



“GETTING YOUR HOUSE IN ORDER”
*Today’s Legal Issues That Will Have The Greatest
Impact on You and Your Family*

**A Special Report from the Law Office of
Eno Boulay Martin & Donahue, LLP
21 George Street
Lowell, MA 01852-2283
Phone: (978) 452-8902
Fax: (978) 453-2585
Web Site: www.ebmdattorneys.com**

2008



TABLE OF CONTENTS

INTRODUCTION..... 3

I. PROPERTY INSURANCE:

 AUTO AND HOME..... 4

II. FAMILY

 ELDER CARE/CHILD CARE: What about YOU?..... 6

 GETTING DIVORCED: Finances v. Custody..... 6

 POST NUPTIAL AGREEMENT: A Pre Divorce Strategy..... 7

III. ESTATE PLAN

 DYING WITHOUT A WILL: What Happens..... 8

 TRUSTS: Why do wealthy people have them? 9

IV. REAL ESTATE

 The Sanctity of the Purchase and Sales Agreement..... 9

 Indoor Air/Environmental Issues in the Home..... 10

V. ON THE JOB..... 11

 Covenants Not to Compete..... 12

INTRODUCTION

Recently we received a call from a client about an insurance question on his wife's car. And another client called about her house and caring for her elderly mother. A business client called about an employee matter. Such is the business of EBM&D, so we came up with an idea for our personal and business clients.

Rather than waiting for disaster to strike, we have prepared a program that gets your house in order so that critical information is assembled for you and your counsel to make judgments about your future.

In *Getting Your House In Order: Today's Legal Issues That Will Have The Greatest Impact On You And Your Family*, we have identified many of the common issues that we address for our clients and selected a sampling of them to possibly get you thinking about issues that you may be confronting. Our hope is that it inspires you to begin to plan ahead and avoid potential legal problems in the future.

Getting Your House In Order is a Legal Planner to get you taking the steps to get your life in order and to systematically and logically address the issues in your life. If this report inspires you, contact our office to learn more about the Legal Planner. For starters here is a general description of how our program works.

How it works:

STEP ONE

Fill out the information requested in the Legal Planner – **Do not try to do it all at once**, take some time to find documents like income tax returns, deeds, wills, or insurance policies and pull them all together. Any correspondence, notes, bank statements, or record that may be remotely relevant will be helpful.

STEP TWO

Once you have the information assembled and the Planner completed, call us to set up your consult. You will be congratulated for taking the necessary steps to assist us in getting you help for the issues that are confronting you and that may be causing you stress. During the consult, we will have reviewed the Planner and briefly discussed items going on in your life. You will have access to at least one attorney and a paralegal for two hours. We will charge you for one hour of our time \$250.00.

STEP THREE

EBM&D legal team will generate an assessment of legal issues that we believe you may need to address and to address them in a particular priority.

STEP FOUR

Execute the Plan. We will determine what issues you want to address and set a budget for addressing the issues outlined. For example, if it is to draft a will, file for a divorce, commence litigation to collect money owed to you, or review an employment agreement, negotiate or mediate a family dispute, or defend you in a litigation, or negotiate with a government agency like the IRS or the EPA, we will outline a Scope of Services, set you a budget and present an Engagement Letter.

For an EBM&D Legal Planner, we will discount our services by 25%.

STEP FIVE

Follow up meetings to address the status of your progress on the identified legal issues.

I. DEALING WITH INSURANCE ISSUES

Home, Business and Auto

Imagine “The Perfect Environmental Storm,” but it happens *in your house!*

Contractors hired to repair and replace a boiler in your cellar illegally remove asbestos from basement pipes, and in the process pipes break, flooding the basement with several feet of water, or when improperly removing an oil tank, cause a spill. Roofers improperly install a roof, causing mold and leaks in the upper floors of the house. The damages wipe out a finished basement...

Mold, oil spills, flooding, asbestos – thousands of dollars of damage...

Your adjuster shows up and challenges everything about the incident and the value of the damages you claim to have lost... they want documentation and they offer to “cut you a check” but you must sign a form, and the values don’t add up and the rebuilder brings in a local inspector...

Understand that in Massachusetts if you have insurance, the conduct of insurance companies is heavily regulated and they are required to abide by certain ground rules for evaluating your claim and ultimately settling the claim.

Negotiating with the insurance company can be daunting. If you have had a flood or property damage you are reeling from the activity and worried about getting business going again so the last thing you want to wrestle with is an insurance adjuster.

What levels the playing field are consumer protection statutes which generally require insurance companies to act reasonably in settling claims and to do so promptly? Obviously, delay would be near torturous if you are trying to get your repairs completed, but you may not want to act to hastily in settling up until all the details are properly addressed. Insurance companies cannot abuse the process and force you to settle a claim unreasonably.

Insurance companies cannot unfairly settle claims such as:

- They cannot misrepresent pertinent facts or insurance provisions relating to coverage
- Compel litigation recover amounts due under an insurance policy
- Failing to effect prompt and fair and equitable settlements
- Attempting to settle a claim for less than to what a reasonable man would have believed he was entitled to

The process is time consuming and heavily regulated so don't settle for less than you are entitled to. As we head towards flood season, you should review your policy as to what is exactly covered. Remember, a Policy is a contract and the parties each carry responsibilities with that contract, including responsibilities to disclose information and keep good records.

Auto

On a leased car, the cost of gap insurance is generally rolled into the lease payments. You don't actually buy a gap policy. Generally, the auto dealer buys a master policy from an insurance company to cover all the cars it leases and charges you for a "gap waiver." This means that if your leased car is totaled, you won't have to pay the dealer the gap amount. Check with the auto dealer when leasing your car.

If you have an auto loan rather than a lease, you may want to buy gap insurance to protect yourself from having to come up with the gap amount if your car is totaled before you've finished paying for it. Ask your insurance agent about gap insurance or search the Internet. Gap insurance may not be available in some states.

II. FAMILY:

ELDER CARE/CHILD CARE: What about YOU?

The Squeeze is on – child care and elder care – and you're in the middle. Whether we like it or not, we are care givers to someone... and that exact role is considerably ill defined by the family dynamic. Someone who always managed things may have died recently and the new family order changes what families manage.

With people moving and spread out geographically, you may find a sibling is closest to an aging parent and taking a rather aggressive route. You may find that someone who has not talked to your parents for twenty years showing up to lend a hand as death appears imminent. The family dynamics of who cares for the parent and how that is addressed in a will can be the most explosive family meeting you can have.

Some ideas if these situations happen to you:

1. Get help. If there is little or no communication, suggest a facilitator to help the process along to address the sensitive issues facing the family.
2. Communication is the key. While painful, talking about a parent's failing health and planning for the changes require diplomacy and openness.
3. Try to articulate a plan with tasks for everyone. Helping is better than not helping and sometime the slightest involvement will help a family find reasonable and peaceful solutions to financial and health care issues.

GETTING DIVORCED: Financial Issues & Custody

Child support guidelines are not meant to apply where the combined income of the parties exceeds \$135,000.00 or where the gross income of the non-custodial parent exceeds \$100,000.00. In cases where income exceeds these limits, the court should consider the award of support at the \$100,000.00 / \$135,000.00 level as a minimum presumptive level of support to be awarded. Additional amounts of child support may be awarded **at the Judge's discretion.**

So often people contact lawyers and want a quick answer to be put at ease, and this issue is not one of them. If someone is looking for more child support or alimony, the Court goes through a lengthy exercise to determine whether or not it is warranted. And in the end, the court has the discretion to make adjustments regardless of guidelines.

In a recent case, the court made an award of child support to allow the wife and children to meet their reasonable expenses and was consistent with the resources of the parties. The

decision addressed the fact that the non-custodial parent's income exceeded \$75,000, which at the time was the limit to which the guidelines were applicable.

The judge created another formula which did not go beyond the reasonable needs of the children. The Judge in that case attributed income to the child's mother. So even though the mother did not hold a job or rather worked less than she could – her earning *potential* was considered by the court in the adjustment.

There are also significant estate planning, tax, and parental rights issues that are considered by the courts in these types of matters that should be carefully reviewed.

POST NUPTIAL AGREEMENT: A Pre Divorce Strategy?

Postnuptial agreements on the rise nationally

Reni Gertner of **Lawyers USA** reports a new interest in postnuptial agreements among some high wage earners anticipating divorce or trying to clear things up mid stream in the marriage. Not a bad planning tool and sounds like a good precursor to estate planning, unless the real motivation is to work out a divorce sooner than later. According to a survey conducted by the American Academy of Matrimonial Lawyers, almost half of divorce lawyers have seen an increase in postnuptial agreements over the past five years.

The public policy of Massachusetts favors the settlement of disputes arising out of a divorce through equitable and enforceable separation agreements. Such agreements may be defined as contracts between spouses made during marriage which foresee dissolution of the marriage and attempt to settle the parties' financial affairs as well as, usually, questions regarding the support, custody, and visitation of any children of the marriage.

A marital agreement used as a separation agreement, called a postnuptial agreement, has been less than enthusiastically received by the Supreme Judicial Court. While postnuptial agreements are contracts between husband and wife, they are made while they are married and not necessarily in anticipation of an immediate divorce.

Since the bargaining position of the parties may be influenced, the courts are scrutinizing these agreements very carefully and if you have discussed, or are in the process of such a negotiation, a word to the wise may not be sufficient.

The most important consideration is what is the motivation for the postnuptial agreement? If for a less contentious divorce, then the courts will view it differently and it is more than likely more favorable if it assists the couple in working matters out amicably.

However, if used as a planning for potential peril, the court will be on the look out for motivation and potential fraud. Like any agreement it must be clear and concise and close the door on all issues considered. That is, leave little to question after the fact.

Don't give up your rights without something in return. It is not uncommon to ask for a end to alimony, a revision to an estate plan, or the disposition of the marital home.

Insist on full financial disclosure.

III. ESTATE PLANNING

Dying Without a Will: What Happens?

So you go to dinner with your aging uncle and he tells you he has a will and he is giving you his beach house. Weeks later he is in the nursing home and the bill is \$15,000 per month. They sell your uncle's beach house to pay the bills... he never had a will.

If you fail to plan your estate and die without a will, the laws of the Commonwealth of Massachusetts will create an estate plan for you. The entire system of "intestate" succession or "descent and distribution" is set forth by statute and is too complex for a detailed discussion here, but some surprising and frequently undesirable results can occur.

The law prescribes both the persons to whom your property will pass and the division of your estate among those persons. The distributions provided by law are inflexible and may not satisfy your desires as to distribution of your estate. In addition, the amount to be distributed to your children will require a cumbersome and costly legal guardianship if the children are minors at the time of your death.

If you die without a will and you are survived by your spouse and children, not all of your probate assets will pass to your surviving spouse. One-half of your probate assets will pass to your surviving spouse and the remaining half of your probate assets will pass to your children.

For the most part, a probate asset is any asset which is in your name alone at the date of your death. The problems of dying without a will are aggravated if a married couple owns a family business with fifty percent owned by each spouse as separate property. If one spouse dies without a will, the ownership interest of the deceased spouse will pass to the surviving spouse and minor children, and a legal guardianship will be required to manage the portion of the business interest that passes to the minor children. The surviving spouse will have the guardianship for the minor children as a "partner" in the family business. In accordance with the requirements of a guardianship, the surviving spouse may have to post a bond and make a detailed periodic accounting to a court for all business transactions.

If you die without a will and are survived by your spouse alone, leaving no children, not all of your estate will pass to your surviving spouse; part of your estate will pass to your parents. Again, such a division of your property may not accurately reflect your wishes.

If you die and are survived by your children only, leaving no surviving spouse, your entire estate will pass to your children. If they are minors, a guardianship will be necessary to manage their property.

TRUSTS: Why do wealthy people have them?

You have more than you think that needs protection... and putting things in trust may be advisable depending upon your circumstances.

A trustee is one to whom property is transferred for the benefit of someone else (the beneficiary).

Trusts allow for plenty of flexibility but also require the delegation to the trustee of some significant authority. A trust can be designed to produce almost any result desired by the client.

At EBM&D we have acted as fiduciaries and trusts for education for grandchildren and as executors of estates. Trustees that are given very broad and adaptable powers to provide flexibility for future events usually are able to address issues and ultimately are better served to adapt to the many things that happen in people's lives.

The trustee should be empowered to do what is best for the beneficiary, without being curbed by inappropriate restrictions and challenged by outsiders.

If a trust is a suitable tool as you develop your estate plan, you will need to exercise care in the selection of a trustee. The family member who comes to mind as a logical first choice may prefer not to deal with the issues outlined in the Trust instrument. If a corporate trustee appears appropriate, you should discuss the relationship with the representative of your bank's trust department.

Further, you should consider methods to change the trustees and set up successors in the event of death or inability to serve as a trustee.

IV. REAL ESTATE

The Sanctity of the Purchase & Sales Agreement

The Unplanned: "We put an offer in on that house and signed a P&S, but later the seller decided she wanted \$15,000 more so we never bought the house, we thought we had no rights..."

The EBM&D Legal Planner: The fact of the matter is that a signed Purchase Agreement is an agreement where specific performance can be ordered by a court of law. You can make

someone sell you the land, house, building whatever. It is a powerful agreement and should not be cavalierly entered into and should be reviewed by an attorney.

The Realtor says: “I will type up this form for you to sign and review, we will want to get it in quickly to tie the house up...”

What have you just signed? What is its legal significance?

There are offers to purchase, Purchase and Sales Agreements, and options to purchase in some commercial leases with options to buy. All of these come in forms that someone is bound to represent is “standard” and acceptable, but are you standard?

Each case is different and really requires some attention to the details. But realize that to purchase property it must be in writing and the details and deadlines precisely set forth. Any deposit funds may be in peril if dates are not met and deadlines passed without fulfilling the obligations outlined in the agreement.

Surprisingly even sophisticated business people get caught in the details that may not have been anticipated and are generally surprised by the fact that they are caught with some boilerplate language that they may not have fully understood.

The Environmental Hazard in Real Estate

Indoor Air

In our environmental practice, we deal with wetlands, air pollution, land use, and zoning issues. All these areas are heavily regulated by local boards and state regulations and law. But interestingly the most precious of commodities – the indoor air that we breathe – is not regulated, and you are on our own in this area and require diligence and maintenance.

As for mold, the ultimate source is moisture – a broken pipe, bathroom moisture that leaks into the floor or tiles, improper drainage – can be a source of mold. Mold is a living organism that is all around us and exists in all living things to some degree. However, heightened levels can be found due to improper ventilation or overwhelming moisture built up in the home. A large effort has gone on for thirty years to weatherize homes to save on energy costs. Installing double-paned storm windows, caulking, and insulation are all sound and prudent steps to tighten up the home to avoid heat loss in the winter. While this will assist you in heating bill payments, it has clearly been tied to increased exposure to indoor air pollutants. That same tightening reduces a home's natural infiltration by upwards to 30%. In the end, that means less fresh air.

With recent increases in energy costs and the construction of new additions to homes and insulation, beware of moisture sources that go unchecked.

Carbon Monoxide Alarms

New regulations require carbon monoxide alarms, so unlike other indoor air issues, carbon monoxide does require attention. This information for the Environmental Protection Agency's website you may find helpful:

Steps to Reduce Exposure to Carbon Monoxide

“It is most important to be sure combustion equipment is maintained and properly adjusted. Vehicular use should be carefully managed adjacent to buildings and in vocational programs. Additional ventilation can be used as a temporary measure when high levels of CO are expected for short periods of time.

- Keep gas appliances properly adjusted.
- Consider purchasing a vented space heater when replacing an unvented one.
- Use proper fuel in kerosene space heaters.
- Install and use an exhaust fan vented to outdoors over gas stoves.
- Open flues when fireplaces are in use.
- Choose properly sized wood stoves that are certified to meet EPA emission standards. Make certain that doors on all wood stoves fit tightly.
- Have a trained professional inspect, clean, and tune-up central heating system (furnaces, flues, and chimneys) annually. Repair any leaks promptly.
- Do not idle the car inside garage.

Measurement Methods

Some relatively high-cost infrared radiation adsorption and electrochemical instruments do exist. Moderately priced real-time measuring devices are also available. A passive monitor is currently under development.”

Source: www.epa.gov/iaq/co

V. ON THE JOB

What is your employment status; Self Employed; Line worker; Service Sector employment? Most people are employed at-will but you may have contract and rights in the work place that need to be discussed.

Progressive Discipline at work may be a Problem:

Consider the recent case of *Ortega v. Wakefield Thermal Solutions* where progressive discipline backfired on the employer. The company did not follow their own company's policy. Doesn't this create a right in a job to be terminated in a certain way and thereby your employee may not be at will at all?

The employee relied upon the progressive discipline and therein was able to be treated as if she had a contract.

Things to Watch For at Work:

1. Disclaimers: Language that disclaims a contract by repeatedly re-stating the at-will employment relationship exists
2. Notice: Are you on notice of changes in employment policies and manuals... when you make changes in a policy or manual, make sure all employees get it

The Tale of Two Covenants

Whether a small company or a new employee in the process of being hired, a “covenant not to compete” is a common employment agreement that needs to meet specific criteria to be upheld in court. Some recent cases in Massachusetts evaluated covenants, and there is a simple formula to make sure that the restrictions are not overly restrictive.

In one the court found that due to the nature of the sales work, the reasonableness of the scope of the restriction and the geographic area – the covenant was enforceable and the salesperson’s post employment activity was restricted. The court scolded that we cannot allow employees to shop around and jump ship for the next best deal especially when they carry with them confidential information and / or customer lists.

In another, the court found for unreasonable or unlawful restriction to its breadth and the lack of any geographic scope defined in the agreement for a financial analyst:

“The clause provided that the employee 'shall not perform any services, either as a consultant, employee, owner, investor, or otherwise, with or for any foreseeable business, product or service of the Company.' The scope of prohibited activities is extremely broad and vague, particularly given the comprehensive nature of services and products offered by firms such as Athena. Further it is unlimited in geographic scope. The function of the non-compete covenant as drafted appears intended to restrain ordinary competition. Thus, the clause is likely to be determined to be unenforceable.” See Suffolk Superior Court, *Edwards v. Athena Capital Advisors, Inc.* (Civil Action No. 07-2418-E) (Aug. 7, 2007).

VI. CONCLUSION

If you are interested, call our office for the Planner so that you can begin the process of **“Getting your House in Order.”**