Why Do You Need Vaughan's Affidavit?
And, If You Get One, So What?

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History and Overview.

In November 1990, Allan P. Vaughan filed a complaint in the Probate Court seeking a divorce from Elizabeth Vaughan, his wife of 21 years. They had no children. Each earned a modest income, but because of the generosity of Allan's family, the parties enjoyed a privileged lifestyle. Allan's grandmother made annual monetary gifts. His parents, Samuel and Joan Vaughan (parents), provided the parties with a home in Prides Crossing section of Beverly, MA at a nominal rent. And, in 1980, Allan's Parents sold the parties a parcel of land in Maine for $1 on which the parties built a vacation home.

Elizabeth wanted discovery about the parents' estates, so first she asked Allan to produce documents and answer interrogatories, which Allan refused. Elizabeth filed a motion to compel Allan to produce the information. While denying that motion, the Probate Court suggested the parties exchange information

regarding the nature and extent of their parents' respective estates - an idea rejected by Allan.

Next, Elizabeth served the Parents with deposition subpoenas duces tecum seeking documents regarding their estates. The Parents graciously advised that the value of Allan's vested interest in their assets was "zero." Wanting information on Allan's un-vested or expectancy of inheritance, Elizabeth pressed for the parents' depositions and for their documents.

The Parents filed a motion for protective order and to quash the subpoenas. After a hearing, the court denied the motion but spelled out a potential compromise. Instead of producing documents regarding their assets and estate planning, the parents could prepare and sign affidavits stating: (1) their approximate net worth (plus or minus $500,000); (2) a general description of their current estate plan, and (3) the date their estate plan was significantly amended.

The parents were not happy with that order. So, they sought relief in an appeal to the single justice of the Appeals Court. After a hearing, the Appeals Court denied the petition. The Parents then petitioned the single justice of the Supreme Judicial Court to invoke the SJC's supervisory power of all lower courts.

Elizabeth was not trying to include the parents' assets in the parties' marital estate; she wanted information about Allan's likelihood of acquiring capital assets,

a factor which must be considered by the probate court in making a division of marital property. G. L. chapter 208, §34. The Parents argued "[b]ecause these expectancies are not subject to equitable division ... they are also not discoverable." ***Vaughan v. Vaughan***, SJC Single Justice, No. 91-485, p. 3 (1991) (unpublished).[1]

The SJC Single Justice held: "Although it is true that Allan's expectancy interests are not subject to division, a [probate court] judge, nevertheless, might properly take them into account in determining what disposition to make of the property which is subject to division." ***Id.*** (Emphasis in original.)

The SJC Single Justice held the Probate Court judge carefully balanced, on the one hand, the parents' right to privacy and confidentiality in their assets and estate planning and, on the other hand, Elizabeth's right to discover her soon-to-be ex-husband's future likelihood of acquisition of capital assets.

At the end of the day, the Parents had the option of producing their documents or their affidavits. If they refused, they could face a complaint and a sentence to jail on civil contempt.

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[1] Because these are 1991 petitions and the opinions were not published, copies of relevant documents are no longer available from The Single Justice of either the Appeals Court or SJC. So, therefore, the authors have made them available on the Nissenbaum Law Offices web site, www.nissenbaumlaw.com, under "Vaughan Affidavit Documents."

Current Trends.

Since 1991, it is now standard practice in divorce cases for each party to seek information about the estate of their soon-to-be ex-in-laws, and to receive what has come to be known as a "Vaughan Affidavit."

Indeed, should a lawyer fail to make this request, that lawyer would be providing services at a standard below that of the average practitioner - think malpractice!

Divorce lawyers should routinely be asking their clients about: (1) contributions made by their respective parents and extended family; (2) the assets and liabilities of each party's parents and other ancestors; and (3) all trusts and wills which might name each party as a vested or contingent beneficiary. If your client's parents are thought by the other side to have assets, whether they made financial contributions to the marriage or not, and if those parents live in Massachusetts,[2] those parents should expect to have to disgorge the extent of their estate and the nature of their estate plan.

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[2]We know of no reported case in a non-Massachusetts jurisdiction which requires parents to disgorge such information in connection with a divorce pending in this commonwealth. In one of our cases, while in Connecticut trying to get this information from the husband's parents during their depositions, they refused to respond. On our motion to compel, the Connecticut trial court held that, on the one hand it would normally treat this as a Massachusetts deposition and use its law and rules to decide the question, which would result in an order requiring the parents to provide the information. But, on the other hand, Connecticut citizens had a right, under the Connecticut constitution, to privacy which, as a matter of Connecticut's "public" policy trumped our client's right to get the requested information.

Parties should encourage their parents to not waste their time or money filing motions to quash. Indeed, parties should encourage their parents, even if the parents live out of state, to file Vaughan affidavits. That request is consistent with each party's fiduciary obligations to each other.

Each party must use good faith and fair dealing to provide all information each knows about the extent of their respective parents' assets and liabilities. Your client may have to explain to his or her parents why the parents need to prepare and file a Vaughan Affidavit containing the information described above. Many parents have never shared this information with their children, and are shocked to learn they must now disclose this to both their child and his or her soon-to-be ex-spouse.

Counsel should routinely ask the other party to provide his or her parents' Vaughan affidavit. If the affidavit is not provided, then counsel should serve a subpoena duces tecum on those parents, requesting all documents regarding their assets, liabilities, estate planning, trusts and other documents in which the other party is named as a contingent or vested beneficiary.

Counsel should also consider asking for the same information from the other party's grandparents or earlier ancestors. Counsel does not want to overlook an interest in an old trust or assets being held in a generation skipping trust.

Typically, once the subpoena is served in Massachusetts on parents and grandparents, they consult with their own counsel. At that point they get the shocking news they have two alternatives: (1) provide a Vaughan Affidavit or (2) produce all those documents. Typically, they elect to provide the affidavit.

Even then, there can be work which counsel must do, such as review irrevocable trusts to see if the trustees have the power to transfer certain kind of trust assets to beneficiaries without waiting for termination of the trust. Counsel may have to depose the trustees to get a list of trust assets and, more importantly, to determine if the so-called independent trustee is truly independent or, as is so often happens, is under the control of the spouse.

If you uncover the latter circumstances, then you can persuasively argue those assets should be counted in the marital estate because the spouse - not the trustees - can decide when he or she will vest in that asset. Failing to seek this extra discovery could leave counsel on the wrong end of a malpractice claim. At the worst, you will find the trustee is independent, so that the assets won't be considered a part of the marital estate. But, the present or future income or future opportunity to receive assets will be factors in the equitable distribution.

The Non-Massachusetts View.

Massachusetts is unique in the scope of this discovery, which is grounded in the inclusive language of chapter 208, §34. Other states do not permit consideration of possible future acquisition of inherited assets. Indeed, most states consider inherited assets to be separate property which is assigned to the inheriting spouse.

Therefore, if you seek and obtain letters rogatory and a commission to take the parents' deposition in a foreign jurisdiction, you may be confronted with a motion quashing Vaughan-type discovery as being an unconstitutional invasion of privacy (see footnote 2, *supra*) - the argument made but not deemed sufficient by the SJC single justice in *Vaughan*.

So, unless those non-Massachusetts parents show up as witnesses at trial, your client will need to use other methods to discover his or her spouse's likelihood of inheritance.

Try serving the parents with a subpoena decus tecum if they come to the Bay State for a family gathering or to visit the grandchildren in Massachusetts.

Seek information about the parents' home(s) from various local assessors and have that property appraised. Even an appraisal based upon square footage and a view from the sidewalk is better than no appraisal.

Conclusion.

In Massachusetts, the Vaughan Affidavit is a reasonable compromise between each party's right to know about their spouse's likelihood of acquisition of future capital assets and their spouse's parents' right to keep their estate plan and personal records confidential. But, if the spouse's parents live outside Massachusetts, the law of the other jurisdiction may trump your client's right to obtain this information.

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