BURNS & LEVINSON LLP

IF YOU WILL®: Short Takes on Estates, Taxes and Trusts

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"IF YOU WILL®: Short Takes on Estates, Taxes and Trusts" is a quarterly glance through an informal lens at selected news items, court decisions, legislative changes and/or important issues pertinent to estate planning. It is primarily intended to inform and entertain you. But if it causes you to pick up the phone and call us with a legal question, we won't complain; and if it inspires you to examine our more in-depth legal updates, you can view them in the "Publications" section of our website at burnslev.com/publications.

YOURS, MINE AND OURS

After being a guest at all those June weddings, maybe you are thinking about taking the plunge. Or if you are in a same-sex relationship, perhaps the United States Supreme Court's recent repeal of the Defense of Marriage Act has you thinking. If so, or even if you have already said "I do," you might want to consider some ways of dealing with the practical issues of a contractual union "until death do us part."

A marriage is truly more than just the joining of two people. It is a merger of their families, and each year we see more books and movies poking fun at the hilarious misadventures created by an unpredictable cast of parents, siblings, in-laws and other new relatives. While great fodder for storytelling, you never want those misadventures to become fuel for legal disputes over property, income or inheritance. Unfortunately, there seem to be even more case books full of such disputes than there are zany comedies on the subject. Perhaps that is why prenuptial and postnuptial agreements are becoming increasingly common.

This edition of "If You Will" provides a look at some of the considerations associated with prenuptial and postnuptial agreements and estate planning for first or subsequent marriages.

Prenuptial Agreements

A prenuptial agreement is a legal contract between you and your spouse-to-be that sets forth what will happen to your assets and sources of income after you die or divorce, and it sometimes addresses – in a "lifestyle clause" – how you and your spouse will make spending decisions or handle finances during your marriage.

Critics of such agreements say that they necessarily contemplate divorce. And certainly one cannot deny that romance and contract negotiations are an uneasy fit. But if called for, these contracts will end up clarifying what each partner wants and what each partner considers important, thereby insuring that both partners enter the marriage with a better understanding of the expectations of the other.

There are many reasons why you might want a prenuptial agreement. Among them:

- You are entering the marriage with a particular family asset (such as a family business or valuable vacation home) that you want to remain in your family even after death or divorce (an especially important consideration in Massachusetts, where gifts and inheritances are subject to being split by a judge in the property division between divorcing spouses);
- You have considerably greater assets or income than your prospective partner, and you don't want them divided by a judge in the event of divorce, or otherwise subject to a negotiated divorce settlement;
- You have assets or income you want preserved for children you brought into the marriage;
- You want to clarify your spouse's inheritance rights in the event of your death as more or less than the amount available to the spouse by the laws of your state;
- You want to clearly define and agree upon what constitutes separate or marital property; or
- You have concerns about the spending habits or lifestyle of your intended spouse and would like to insure that they live within a reasonable financial framework.

Generally speaking, prenuptial agreements, like other contracts, must demonstrate that they were entered into without any fraud or duress. Thus, each spouse must disclose all income, assets and debts in accord with the advice of their respective counsel. Ultimately, a court may determine whether the agreement is fair and reasonable, so negotiations should be undertaken in keeping with that need. And even if not required by state law (and some states do require it), it is highly advisable to have both sides represented by counsel to avoid claims of coercion or over-reaching.

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Postnuptial Agreements

In some states, a couple can enter into a binding agreement regarding property and income division, as well as lifestyle during the marriage, even after getting married. For instance, the Massachusetts Supreme Judicial Court (SJC) – in *Ansin v. Cravin-Ansin* – has ruled that a post-marital agreement can be enforced if it was "fair and reasonable" at the time of execution.

In order to determine whether an agreement is fair and reasonable, said the SJC, a judge must consider the entire context in which the agreement was reached, including whether both sides were represented by counsel. But unlike prenuptial agreements, the spouse seeking to enforce a postnuptial agreement has the burden of proving that there was no fraud or coercion in obtaining it. Experienced domestic relations counsel can help meet this burden. But if an agreement is contemplated, it is wiser to complete it prior to marriage if one can.

Estate Planning Considerations for Spouses Who Have Been Previously Married

A marriage merger is a bit more complicated when prior children, ex-spouses and related obligations are involved. That is why second and subsequent marriages require special planning with regard to finances and distribution of assets and income after death or divorce.

For example, a remarrying spouse should consider:

- Whether to protect assets brought into a subsequent marriage from a claim of the spouse in the event of a death or divorce;
- Whether to insure that designated property passes to designated children from one of the marriages, and whether step-children will be included;
- Whether to create a trust that will provide an income stream to a surviving spouse in the event of death, and will distribute the principal of the trust to designated descendants after both spouses are deceased;
- Whether to devise a comprehensive plan with regard to assets, income and spending during the course of and after the marriage.

There are many nuanced considerations involved in planning, such as whether to consider a waiver of the legal obligation of spousal support in a state that permits it. This kind of consideration can be very important in marriages between older spouses who could incur long-term nursing home care obligations that will significantly impact community or marital property.

As a re-marrying spouse, you should also consider:

- Providing definitions of separate property you want to protect from spousal or third party claims;
- Redoing any existing wills, revocable trusts or other estate planning documents as part of the overall scheme you may have formed in the course of creating a pre- or postnuptial agreement;
- Designating with careful thought the beneficiaries under your life insurance, retirement plans and other contracts that may not be governed by a will; and
- Addressing how to treat property you will receive by gift or inheritance during the marriage.

Marriage and Wills, Trusts, and Inheritance

If you do not or cannot complete a pre- or postnuptial agreement, the rules regarding inheritance and wills are both complicated and vary extremely from state to state. Every state prescribes a share to be inherited by a spouse where there is no will (an "intestate share"). Most states also allow a spouse to "waive" a will where he or she is disinherited and instead take a statutory share of the estate (often quite different than the intestate share). There is very little uniformity between the states on these rules, so if in doubt, consult an attorney. In many states, in lieu of a prenuptial (but not a post-nuptial) agreement, a spouse may place assets in an irrevocable trust prior to marriage to avoid the effect of the will waiver statute.

As you can see, if you are thinking about a marital merger, there is obviously a lot to consider. The attorneys in Burns & Levinson's Private Client Group can provide you with a strategy and a plan that will help you sleep at night.

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Who Needs Estate Planning and When?

For many people, the value of an estate plan will far exceed its cost due to tax savings. Furthermore, estate planning is not just for individuals who have a net worth in excess of state or federal exemptions (currently set at $1 million and $5.25 million respectively, but subject to change). The following people can greatly benefit from estate planning with experienced legal counsel

- Individuals or couples who have dependents or beneficiaries with special needs;
- Adoptive parents who need to make special provisions for inheritance that differ from state law provisions that apply to those without a legally enforceable plan;
- Other non-traditional families, such as those of unmarried couples or domestic partners;
- Married persons who have previous spouses or children from a prior marriage;
- Those who have special charitable goals; and
- Those who have ownership shares in a closely held business that could suffer grave disruption from an inheritance battle or significant death taxes on their estates (such people can benefit from a well-structured agreement providing for life insurance on key owners in amounts adequate to fund the purchase of a decedent's shares, according to valuations set in advance by agreement).

NOTE: *This newsletter is not intended to constitute legal advice, which always must be given based on the facts of a particular case. If you have any questions, do not hesitate to call us for additional information.*

For more information, please contact your Burns & Levinson attorney. To learn more about our Trusts & Estates practice, visit www.burnslev.com/our-practices/trusts-estates.

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