

Yours, mine and never ours: The trouble with some prenuptial agreements

By Thomas J. Barbar

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A recent reading of the case summaries in *Lawyers Weekly* drew my attention. The case, *Lambrou v. Lambrou*, Essex Probate and Family Court docket no. ES-10D-3114-DR, was cited on May 23, 2011. It is a prenuptial case decided by the Essex Probate and Family Court.

Granted, it is not an SJC or an appellate court case, and is in fact a prenuptial case consisting of a partial judgment. But, nevertheless, the case drew my attention because it addressed the issue of a prenuptial agreement which indicated that the parties would have no marital assets.

The Essex Probate and Family Court ruled in this case that "the agreement was invalid as a matter of law, as it was not fair and reasonable at the time of its execution for the party contesting the agreement." (Memorandum of Decision, May 18, 2011, at p.4) The court pointed out that "the agreement made no provisions for *either* party in the event of divorce." (Memorandum of Decision, May 18, 2011, at p.3)

In addressing marital assets further, the court ruled, "the document makes no provision, either in whole or in part, for any income or assets acquired by the parties during the marriage, either individually or jointly, directly, indirectly or equitably." (Memorandum of Decision, May 18, 2011, at p.4)

In its ruling, the court cited MGL c. 231A and the cases of *Krapf v. Krapf*, 439 Mass App. Ct. 97 (2003), *Tompkins v. Tompkins*, 65 Mass. App. Ct. 487 (2006), and *Broome v. Broome*, 40 Mass App. Ct. 148 (1996). (Memorandum of Decision, May 18, 2011, at p.2)

The court also pointed out that, "the determination of whether a prenuptial agreement is valid is governed by the ... principles as set forth in *DeMatteo v. DeMatteo*, 436 Mass. 18, 26 (2002) (quoting *Rosenberg v. Lipnick*, 377 Mass. 666, 672 (1977))." (Memorandum of Decision, May 18, 2011, at p.2)

The main reason *Lambrou* drew my attention was that, in my experience of working on prenuptial agreements, I am more often the attorney representing the potential spouse, who is sometimes referred to as the "lesser monied spouse," the "LMS," the one who has lesser assets, income and means at the time of the upcoming nuptials. I am most frequently the attorney who receives the draft prenuptial agreement from the attorney for the "more monied spouse," the "MMS."

Oftentimes, these draft agreements indicate *inter alia* that the parties will have no marital assets. These are what I refer to as the "mine, yours, but never ours" agreements. When this occurs, I often find myself wondering, and even expressing to the attorney for the MMS and to my client (the LMS) why the MMS is getting married instead of getting a roommate. This may appear to

be an odd statement, given that the parties may have planned a wedding to take place within the next month, for example, with all the trappings of a bridal magazine wedding.

However, the statement signifies that the notion of "never ours" is not realistic. In fact, the roommate statement signifies that this notion is not novel at all, and it has, in fact, been addressed in this case and other more recent prenuptial agreement cases since *DeMatteo* and *Lipnick*.

For example, in *Eyster v. Pechenik*, 71 Mass. App. Ct. 273 (2008), the court, in finding that the parties' prenuptial agreement was invalid, found that while the agreement did address gifts and inheritance that the other party might receive during his/her lifetime, there was no provision for assets acquired during the marriage.

In *Ansin v. Craven-Ansin*, 457 Mass. 283 (2010) the SJC ruled not only that the postnuptial agreement was not against public policy, but also that the agreement was enforceable. One may look at *Ansin* as a case notably addressing a postnuptial agreement, but also as a case which addresses a postnuptial agreement which was modified over time, an agreement which further addressed assets as the parties' marriage continued.

When drafting and negotiating prenuptial agreements, we need to be mindful that not only will the parties possibly have title to real estate in both of their names, but also there will most likely be a joint checking account, automobiles and even furniture that the parties obtain over the course of their marriage.

While it is certainly appropriate for the new agreement to address premarital assets such as retirement funds, real estate, bank accounts and inheritance, it is not appropriate for a prenuptial agreement to indicate that there will not be marital assets at all.

In the last several months, I have found myself providing the *Lambrou* case to opposing counsel in response to his/her position that the parties will have no marital assets after their marriage. The result has been that the opposing party cannot argue with the concise ruling set out so clearly by the Essex Probate and Family Court in *Lambrou*, as it is a consistent ruling based on other Massachusetts prenuptial cases and Massachusetts law.

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