Long Awaited Guidance on Post Nuptial Agreements in Massachusetts:

A Dissection of *Ansin v. Craven Ansin*

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The Massachusetts Family Law bar has been waiting for the answer to whether or not Massachusetts will recognize a post nuptial agreement since 1991 when the SJC left "to another day" the question of whether martial agreements were valid in Massachusetts. *Fogg v. Fogg*, 409 Mass. 531, 532 (1991). Since then, some practitioners have shied away from clients seeking post nuptial or marital agreements out of fear of the unknown and the potential for a malpractice claim.

On July 10, 2010 the SJC upheld the Worcester Probate and Family Court's decision to enforce a marital agreement entered into by Kenneth Ansin and Cheryl Craven-Ansin after both parties petitioned the SJC for direct appellate review. See, *Ansin v. Craven-Ansin*, MA SJC 10-548, July 16, 2010. The decision provided some much needed practical guidance for practitioners while at the same time raising new questions which remain for another day.

The Ansins executed their marital agreement in July, 2004 after nineteen years of marriage. Mr. Ansin requested the marital agreement after the parties experienced a difficult patch in their marriage, mainly for the purpose of protecting his minority interest in family owned and operated real estate in Florida. At first Mrs. Craven-Ansin rejected Mr. Ansin's request and the parties separated for six weeks. However, they continued to talk and Mrs. Craven-Ansin eventually agreed to the marital agreement. Both parties were represented by independent counsel while the agreement was being negotiated. Both parties had the opportunity to and did make changes to the agreement before it was signed. Both parties had free access to the parties' long time financial consultant at RINET during the course of their negotiations. The parties disclosed their assets to each other, albeit the number used by Mr. Ansin for his interest in the Florida property was a mere "placeholder" – a number obtained by asking Mr. Ansin's uncle who managed the property for an approximate value of Mr. Ansin's interest. Although imperfect, this is how the Florida property had been valued for years by the parties and RINET so there was nothing new or fraudulent about their valuation method.

The final product contained recitations of their intent, awareness of their statutory rights, a waiver of those rights, awareness of each other's income and assets, a waiver of the right to make further inquiry into finances, and a statement of mutual satisfaction with the final agreement. The financial provisions included a waiver of the assets by Mrs. Craven-Ansin in exchange for $5 million plus 30% of the increased value in the assets (excluding the FL property) and the right to remain in the marital home for a year at Mr. Ansin's sole expense. After it was signed, the parties resumed working on strengthening their marriage including, among other things, traveling, and marathon training together.

The first bump in the road came a month later when Mr. Ansin told Mrs. Craven-Ansin something which led her to believe the marriage was over. Because of the spousal communication exclusion, Mrs. Craven-Ansin was never permitted to testify about what Mr. Ansin said – something the SJC determined to be harmless error if it was an error. Despite Mrs. Craven-Ansin's claim the marriage continued. The parties purchased, renovated and moved into a new home. Then, in June, 2005 Mr. Ansin

moved out at Mrs. Craven-Ansin's request. Finally, in November, 2006, Mr. Ansin filed for divorce and asked the court to enforce their marital agreement.

Mrs. Craven-Ansin did her best to get out of the marital agreement. She argued that, in general such agreements should be declared void as against public policy. She claimed that marital agreements "are 'innately coercive,' 'usually' arise when the marriage is already failing, and may 'encourage' divorce." While the SJC did not find any support for these claims, they made clear that a marital agreement "will always be reviewed by a judge to ensure that coercion or fraud played no part in its execution." *Ansin v. Craven-Ansin*, p. 3.

In determining that Massachusetts should join the majority of states which recognize and permit post-nuptial agreements, the SJC made clear that a number of items must be scrutinized by the trial court prior to enforcing such an agreement. "[A]t a minimum, the court needs to determine whether (1) each party has had an opportunity to obtain separate legal counsel of their own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce." *Id*. The SJC held that the party seeking enforcement of the agreement has the burden of proving these factors. *Id*. The court chose not to follow the lead of other states, some of whom chose to increase the burden of proof to a standard of clear and convincing evidence (See, for example, *Matter of Estate of Haber*, 104 Ariz. 79, 88 (1969)).

In a sense, the final factor for determining whether a post-nuptial agreement should be enforced brings us back to the old days of arguing for the enforcement of pre-marital agreements before *DeMatteo*. In *DeMatteo* we saw a shift in the scrutiny of a pre marital agreement from one of fair and reasonable at the time of execution with a second look to see if the agreement remained fair and reasonable at the time of enforcement, to a fair and conscionable standard at the time of enforcement. *DeMatteo v. DeMatteo*, 436 Mass. 18, 27 (2002). In setting the standard of fair and reasonable on execution and fair and reasonable on enforcement, the court rejected the standards proposed by Mr. Ansin.

Mr. Ansin argued the standard for enforcing pre nuptial agreements ought to apply to marital agreements. The problem with that idea is that a marital agreement is an entirely different animal than a pre marital agreement. If the parties to a pre nuptial agreement cannot agree on terms, either party is free to walk away and not get married. With a marital agreement, the parties are already married, the stakes are necessarily higher and, as a result, the parties owe each other statutory obligations born out of their marriage. As soon as a couple marries, they acquire rights under M.G.L. c. 208, §34 – rights that a couple negotiating a pre nuptial do not have – rights that they will have to be made aware of and specifically relinquish in their marital agreement if it is to be enforceable. In this sense, a marital agreement is more akin to a separation agreement. However, the court observed "parties to a marital agreement do not bargain as freely as separating spouses do … because a marital agreement is executed when the parties do not contemplate divorce and when they owe absolute fidelity to each other…" *Ansin v. Craven-Ansin*, p. 4 of 7.

Nevertheless, in evaluating whether a marital agreement is fair and reasonable at the time of divorce, the trial judge can satisfy the inquiry required by the SJC by examining the same factors

examined in evaluating a separation agreement. *Id*, p. 5 of 7. So, the trial judge may consider: "(1) the nature and substance of the objecting party's complaint; (2) the financial and property division provisions of the agreement as a whole; (3) the context in which the negotiations took place; (4) the complexity of the issues involved; (5) the background and knowledge of the parties; (6) the experience and ability of counsel; (7) the need for and availability of experts to assist the parties and counsel; and (8) the mandatory and, if the judge deems it appropriate, the discretionary factors set forth in G.L. c. 208, §34." *Dominick v. Dominick*, 18 Mass. App. Ct. 85, 92 (1984). The trial judge in Ansin did just that and found the marital agreement to be fair and reasonable.

In upholding the trial court, the SJC set forth some clear and specific guidelines which will help practitioners navigate their way through drafting enforceable marital agreements and in litigating poorly drafted agreements. They were even helpful enough to suggest that if there had been a material change in circumstances between the time a marital agreement is executed and the time one side seeks to enforce it, that might make a difference in enforceability. So, now we can sit back and wait to see what kinds of case-specific "material" changes come down the pike which might be considered material enough so that an otherwise fair agreement will not be enforced. And, we have to consider if it is possible to draft around such future contingencies much the way many of us attempt to do so in our separation agreements.