



Boston Bar
ASSOCIATION

SUMMER 2008

Trusts & Estates Section

Summer 2008 Newsletter

A PUBLICATION OF THE BOSTON BAR ASSOCIATION TRUSTS & ESTATES SECTION

SUMMER

2008

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Calendar of Section Events

Following is a list of the upcoming events sponsored by the Trusts & Estates Section of the Boston Bar Association.

Monday, June 9, 2008, 3:00 p.m. - 6:00 p.m.
BBA CLE: "TRUSTS AND ESTATES YEAR IN REVIEW"
Sponsor: The Estate Planning Committee

An annual hit among estate planning practitioners, this seminar offers a rare opportunity to learn about the year's significant developments in Massachusetts and federal laws that affect your estate planning practice. The panelists will cover new matters that arose in transfer tax law and non-tax law between June 2007 and June 2008 and will give a status update on legislation in the pipeline. It is one that you cannot afford to miss!

Panelists:

Robert A. Vigoda, Esq.

Edwards Angell Palmer & Dodge LLP

Robert J. Morrill, Esq.

Gilmore, Rees, Carlson & Cataldo, P.C.

Michelle M. Porter, Esq.

Goulston & Storrs – A Professional Corporation

Ellen S. Berkowitz, Esq.

Holland & Knight LLP

Program Co-Chairs:

Stephen Ziobrowski, Esq.

Day Pitney LLP

Anne Marie Towle, Esq.

Athena Capital Advisors LLC

Tuesday, June 17, 2008, 12:00 p.m.

Brown Bag Lunch: "Ethical considerations in representing elderly and disabled clients."

Sponsor: Elder Law and Disability Planning Committee

Speaker: Linda Bauer of the Board of Bar Overseers

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ARTICLES WANTED

You are all invited and encouraged to contribute an article on any subject of interest, particularly if you find yourselves dealing with an unusual or undecided issue in Massachusetts. Please contact, Amiel Weinstock at amiel.weinstock@klgates.com or Christopher Perry at cdp7@ntrs.com to pursue this further.

Common Ethical Issues that Arise in the Representation of Elder or Disabled Clients

By Linda Bauer, Esq.

Recent attorney disciplinary decisions have highlighted the importance of identifying who is the client when engaging in estate planning for an elder or disabled client. For example, in *Matter of Warshaw*, Public Reprimand No. 2007-28 (January 3, 2008), an attorney was disciplined for preparing significant donative documents for an elderly woman at the request of two of her children, leaving her estate to one of them at the expense of her other children. The attorney violated Mass. R. Prof. C. 1.7(a) and (b) by preparing and assisting the mother to execute a deed and a will that benefited one of his clients without first obtaining the consent of the mother to the conflict of interest after consultation. In addition, the attorney violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, and 1.4(b), by failing to take adequate steps to assure that the mother understood the import of the documents, agreed to their terms, was competent to sign the documents, and was not subject to any undue influence.

At an upcoming brown bag luncheon of the Trusts and Estates Section of the Boston Bar Association, I will discuss some common ethical questions that arise when representing elder or disabled clients. In addition, I will discuss some pointers for avoiding disciplinary issues in this area of practice.

Among the topics to be discussed will be the following:

- Identifying who is the client;
- When asked to represent multiple clients, determining whether joint representation is possible, and if so, obtaining informed consent after consultation;
- Identifying other possible conflicts of interest;
- The importance of meeting alone with the estate planning client;
- Assessing competency of the client;
- Protecting client confidences;
- Getting paid – who can pay the legal bill?
- Avoiding disciplinary complaints, and what to do when you receive a letter from bar counsel.

Linda G. Bauer, Assistant Bar Counsel, Massachusetts Board of Bar Overseers.

The Proposed Massachusetts Homestead Act: A Senate Bill That Would Offer Welcome Change and Clarification

By Robert H. Ryan, Esq.

This article describes the existing Massachusetts Homestead statute, explains a number of outstanding questions that puzzle practitioners who work with the existing law, outlines the provisions of Senate Bill 2653, the proposed Massachusetts Homestead Act, and explains some of the ways in which the proposed Homestead legislation would clarify old questions and improve the Homestead protections.

Background - M.G.L. c. 188 §1 and §1A

The protection afforded by a Massachusetts Declaration of Homestead (See M.G.L. c. 188 §1 [regular] and §1A [elder and disabled]— hereinafter c. 188 §1 and c. 188 §1A) is often an overlooked asset protection strategy when focus is placed on the use of Trust planning to avoid Probate, and in the case of married couples, to equalize estates to optimize estate tax minimization. A Homestead declaration in Massachusetts provides the owner of a principal residence protection for up to \$500,000 of equity – but it is generally accepted that such protection does not apply to a principal residence that is titled in Trust.

There has been considerable discussion regarding Homestead protection during the past few years by many practitioners and several articles have appeared in Massachusetts legal publications highlighting problems with the current law. The sad reality is the confusion reigns due to the fact that the current Massachusetts Homestead statute is less than clear on a number of issues. A list of some of the outstanding questions raised by the current Massachusetts Homestead statute follows.

What is the Impact Of Trust Ownership On Homestead? In a typical estate plan involving the use of Trusts, the transfer of title of a principal residence is often done without proper consideration being given to the issue of the Homestead protection. Some practitioners believe that a properly recorded Homestead declaration can be preserved by reserving the Homestead when a transfer is made to a Trust. The authority cited for this position is c. 188 §7, where reference is made to termination of a Homestead “by a deed conveying the property in which an estate of homestead exists, signed by the owner and

the owner’s spouse, if any, which does not specifically reserve said estate of homestead {emphasis added}.” Accordingly, some practitioners believe that a reservation of a Homestead, when conveying the principal residence to a Trust, is sufficient to preserve a Homestead for property held in Trust.

However, it is understood that the Land Court strictly relies on the ruling in *Bristol County v. Spinelli*, 38 Mass. App. Ct. 655 (1995) that a Homestead cannot apply to Registered land held in trust. Therefore, it appears likely that the Land Court would not recognize the reservation of a Homestead declaration for a conveyance of Registered land to a Trust. Unfortunately, there is uncertainty whether Homestead protection can apply to Recorded land. Some practitioners believe that since *Spinelli* did not address Recorded land, a Homestead declaration may still be recorded for Recorded land conveyed to a Trust. It is my opinion that based on the reasoning in *Spinelli*, a Homestead won’t apply to any property in Trust - including Recorded land – even if it is reserved upon the conveyance to Trust.

Who Is Protected By A Homestead Declaration?

A further issue of concern is the determination of who benefits from the protection afforded by a Homestead declaration. It is interesting to note that the statute clearly states that a c. 188 §1 declaration applies to a “family” as defined in the statute, which includes the declarant’s children and spouse. For c. 188 §1 purposes, the statute applies even if a child is an adult. However, c. 188 §4 provides for the continuation of the Homestead upon the death of the declarant. But in that instance, c. 188 §4 refers to the “minor” children of the declarant so that raises a valid question as to whether a new Homestead must be declared by the surviving non-declarant spouse in order to provide protection to the “adult” child who is a member of the family.

If a couple owns a property as tenants-in-common, joint-tenants, tenants-by-the-entirety, or life tenants, the statute is clear that they are a family and a family can only record one c. 188 §1 Homestead. Therefore, there is often a question as to which spouse or family member should record the declaration of Homestead. If the declarant

spouse dies, the surviving spouse is protected. However, a c. 188 §1A elder and disabled Homestead only applies to the owner who declared it and therefore the Homestead protection terminates at the same moment the c. 188 §1A declarant dies.

Furthermore, there has been confusion in the Registry of Deeds as to whether multiple co-owners may file a Homestead exemption. In response to the uncertainty, the Chief Title Examiner for the Land Court issued a memo to the Registry of Deeds, dated August 25, 2006, in which he confirmed that multiple Homestead exemptions may be filed by unrelated co-owners. However, there is still a question as to whether tenant in common siblings should be able to each declare a separate Homestead. C. 188 §1 provides that a Homestead is limited to one per “family” but a family is defined to include “a parent and child or children, a husband and wife and their children, if any, or a sole owner.” Therefore, it appears that co-owning siblings should not be treated as a family and should each be able to record a Homestead.

Many Questions

As highlighted by the above overview of key Homestead issues, it is clear that there are many questions with the current Homestead statute that need to be resolved, such as:

1. Why isn't the Homestead protection automatic?
2. How much equity is protected by the Homestead declaration if there is more than one owner?
3. Is the only choice to benefit from Trust planning or Homestead protection, but not both?
4. Is a Homestead terminated by transfers within the family or upon the death of the declarant?
5. Are the proceeds from a sale or insurance payout of the principal protected by a Homestead?
6. Does the waiver of Homestead in refinancing documents waive the Homestead protection against all creditors?
7. Who should file the Homestead? Should it be the spouse with greater exposure?

Senate Bill 2653: Proposed Homestead Legislation - Hope on the Horizon

Culminating a three-year effort, the Real Estate Bar Association and Boston Bar Association have proposed

comprehensive legislation to reform the Massachusetts Homestead Statute and address the above-stated questions – as well as many more. The legislation is currently identified as Senate Bill 2653 and it is expected to be considered, and hopefully passed, during the current Legislative term.

Key Highlights of Homestead Legislation:

Automatic Homestead Protection

In response to concern that many homeowners are not aware of the requirement that a formal filing must be made in order to benefit from the Homestead statute, the proposed legislation provides for an automatic allocation of Homestead protection to a property that is the principal residence of the owner. However, the amount of automatic protection is only \$125,000 of equity, therefore a homeowner must still file a Homestead declaration to benefit from the full amount of the \$500,000 of equity Homestead protection. This automatic will apply to all existing principal residences regardless of the purchase date.

Clarification of Extent of Protection for Multiple Owners

The proposed legislation clarifies that although multiple owners of a principal residence may benefit from Homestead protection, the aggregate protection is limited to the \$500,000 Homestead amount. In the case of a couple who can benefit from what are currently known as a c. 188 §1 regular Homestead and a c. 188 §1A elder and disabled Homestead, the aggregate protection will be increased to \$1,000,000 of equity. If the owners fail to file for the increased protection of the \$500,000 Homestead, the aggregate protection will be limited to the \$125,000 automatic Homestead amount.

Finally – Homestead May Apply To Property In Trust

In apparent recognition of the extensive use of Trusts to hold title to principal residences, the proposed legislation will finally extend the benefit of Homestead protection to principal residences for which title is held in Trust. In order to obtain such protection, the Trustee must file a declaration of Homestead stating, among other things, the names of the beneficiaries who seek to obtain such Homestead protection, and the fact that the property is their principal residence.

All In The Family

The proposed legislation will provide that transfer of a principal residence between family members will not terminate an existing Homestead - even if the new deed fails to reserve the Homestead upon the transfer. In addition, a Homestead existing at the death or divorce of a person holding a Homestead shall continue for the benefit

of his or her surviving spouse or former spouse and minor children who occupy or intend to occupy said home as a principal residence. Any adult child, who has an ownership interest in the principal residence, will be required to file their own Homestead declaration if they wish to have the increased protection of the \$500,000 amount.

The information contained in this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The information is intended for general informational purposes.

Sales and Insurance Proceeds Relating to Homestead Property Are Protected

Finally resolving an age-old question, the proceeds from the sale of a principal residence, or the insurance proceeds from a principal residence that is damaged, will be protected by the Homestead in order to purchase a new principal residence or repair a damaged one. The proceeds from a sale will be protected for the period of one year from sale of the current principal residence but the insurance proceeds will be protected for a two year period from receipt of the proceeds.

Mortgage Waiver Of Homestead Is Just That

Another age old question relates to whether the apparent blanket waiver of a Homestead in mortgage documents terminates the protection of a Homestead against all creditors. The proposed legislation provides the sensible answer that a mortgage does not terminate a previously filed Homestead but only subordinates the Homestead to the specific mortgage at issue.

Simple Solution to Which Spouse Files the Homestead

To resolve the question of which spouse should file the Homestead the proposed legislation chooses a simple solution – require both spouses who have an ownership interest to sign the declaration of Homestead. In addition, the declaration must identify each person receiving Homestead protection, including the name of a spouse who may not be an owner. The declaration must also state that each person occupies, or intends to occupy, the property as his or her principal residence.

When Will Your Clients Benefit From The New Legislation

The Homestead legislation has key backing from top law makers in both the Massachusetts House and Senate. Hopefully, it will be approved in the current legislative term. If you wish to improve the chances of obtaining the numerous improvements cited above, please contact your State legislators and ask for their support of Senate Bill 2653.

Robert H. Ryan is an associate at Bove & Langa, P.C. He focuses his practice on estate and tax planning, asset protection and trust and estate administration. He can be reached at ryan@bovelanga.com.

Eyster v. Pechenik

Case Summary by Christopher D. Perry, Esq.

2008 WL 2132587 (71 Mass.App.Ct. 773 May 23, 2008)

Chris Perry is the Sr. Fiduciary Officer at Northern Trust in Boston, in charge of trust and account administration and client relationships.

Legal Issue: Validity of prenuptial agreement. Held – no express waiver of marital rights in the agreement.

Facts:

Linda Sue Eyster (“wife”) and Jan A. Pechenik (“husband”) signed a prenuptial agreement dated July 12, 1982, five days before their wedding on July 17, 1982. The husband drafted the agreement after reading articles in financial magazines and newspapers and at least one book from a local bookstore. Neither party consulted an attorney before signing the agreement. The one-page agreement pertained mainly to the distribution of financial assets and property owned by the parties, with a gradual acquisition of financial interest by the wife in the property on 1578 Cambridge Street, Cambridge, Massachusetts. Alimony and child support were not mentioned in the agreement.

At the time of signing the agreement, the husband was thirty-two years of age and had a Ph.D. in biology from the University of Rhode Island, in addition to a master’s degree from the Massachusetts Institute of Technology, and a bachelors degree in biology from Duke University. The wife was twenty-nine years of age and was in the process of receiving her Ph.D. in biology from Northeastern University. She had received a master’s degree from the University of South Carolina, and a bachelor’s degree from the University of Louisiana. The parties had been living together for two years and co-owned a one-week timeshare. The husband and wife had approximately equal assets. The husband’s condominium in Cambridge, discussed in the agreement, was the most valuable asset.

On March 1, 2004, after almost twenty-two years of marriage, the wife filed for divorce in the Middlesex division of the Probate and Family Court department. At the time of the divorce, the wife’s net worth totaled \$852,376.76 and the husband’s net worth was \$2,368,468.03. In her divorce complaint, the wife sought a declaration that the prenuptial agreement was void. The husband’s answer and counterclaim sought

specific enforcement of the agreement.

Probate Court Decision

In the accompanying memorandum of the probate judge’s decision, the judge held that the agreement was enforceable, reasoning that the circumstances demonstrate that the wife recognized that marriage conferred certain rights, and that she waived those rights by signing the agreement. In support of the holding, the judge observed that both parties voluntarily and freely chose not to utilize the services of an attorney in negotiating, preparing or executing the agreement, and that they had sufficient time to review the document.

Legal Issues

1. Was the wife’s appeal timely?
2. Was the prenuptial agreement valid?

Discussion and Decisions

Procedural issues. Facts pertaining to the timeliness of the wife’s appeal were set forth in the decision and are not recited here. The Court exercised its powers pursuant to Mass. R.A.P. 14(b) to deem one of several of the wife’s notices of appeal as timely nunc pro tunc, thereby vacating the order of the Probate and Family Court dismissing the wife’s appeal and the order of the single justice of the Massachusetts Court of Appeals denying relief under Mass.R.A.P. 14(b).

Validity of prenuptial agreement. The Court, reversing the probate judge’s holding, held that there was no waiver of marital rights in the prenuptial agreement, nor plain language or other evidence demonstrating that the parties sufficiently understood their marital rights and how they were altering them. The Court held that, as the wife was not represented by legal counsel or even advised to seek such counsel, the agreement does not

contain a proper waiver of marital rights and is therefore invalid.

The Court quoted extensively from *DeMatteo v. DeMatteo*, 436 Mass. 18 (2002). The Court noted that a prenuptial agreement is enforceable only if a judge determines the agreement to be valid, and observed that in order for an agreement to be valid the judge must find:

1. the agreement contains a fair and reasonable provision as measured at the time of the execution of the party contesting the agreement,
2. the contesting party was fully informed of the other party's worth prior to the execution of the agreement, and
3. a waiver by the contesting party is set forth.
4. The wife's appeal focuses on the third "fair disclosure" requirement, arguing that there was not a meaningful informed waiver of marital rights and therefore the agreement was unenforceable.

The Court noted that the Supreme Judicial Court in *DeMatteo* went beyond the waiver language itself and held that it was correct for a judge to consider such factors as "whether each party was represented by independent counsel, the adequacy of the time to review the agreement, the parties' understanding of the terms of the agreement and their effect, and a party's understanding of his or her rights in the absence of an agreement." A brief summary of the factors weighed by the Court in making its decision follows:

- The Court contrasted the facts in the instant case with the facts in *DeMatteo*, emphasizing that both parties in *DeMatteo* were represented by independent counsel, were informed of their rights, had considered the effect of the agreement on their estates, and freely and willingly waived rights in exchange for the provisions of the agreement. The Court noted that the wife in the instant case was neither represented by separate counsel nor advised to obtain her own legal counsel. The Court quoted from ALI Principles §7.04(3) ("A premarital agreement is rebuttably presumed to satisfy the [informed consent requirements] when the party seeking to enforce the agreement shows...both parties were advised to obtain independent legal counsel, and had reasonable opportunity to do so").
- The Court noted that it was not clear from the factual findings when the agreement was drafted

and whether the wife had sufficient opportunity to review the agreement before the wedding, noting that the agreement was executed only five days before the marriage. The Court compared the facts in the instant case with ALI Principles § 7.04(3) ("A premarital agreement is rebuttably presumed to satisfy the [informed consent requirements] when the party seeking to enforce the agreement shows that [a] it was executed at least 30 days before the parties' marriage").

- The Court described the agreement as "sketchy" and noted that it did not contain an explanation of marital rights, or of how those rights are altered by the agreement. The Court contrasted the agreement in the instant case with an agreement that discloses in plain language the nature of the marital rights being waived. The Court again quoted from ALI Principles § 7.04(3) ("the agreement states, in language easily understandable by an adult of ordinary intelligence with no legal training, [i] the nature of any rights or claims otherwise arising at dissolution that are altered by the contract, and the nature of that alteration").
- The Court noted that the high level of intelligence and education of the parties was a factor in favor of a finding of validity. The Court found, however, that there was no evidence showing that the wife possessed a practical understanding of marital rights and a meaningful understanding that the agreement may provide for a disposition of property and support rights that could be very different from that to which the parties would otherwise be entitled under Massachusetts law should the case be presented to a judge to decide.
- The Court noted that the rationale for imposing procedural and substantive requirements on the enforcement of prenuptial contracts results from the distinctive expectations that persons planning to marry usually have about one another, which expectations potentially disarm their capacity for self-protective judgment or disable their inclination to use their self-protective judgment.

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