

Spring 2005

## Look Twice Before You Leap: Prenuptials

By Lisa M. Cukier  
and Nancy R. Van Tine

In 2002, the highest court in Massachusetts allowed a husband to use a prenuptial agreement to exit his marriage with the \$100 million he brought with him when he entered the marriage ten years before. The Court took a take-it-or-leave-it approach, stating that if one party does not like the terms of a proposed prenuptial, a party is free not to marry. However, on February 8, 2004, The Massachusetts Appeals Court decided in *Austin v. Austin* that a prenuptial agreement that waived the wife's right to receive alimony was invalid, and it awarded her alimony, even though the wife voluntarily and knowingly signed away her right to alimony.

If you are married and have a prenuptial agreement, or if you are contemplating marriage, how might this seeming contradiction in the law affect your ability to rely on the choices you make? Two partners at Burns & Levinson LLP, Lisa M. Cukier and Nancy R. Van Tine, offer their insights and experience to help reconcile the case law and explain your rights.

### What is a Prenuptial Agreement?

In Massachusetts, a prenuptial or "antenuptial" agreement can be used to spell out the rights, obligations, and protections of parties if they divorce or one party dies during the marriage. Attorney **Van Tine** advises, "a prenuptial agreement must be signed before the parties marry." She counsels, "to be enforceable, the prenuptial discussions must include full financial disclosure by each party of the nature and extent of each one's assets, and any waiver of rights to the other party's assets must be made voluntarily, knowingly, and intelligently after full disclosure of assets owned by

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the other." Attorney **Cukier** continues, "a premarital agreement is only enforceable if its terms are fair and reasonable when the parties execute it and if it is conscionable when a party seeks to enforce it. This means, even if the court determines that a prenuptial agreement was fair and reasonable when the parties signed it, the court will still take a second look to determine if circumstances have changed making it unconscionable when it is offered up for the divorce judge to consider." This was affirmed by the court's decision in *Austin v. Austin*.

### How do Prenuptial Agreements Protect Premarital Assets and Alimony Rights?

With a prenuptial agreement, the parties can shelter premarital real estate or personal assets from what becomes marital property, so that distribution of property in a divorce or at death will exclude the sheltered assets, reserving them for the original owner or that person's estate. Attorney **Van Tine** advises, "in a divorce, while courts will generally allow parties to leave a marriage with the premarital property division agreed to in the prenuptial, limitations on alimony are more closely scrutinized." "Alimony," Attorney **Van Tine** explains, "is different than pre-

marital property because it is a right that grows and accrues to the spouses through their combined efforts during their marriage." Attorney **Cukier** adds, "Alimony is a future right impacted by future circumstances that cannot be anticipated or calculated when the parties sign the prenuptial before their wedding day." Attorney **Van Tine** and Attorney **Cukier** advise their clients to make some provision for support in the prenuptial agreement, based on known and foreseeable circumstances, because an agreement that strips a less advantaged spouse of all alimony rights probably is less likely to be enforced the longer the marriage lasts.

### Why Consider A Prenuptial Agreement?

Attorney **Cukier** notes, "families today include children from prior marriages, adoptive and stepchildren, cross-generational marriages, and most recently, same-sex spouses and in-laws." Attorney **Van Tine** explains, "the reality of our culture is that many of us have segmented our lives in chapters which include wholly different sets of family members for whom we wish to support or preserve our wealth. In addition," says Attorney **Van Tine**, "some families maintain a tradition of preserving wealth within a particular family line. A prenuptial offers predictability and continuity of wealth." Attorney **Cukier** counsels, "a prenuptial agreement that shelters certain premarital assets from

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# Take Our Advice, But Not Necessarily Our Opinion!

By Howard J. Susser

## Patent Law Change May Obviate Need For Costly Opinions of Counsel in Many Cases

Article I of the US Constitution promotes patents as national incentives to innovation. For that incentive to work, patents must be respected, and businesses thus owe an *affirmative duty of due care* to avoid patent infringement. Congress gave teeth to that duty in the federal patent statute's provision that infringers found liable of willful infringement may be subject to triple damages and payment of the patent owner's attorney fees. The risk of willful infringement affects more and more owners of businesses who are often surprised to learn that issued US patents now lurk beyond electronics and pharmaceuticals and other traditional industries, having been expanded in recent years to cover software tools, research techniques, and all kinds of commercial business methods.

For many years, when one became aware of an issued patent, exercise of due care required obtaining a formal, and often costly, written opinion of patent counsel giving a green light to continued business despite the patent, assuming the opining counsel determined there was no infringement or that the patent was invalid or both. Then, even if later found liable for infringement, the infringer could avoid a willfulness finding by relying on the opinion to show *due care* beforehand (that is, even though the opinion ended up being wrong). A further cost to such reliance is that production of the opinion voluntarily waives the party's attorney-client privilege, and that waiver can extend to non-communicated documents residing, secretly perhaps, in the opining counsel's private files, and in some chilling cases, to the files of trial counsel, too.

Eschewing an opinion could be a dangerous risk. Until recently, where an infringer was shown to have had prior knowledge of a patent, but failed to obtain an opinion of counsel, or declined to produce the opinion it

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did get to preserve privilege, the jury would be instructed to draw an "adverse inference" that the opinion was or would have been unfavorable – a black mark with unsurprisingly adverse consequences for infringers in many cases.

The Court of Appeals for the Federal Circuit (CAFC) in DC was established in 1982 as the exclusive appeals court for patent cases to bring uniformity to the US patent laws, and stem the perceived widespread disregard of patent rights that was undermining the national innovation incentive.

Recently, in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, ten of the eleven judges of the CAFC decided in favor of eliminating entirely the adverse inference doctrine in patent cases, and with it, what was becoming a virtual requirement of a formal opinion of counsel in every case.

The CAFC decided that the adverse inference rule put too much pressure on the attorney-client privilege – recognized by the Supreme Court as one of the oldest privileges known in the law. The jury can no longer draw an adverse inference based on invocation of the attorney-client privilege to shield an opinion, or from an infringer's failure to obtain an opinion in the first place.

So, what does *Knorr-Bremse* mean for a business becoming aware of a patent? Though a formal opinion of counsel may no longer be an absolute necessity, one still must respect the patent with

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## What's New

### News

At the Boston Bar Association's Annual Law Day Dinner on May 24, 2005, Burns & Levinson LLP will be awarded with the BBA Youth Outreach Award for our continued work with Brighton High School.

Burns & Levinson has moved its Metro West office from Wellesley, MA to Waltham, MA off of Route 128/95.

**Lisa Cukier** has been named Partner in the Firm's Probate & Trust Litigation and Divorce & Family Law Groups.

**Alisa Hacker** has joined the Firm as an Associate in the Divorce & Family Law and Probate & Trust Litigation Groups.

Burns & Levinson was named a "Go-To Law Firm™" by client of the firm, Reebok International Ltd., in the practice area of litigation. The "Go-To Law Firms™" are printed in the Directory of In-House Law Departments at the Top 500 Companies, published by Corporate Counsel.

### Articles

**David Amidon's** article "Return of

the Prodigal Lawyer," was published in the March/April 2005 issue of the *Boston Bar Journal*.

**Lisa Cukier** and **Brian Bixby** were co-authors and seminar panelists for a new MCLE book called "Elder Law Litigation and Advocacy" on February 2, 2005.

### News Quotes

**Andrew Merken** was quoted in the *Boston Business Journal* in the article "Law Firms Tap Alumni to Stake Out Client Mind Share" on April 1, 2005.

**Brian Bixby** was quoted in "Case Spurs Rush on Living Wills" in the *Boston Herald* in the March 27, 2005.

**George Tobia** was mentioned in various publications for his involvement with the management and representation of the estate of late writer Hunter S. Thompson. Specifically, he was quoted in *The Boston Globe*, *The Chicago Tribune*, and in Associated Press stories both nationally and internationally.

### Recent Client Updates

"Flexibility in License Arrangements," *B&L Intellectual Property Update*, April 2005.

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# The “Dynasty Trust”

By Malcolm W. Starr

What is it? Is it for you?  
(Or forever is a long, long time.)

In the past few years, a number of states, including Rhode Island, have repealed or modified the Rule Against Perpetuities, an old English law adopted by all the states, which requires that trusts must terminate within 21 years after the death of some person living when the trust began. In effect, a non-charitable trust could only last 80 to 110 years. Now you may create a trust which will, if it is governed by the laws of a state which has repealed the Rule Against Perpetuities, last forever. Such trusts are being termed “Dynasty Trusts.” The question is: Would you want to create a Dynasty Trust?

There are definite tax advantages to trusts which pay income to a child for the child’s lifetime and then pass to the grandchildren. Known as “Generation-Skipping Trusts” (GSTs), they were formerly widely used to avoid imposition of estate taxes on the trust in the children’s estates. In 1986 Congress limited this kind of planning by imposing a separate “Generation-Skipping Transfer Tax” (GSTT) on GSTs, applying the highest marginal estate tax rate (currently 47%) against the trust assets. Congress at the same time provided a limited “safe harbor”. Currently up to \$1,500,000 may be elected as exempt from the GSTT. Therefore a Dynasty Trust funded with the exempt amount (and all the growth of such assets) may never be subject to estate tax or GSTT. An even greater advantage may be obtained if a “leveraged” asset, such as an insurance policy, is placed in a GSTT exempt Dynasty Trust.

Although there is discussion about possible permanent repeal of the estate tax and GSTT, many estate planners

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are advising clients with substantial estates to assume there will be a federal estate tax and potentially a GSTT levied on some portion of it.

Taxes aside, Dynasty Trusts may include a so-called “spendthrift provision.” This asset protection device may mean the inheritance the trust’s creators leave their children, grandchildren and later generations will not be subject to the claims of a descendant’s creditors in case of divorce, lawsuit or bankruptcy.

In sum, Dynasty Trusts present enormously attractive features.

So why wouldn’t you rush to insert a Dynasty Trust in your estate plan? For one thing, the selection of Trustees may not be to one’s liking. To establish jurisdiction in states such as Rhode Island, Delaware or South Dakota, the client is generally required to appoint an individual or corporation *in that state* as one of the Trustees, thus involving in the administration of the trust persons the client may never meet or only have minimal contact with before and after the trust is created. Further, in order that the trust have sufficient flexibility to carry out the creator’s wishes regardless of what unanticipated events happen in the future, the governing provisions are often extremely broad, investing a lot of power in the Trustee for a very long time. Provisions which might be drafted to check this power require more time and effort by the drafting attorney (and generate a larger fee) than a typical estate plan. For example, special consideration must be given to the selection of Trustees and their succession in future generations. Another issue is presented by the possibility that the family tree may grow faster than the trust estate, so that the benefit to the family is diluted over time and continuation of the trust will no longer be appropriate. The attorney and client must consider under what terms and conditions should the trust be terminated, and to whom should the balance be distributed. A trust lasting 100 years can

easily have more than 100 beneficiaries competing for distributions!

And while in some cases the Dynasty Trust may prove to be a textbook example of the power of long-term investing and compounding wealth – with some hard-to-beat legal advantages thrown in for good measure – it is also worth considering the possibility that the trust may become an “institution” over the long term, with inertia of its own – long after the trust creator is there to move things along in the intended direction.

While not forever, all states, including Massachusetts, allow private trusts to last for many decades. So whether you wish to explore creating a Dynasty Trust, a standard long-term trust, or other forms of trust – or just wish to assure your estate plan takes full advantage of the current law – please feel welcome to request a meeting with a member of Burns & Levinson’s Trust & Estates Group in Boston or Providence. ■■

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## Prenuptials

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unpredictable dissipation in divorce or on death is critical to give meaning to an estate plan that preserves wealth for and protects certain family members or future generations.” The attorneys agree that prenuptial agreements can be misperceived as forbearers of divorce, when in fact, prenuptial agreements play an integral role in multi-family commitment, financial predictability and stability. ■■

*The statements in quotations above, attributed to Attorney Cukier and Attorney Van Tine, paraphrase Austin v. Austin, 62 Mass. App. Ct. 719 (2004).*

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## What’s New

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“New Developments in the Massachusetts Wage Act,” *B&L Employment Solutions Update*, March 2005.

“Have you Posted your USERRA notice?” *B&L Employment Solutions Update*, March 2005.

Burns & Levinson LLP is a leading full-service law firm. For over 40 years we have served a diverse group of individuals and corporations in all industries. The firm operates with an entrepreneurial spirit, like many of our clients, and uses a multi-disciplinary approach to achieve our clients’ goals.

*Building relationships  
with and for our clients.*

Massachusetts • Rhode Island • District of Columbia

## Burns & Levinson Walks to the Hill for Legal Aid

Contributed by Victoria L. Walton, an Associate in the Firm's Business Litigation Group

On Tuesday, March 8, 2005, eleven Burns & Levinson attorneys joined approximately 400 attorneys in the 2005 Walk to the Hill for Legal Aid. The Walk to the Hill is a lobbying opportunity for private attorneys to personally speak with their legislators about the importance of funding for civil legal aid programs. Legal aid programs provide advice and representation to Massachusetts residents who cannot afford to pay for private attorneys. These individuals range from domestic violence victims to elderly victims of financial scams to families threatened with eviction, to name a few. Without these programs, legal aid clients often are unable to escape a cycle of violence or homelessness.

Under the current system in Massachusetts, eligibility for legal aid is set at 125% of the federal poverty line, which means that the income for a family of four cannot exceed \$453 per week. Even with such strict eligibility requirements, a majority of eligible clients are turned away by legal aid programs due to a lack of resources. This means that legal aid programs are faced with making potentially life-saving decisions, all based on the amount of resources, rather than the genuine needs of the

client. Burns & Levinson LLP is a long-standing contributor to legal aid programs through Greater Boston Legal Services' annual Lawyer's Fund Drive and Associates' Drive. This year marks Burns & Levinson's fourth year of Walking to the Hill. ■



From the left, clockwise: Michael MacClary, Elizabeth Brady, Michael Murphy, Lauren Kohl, David Rosenblatt, Diane Noël, Victoria Walton, Nancy Newark, Anne Pareti and Clifford Cohen.



From left to right: Robert P. Maloney of Prince, Lobel, Glovsky & Tye; Robert L. Kann of Bromberg & Sunstein; David P. Rosenblatt of Burns & Levinson LLP; Timothy C. Blank of Dechert; BBA President M. Ellen Carpenter; MLGBA Co-Chair John N. Affuso, Jr.; WBA President; Marianne C. LeBlanc; Joseph F. Ryan of Brown, Rudnick, Berlack Israels; and MBA President Kathleen M. O'Donnell.

## Focus

Focus is published three times a year by Burns & Levinson LLP for clients and friends of the firm. This newsletter provides general information and does not constitute legal advice.

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## Take Our Advice, But Not Necessarily Our Opinion! *continued from page 2*

due care, based on all the circumstances and the theme of whether a prudent person would have a sound reason to believe the patent was not infringed or was invalid. Factors such as whether the infringer copied aspects from the patent owner's commercial products, the closeness of the infringement case, and the infringer's litigation conduct and attempts to conceal misconduct will be considered.

Still, in many situations a formal

opinion is highly advisable. The determination of whether one infringes often does turn on legal issues that can be especially daunting to strangers to patent law's vagaries. Sometimes the majority of the expense involved in a formal opinion is due to the fact that determining infringement is so complex. More sophisticated companies, others suggest, can rely on in-house specialists or specially retained technical experts with patent experience.

The post-*Knorr-Bremse* cases will clarify what conduct constitutes due care in the absence of an opinion. What *Knorr-Bremse* clearly provides, however, is greater flexibility in responding to notice of a patent, which response, we suggest, still should begin with seeking the *advice* of patent counsel, regardless of whether such counsel's formal *opinion* will prove ultimately necessary. ■