



Case by Case

A PERIODIC NEWSLETTER

Spring 2005

FOR RICHER OR POORER: UNTIL PRENUP DO US PART by Judith Ellenthal

Should you add a prenuptial agreement to the wedding vows? Prenuptial agreements do not just provide benefits for wealthy people. Others who may benefit include people who have received or anticipate an inheritance, people with children from a prior marriage, those whose parents set up savings accounts or stock portfolios for them as children, or who work in a family-owned business. The list also includes people who are giving up spousal support to remarry, those who want to exclude assets acquired after marriage, people with retirement funds and retirement concerns, and ones who already have had an emotionally and financially draining divorce. A prenuptial agreement does not have to address every possible issue; it can be tailored to address what people feel is important to them.

An agreement *can* be drafted to meet a couple's unique needs, but it must also be enforceable. Certain provisions in a prenuptial agreement would not be enforceable, such as those in violation of public policy. A court could review and modify any provision that affects the care, custody, and visitation of a child. A court is not bound by a prenuptial agreement until it has reviewed it and found it enforceable. If the court does not find the agreement enforceable, the court can issue orders which are not consistent with the agreement. The court may find that if the agreement were enforced, it would create an economic injustice to one of the parties.

The Connecticut Premarital Agreement Act (Connecticut General Statutes §§ 46b-36a through -36j) applies to all prenuptial agreements entered into after October 1, 1995. Disputes regarding prenuptial agreements entered

into prior to October 1, 1995 are guided by the application of common law principles. The Act prescribes the form of an agreement, and the potential content of an agreement. It



also establishes the effect a marriage has on a premarital agreement, and provides rules for the amendment or revocation of a premarital agreement after marriage.

The most common events in life that are addressed in a prenuptial agreement are death and divorce. Death is often the easier one of the two to address. For example, if the marriage is a second marriage for one or both parties, and one party has children from a prior marriage, that party often wants to make sure that his or her children will inherit all of the property owned by him or her. Since spouses have certain automatic rights of inheritance in Connecticut, providing for the children often requires that the new spouse waive either partially or entirely the right to inherit. Depending on the age of the parties, a life insurance policy naming the new spouse as the beneficiary could be obtained so as to protect the new spouse.

The second most common event that would impact a division of the assets and spousal support is a divorce. What may be fair for a division of assets or spousal support for a short-term marriage could be an unfair allocation for a long-term marriage. One way to deal with the different scenarios is to address them in the agreement as levels or

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stages. If the parties are married for only a short time, for example three to five years, then that would require a different allocation of the assets or spousal support than if they were married six to ten years. There could also be additional levels to address longer term marriages.

A prenuptial agreement gives people the opportunity to discuss in advance how they would want their assets to be divided should there be a divorce or death and to address the possibility of alimony. The hope is that by addressing these issues in advance, a costly divorce, both emotionally and financially, can be avoided. That hope is reason enough to consider a prenuptial agreement. ☺

NEW MEDICAID PENALTY RULES????

President Bush's 2006 budget includes projected savings from tightening up the Medicaid transfer of asset penalty rules. Instead of the penalty period beginning when the gift was made, the proposed rule would start the penalty when the applicant ran out of money and applied for Medicaid. The House approved the change but the Senate voted it down. A conference committee will have to resolve the impasse.

DO I REALLY NEED A LAWYER FOR THIS?

by Edward F. Nemchek and Katherine T. Blakeslee

The question is often raised as to whether a lawyer is actually needed for a Connecticut real estate transaction. The simple answer is: When either selling, purchasing or refinancing one's home, which is usually a person's single largest asset, *not* engaging an attorney to represent you can prove extremely costly in terms of both dollars and inconvenience. In many states, attorneys do not participate in real estate transactions which are mainly handled by title companies. Connecticut is different from other states because in Connecticut, the attorneys are actually agents of the title companies and perform a dual role in the transaction.

In addition to several administrative functions usually delegated to a law firm's professional staff, such as arranging for closings, preparing a financial statement of the transaction, gathering information on taxes and other adjustments, and ordering releases of mortgages and liens, lawyers in Connecticut perform several valuable functions.

Lawyers provide advice on the terms, meaning and items included in the brokerage contract or listing agreement. Lawyers also play a valuable role during preliminary negotiations and at the contract stage. While price is often foremost in the minds of the parties, there are several issues such as terms of payment, mortgage contingency clauses, status of fixtures or personal property, and liquidated damages which both the buyer and seller need to grasp

before signing a contract. For example: Many sellers still believe that a seller can keep the deposit if a buyer walks away from a transaction after all contingencies are met. In at least one recent case, a judge found that the seller was *not* entitled to the deposit. A lawyer can review this type of situation with the client before it becomes an issue.

During the course of a transaction, it might be revealed that an underground oil storage tank had been removed. A lawyer can review the appropriate documentation to ensure that the removal and cleanup were done properly and in accordance with applicable laws. If this type of issue is not handled properly, a purchaser may inherit a potentially costly problem.

In most Connecticut real estate transactions, a purchaser's lawyer will assist the client in the financing aspects of the transaction. Although the interest rate and term of the loan are important considerations in financing, points, commitment conditions, service charges, prepayment penalties and a host of other factors are worthy of a lawyer's consideration and advice.

One of the lawyer's most important roles is determining the status of title. Even if a title insurance policy is to be issued, it is critical that any limitations in the title be determined and explained. If a title problem is discovered, the attorney can initiate and review the appropriate action necessary to alleviate the problem. Lawyers are responsible

for drafting and reviewing the necessary instruments of conveyance, including in many cases, the lender's documents.

The lawyer's attendance at the closing stage is critical in order to bring proper finality to the transaction. In many instances, a lawyer's work on a particular transaction continues for months after the transaction has closed, tracking appropriate releases and ensuring the proper recording of documents.

It is becoming more and more common for some lenders to close on refinances or home equity lines of credit without

borrowers using a lawyer. There have been many borrowers who have subsequently discovered that they did not fully understand all of the terms of the loan agreement such as prepayment penalties, annual fees and adjustable rates.

With so many dollars at stake, particularly where Fairfield County real estate is concerned, it is often necessary to hire several professionals for a real estate transaction such as brokers, home inspectors, surveyors, septic, well, radon, pest and oil tank inspectors. The real estate attorney is usually the best professional investment one can make in a real estate transaction. ☺

ADVANCE DIRECTIVES

When you are incapable of making important health care decisions for yourself, helpful tools called "lifetime planning" or "advance directives" can avoid a situation where your wishes may not be carried out because of your inability to communicate with your physicians. The recent Schiavo case underscores the importance of Living Wills and other properly executed Advance Directives. Contact our Estate Department to discuss some of the methods you can plan right now to manage your affairs when you might not be able to make decisions regarding your property, your medical treatment, even your life.

HOW WILL FREDDIE AND FANNIE AFFECT THE HOUSING MARKET?

by Sherwood R. Spelke

Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corp. (Freddie Mac), the two companies chartered by Congress to promote housing but owned by private shareholders, buy mortgages from banks and other lending institutions. They are the two dominant entities in the secondary residential mortgage market. By buying mortgages from lending institutions, Freddie Mac and Fannie Mae pump more dollars into the housing market.

Before these companies were created, the home mortgage industry was characterized by regional variations in interest rates and lending criteria that made it difficult for some consumers to obtain loans. Today, the two companies are mandated to buy a specified share of mortgages from low income, moderate income, and central city home buyers.

The issue of how much financial backing Fannie Mae and Freddie Mac should continue to have from the federal government is once again being raised. In the wake of accounting scandals at the two government-sponsored companies, the Bush administration is pushing for

legislation that would create tough new regulations, including the power to force the companies into receivership if they cannot meet their obligations. Also, in a further effort to distance the government from the companies, the White House has ceased making appointments of directors to both Boards of Directors.

The purpose of the new regulations is to discourage investors from assuming that the federal government would bail out Fannie or Freddie if they ran into financial trouble. Currently, the assumption that the companies are backed by the full faith and credit of the government is shared by many investors, allowing the companies to borrow at interest rates only slightly higher than those paid by the U. S. Treasury. Any steps that undermine the government's "implied guarantee" of the two mortgage companies' debts would cause investors to lose confidence, causing interest rates to rise and the housing market to cool dramatically. It is in the interest of the home buyer for Congress to pass legislation that would end the uncertainty that has been plaguing Freddie Mac and Fannie Mae since the scandals erupted two years ago. ☺

PERSONAL NOTES

Richard S. Fisher presented a program on "Best Ways to Finance the Cost of Long-Term Care" at Greenwich Adult Education on April 11, 2005. As Co-chair of the Incapacity Committee of CBA Estates & Probate Section, Dick is working with the General Assembly on legislation to allow an individual to choose who shall have custody of his/her body after death. Dick has also been named by State Senator Edith Prague to a Living Will Study Group to recommend revisions in the Connecticut advance directive (living will) laws. Dick has been invited to join the Professional Advisors Council of the Fairfield County Community Foundation which is being formed to promote the Foundation among advisors.

Ronald E. Kowalski, II has been elected Vice-Chairman of the Easton Police Commission, and was the First Place finisher for the Police Team in the Easton 5K Race for

D.A.R.E. In January, Ron moderated a "Forum on Easton's Future" held at the Easton Public Library, and in February, served as a Special Master conducting pretrial conferences in real estate tax appeals for the Stamford Superior Court.

Michael J. Cacace was recently elected President of the Italian Center of Stamford. Michael has been named by Westchester Magazine as one of the top lawyers in the region for real estate (see insert). He will be teaching seminars in Trumbull and Hartford in July entitled: "Zoning and Land Use in Connecticut."

Cacace, Tusch & Santagata welcomes three new Associates to the firm. **Meredith Denecke**, a graduate of Pace University School of Law in 2004, has been with the firm since November 2004. Her practice includes zoning, planning, land use, and family law.

Jill Alward has been a Litigation Associate with the firm since March 2005. Her practice includes real estate transactions, personal injury law, contract litigation, employment law, land use litigation, non-profit organizations and tax appeals. **Keenan McMahon** recently joined the firm and practices in the area of family law. Keenan is a 2004 graduate of Quinnipiac University School of Law.

Meredith Denecke participated as a Judge in the 26th Annual Connecticut High School Mock Trial competition which took place on March 11, 2005 at the Stamford Superior Court.

Sherwood R. Spelke will be addressing the 2005 class of new real estate brokers at Prudential Connecticut Realty in Stamford. He will be speaking on the Real Estate Attorney's Role in Closings as it Interfaces with the Broker.

CACACE, TUSCH & SANTAGATA is a full service general practice law firm dedicated to providing its clients with quality legal work. The firm occupies the second and third floors of the office building located at 777 Summer Street, Stamford, Connecticut, and has an office at 124 West Putnam Avenue, Greenwich, Connecticut. Our attorneys' areas of practice include:

ZONING AND LAND USE PLANNING ❖ REAL ESTATE TRANSACTIONS ❖ CIVIL LITIGATION
ADMINISTRATIVE HEARINGS AND APPEALS ❖ VALUATION OF PROPERTY ❖ FAMILY LAW ❖ LANDLORD/TENANT LAW
ESTATE PLANNING AND PROBATE ❖ ELDER LAW ❖ BUSINESS AND CORPORATE LAW ❖ CRIMINAL LAW

Case by Case is intended to provide a periodic discussion of developments and issues of interest to our clients and friends. If readers have questions concerning the matters discussed herein, they should direct them to Edward F. Nemchek, the attorney responsible for the newsletter's content at: CACACE, TUSCH & SANTAGATA by telephone at (203) 327-2000 or by e-mail at ENEMCHEK@LAWCTS.COM.

N.B. The information contained in this newsletter is informational and not intended to be legal advice and may not be reproduced in any form without consent. Requests for consent should be directed to Paul T. Tusch, Esq., Cacace, Tusch & Santagata, P.O. Box 15859, 777 Summer Street, Stamford, Connecticut 06901-0859.



Attorneys at Law

777 Summer Street
P.O. Box 15859
Stamford, Connecticut 06901-0859
E-mail CTS@LAWCTS.COM

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