in your definition of family. And in some cases you might have a cousin, sibling, niece, nephew, or even child or grandchild who doesn't make the cut. While Massachusetts does not permit you to fully disinherit a spouse, it does permit you to disinherit any other member of the family, including an adult child. If disinheriting a child, you can choose to leave him absolutely nothing – not even a dollar; and, depending on your personal reasons for excluding a child, you could take the approach of the Marquis d'Aligre, whose Will stated, "To my son I leave the pleasure of earning a living. For twenty years he thought the pleasure was mine." If you wish to specifically omit someone as a beneficiary, it is important that your estate planning documents clearly reflect your wishes.

Furthermore, unlike some other states (e.g., Florida), Massachusetts recognizes "in terrorem" provisions, or "no contest clauses." No contest clauses can be a useful tool where unequal distributions are to be made to beneficiaries of your estate. For example, you choose to leave $100,000 to your favorite sister, Megan, but choose to leave only $50,000 to your wayward brother, Sam. If your documents included no contest clauses, and Sam chose to contest the provisions of your documents, not only would Sam be removed as a beneficiary, but Sam's descendants could also be excluded as beneficiaries if the documents were drafted as such. As you can see, no contest clauses work to discourage a beneficiary from contesting the provisions of your documents.

Does The IRS Tell You Who Your Family Is? Yes, And It's Not Consistent. Go Figure! The Internal Revenue Code ("Code") defines family ("related parties") in several different sections, since transactions between family members are susceptible to manipulation for tax results. In order to prohibit (or minimize) such manipulation, Congress has defined when one "party" is "related to" another. For example, in one section, an individual is considered "related to" the individual's spouse, child, grandchild, and parent; but grandparents, siblings, nieces, nephews, and in-laws don't make the cut. Under a different section, an individual is considered to own certain property for certain purposes if it is owned by the individual's "family," which consists of the individual's spouse, siblings (including half-siblings), ancestors (parents, grandparents, etc.) and descendants (children, great grandchildren, etc.). Siblings are now included, but those poor nieces and nephews and in-laws – they can't catch a break. Moreover, stepparents and stepchildren are apparently devoid of any meaning under this section. Finally, a third section purports that an individual's "family" consists of the individual's spouse (but only if they are living together), parents, descendants, or siblings (including half-siblings). Oh how nice it is that the Code can tell us who our family is and isn't, especially when the definition changes section by section.

One last point – thus far, we have used the term "spouse" quite often. How does the Code define a spouse? Well, it doesn't. The IRS will look to state law to determine if the couple is married. Until very recently, the Defense of Marriage Act ("DOMA"), which applied to all federal legislation, defined marriage as between one man and one woman, thus prohibiting married same-sex couples from receiving federal benefits, including those under the Code. Following the recent U.S. Supreme Court ruling, all lawfully married couples are now

treated the same under the Code. Interestingly, this case, US v. Windsor, was an estate planning case. The Code permits spouses to leave each other property within an estate plan in a manner which postpones the estate tax until the second spouse's death. DOMA limited this privilege to opposite sex couples, causing Ms. Windsor to pay over $300,000 in estate taxes when her spouse died. She sued. She won, with the Supreme Court holding that this unequal treatment of lawfully married couples based upon the sex of the spouse was fundamentally unfair, and a violation of Ms. Windsor's constitutional right of equal protection under the law.

Arf! Arf! Meow! Meow! Pet-lovers unite over their additional family members. Sometimes, pet owners even refer to themselves as "mom" and "dad" and the older generation refers to their children's pets as their "granddog" or "grandcat," but where do you draw the line? If your definition of family includes your pet(s), your estate plan can include provisions for their care when you are no longer around to care for them. It might be something as simple as directing who should receive your pets, or it could be more thorough, such as creating a pet trust (now recognized in Massachusetts). For example, you may have heard of the $12 million trust Leona Helmsley created for her dog, Trouble. When making provisions for your pets, it is important to consider the related expense, especially with certain animals, such as horses. Therefore, we recommend including a monetary distribution to the future caregiver to ensure they have the means to care for your pet as you would have.

IN "SUMMER-Y"

In light of our discussion on the expanding notion of what a family consists of, the words of Trenton Lee Stewart are fitting: "You must remember, family is often born of blood, but it doesn't depend on blood. Nor is it exclusive of friendship. Family members can be your best friends, you know. And best friends, whether or not they are related to you, can be your family." We at Bove & Langa hope that every one of you is enjoying your family, whomever that may include.