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INTERSECTION OF FAMILY AND PROBATE LAW
HAMPDEN COUNTY ESTATE PLANNING COUNCIL

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I. Mass General Laws 208 § 34

II. Massachusetts Child Support Guidelines @
<http://www.mass.gov/courts/childsupport/guidelines>

III. Prenuptial Agreements

- a. Separate counsel;
- b. Waiver of rights;
- c. Provisions upon divorce and/or death;
- d. Requirements for disclosure;
- e. "Second look";
- f. Standard of review;
- g. State law application;
- h. Estate Planning considerations
 - *Impact on a client's estate planning;*
 - *Enforceability of prenuptial agreements at death.*
- i. Principal cases;
 - *Osborne vs. Osborne, 384 Mass. 591;*
 - *Austin vs. Austin, 445 Mass. 601;*
 - *Biliouris vs. Biliouris, 67 Mass.App.Ct. 149;*
 - *Rostanzo v. Rostanzo, 73 Mass. App. Ct. 588*

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IV. Postnuptial Agreements

- a. Aspects that differ from prenuptial agreements;
- b. State law application;
- c. Principal case
 - Ansin vs. Craven-Ansin, 457 Mass. 283 (2010);
- d. Estate planning considerations.

V. Distribution of Inheritances and Family Gifts as Marital Assets

- a. Timing;
- b. Integration into fabric of marriage;
- c. Anticipated inheritance, Vaughn affidavits; and
- d. American Law Institute suggested formula.
- e. Principal case
 - Williams v. Massa, 431 Mass. 619 (2000).

VI. Trusts

- a. Revocable, irrevocable; and
- b. Terms, pattern of access.
- c. Principal cases
 - D.L. v. G.L., 61 Mass.App.Ct. 488 (2004);
 - Darden v. Darden, Barnstable Probate Court, Docket # BA09D0158DR.

VII. Business Interests

- a. Valuation; and
- b. Pass-through income;
- c. Principal cases
 - J.S. v. C.C., 454 Mass. 652 (2009);
 - Bernier v. Bernier, 449 Mass 774 (2007).

VIII. Alimony and Retirement

- a. Principal Cases
 - Greenberg vs. Greenberg, 68 Mass.App.Ct. 344 (2007);
 - Pierce vs. Pierce, 455 Mass. 286 (2009)

M.G.L. 208 § 34

1. Length of marriage.
2. Conduct of the parties during the marriage.
3. Ages of the parties.
4. Health of the parties.
5. Station in life of the parties.
6. Amount and sources of parties' income. Refer to Financial Statements of parties.
7. Educational and vocational skills of the parties.
8. Employment and employability of the parties.
9. Estates of the respective parties and the marital estate. Refer to Financial Statements of parties
10. Liabilities and needs of the respective parties (include health insurance information and provider of same).
11. Opportunities of the respective parties for future acquisition of capital assets and income.
12. Present and future needs of the dependent children of the marriage.
13. Contributions of the respective parties in the acquisition, preservation or appreciation in value of their respective estates.
14. Contribution of each party as a homemaker, parent and contributor to the family unit.

I. INCOME DEFINITION

A. Sources of Income

For purposes of these guidelines, income is defined as gross income from whatever source regardless of whether that income is recognized by the Internal Revenue Code or reported to the Internal Revenue Service or state Department of Revenue or other taxing authority. Those sources include, but are not limited to, the following:

- 1) (a) salaries, wages, overtime and tips,
(b) income from self-employment;
- 2) commissions;
- 3) severance pay;
- 4) royalties;
- 5) bonuses;
- 6) interest and dividends;
- 7) income derived from businesses/partnerships;
- 8) social security excluding any benefit due to a child's own disability¹;
- 9) veterans' benefits;
- 10) military pay, allowances and allotments;
- 11) insurance benefits, including those received for disability and personal injury, but excluding reimbursements for property losses;
- 12) workers' compensation;
- 13) unemployment compensation;
- 14) pensions;
- 15) annuities;
- 16) distributions and income from trusts;
- 17) capital gains in real and personal property transactions to the extent that they represent a regular source of income;
- 18) spousal support received from a person not a party to this order;
- 19) contractual agreements;
- 20) perquisites or in-kind compensation to the extent that they represent a regular source of income;
- 21) unearned income of children, in the Court's discretion;
- 22) income from life insurance or endowment contracts;
- 23) income from interest in an estate, either directly or through a trust;
- 24) lottery or gambling winnings received either in a lump sum or in the form of an annuity;
- 25) prizes or awards;
- 26) net rental income;
- 27) funds received from earned income credit; and
- 28) any other form of income or compensation not specifically itemized above.

B. Overtime and Secondary Jobs

If the Court disregards income, in whole or in part, from overtime or a secondary job, due consideration must first be given to certain factors including but not limited to the history of the income, the expectation that the income will continue to be available, the economic needs of the parties and the children, the impact of the overtime on the parenting plan, and whether the extra work is a requirement of the job. If, after a child support order is entered, a payor or recipient obtains a secondary job or begins to work overtime, neither of which was worked prior to the entry of the order, there shall be a presumption that the secondary job or overtime income should not be considered in a future support order.

C. Self-Employment or Other Income

Income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely-held corporation, is defined as gross receipts minus ordinary and necessary expenses required to produce income. In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine the appropriate level of gross income available to the parent to satisfy a child support obligation. In many cases this amount will differ from a determination of business income for tax purposes.

Expense reimbursements, in-kind payments or benefits received by a parent, personal use of business property, payment of personal expenses by a business in the course of employment, self-employment, or operation of a business may be included as income if such payments are significant and reduce personal living expenses.

American Law Institute suggested formula for separate property:

- (a) For each year of marriage after the fifth year, four percent of the value of all separate property held by the spouses at the time of their marriage is treated at dissolution as the spouses' separate property. In marriages of 30 years or more, all separate property held by the spouses at the time of their marriage is treated at dissolution as marital property.
- (b) In marriages of five or more years' duration during which a spouse acquires separate property, four percent of the value of that separate property is treated at dissolution as marital property for each "augmented year" applicable to the property.
 - a. The augmented years applicable to any item of separate property acquired during the marriage equal:
 - i. The number of years from the fifth year after the property's acquisition to commencement of the dissolution action, plus:
 - ii. Half the number of years between the fifth year of the marriage and the year of the property's acquisition.
 - b. This subsection does not apply to property acquired less than three years before commencement of the dissolution action.

Criteria for Post Nuptial Agreements

- (1) each party must have had an opportunity to obtain separate legal counsel of his/her own choosing;
- (2) the marital agreement must have been signed freely and voluntarily without any fraud or coercion;
- (3) the marital agreement must contain a full disclosure of all assets with their approximate market value, a statement of each party's approximate annual income and equally as important, disclosure of any significant future acquisitions or changes in income which are reasonably anticipated;
- (4) the marital agreement must also contain a clear and explicit waiver of the right to a judicial determination of marital rights and asset distribution in the event that a divorce does take place at some point in the future;
- (5) the marital agreement must be evaluated to determine if the terms were fair and reasonable at the time of the execution of the agreement and are still fair and reasonable at the time of the divorce.

A judge may consider:

- (1) the difference in the outcome under the marital agreement from the outcome under current law;
- (2) whether the purpose was to benefit the interests of third parties such as children from a prior relationship;
- (3) the impact of the agreement on the children of the parties;
- (4) the length of the marriage;
- (5) the motives of the parties;
- (6) the bargaining positions of the parties;
- (7) the circumstances which gave rise to the agreement;
- (8) the degree of pressure experienced by the spouse who is contesting enforcement of the marital agreement; and
- (9) other circumstances that the judge may want to consider.