

**COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT**

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FAR No.  
Appeals Court Nos. 2018-P-0871 & 2018-P-0872  
Consolidated Decisions

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**IN THE MATTER OF THE ESTATE OF DAVID E. STACY**

And

**DEBORAH A. STACY  
ELAINE KELLEY AND DAVID KELLEY**  
Plaintiffs — Appellants - Appellee in Cross Appeal  
**v.**  
**IANA A. STACY**  
Defendant — Appellee – Appellant in Cross Appeal

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On Appeal From A Judgment Of The Massachusetts Appeals Court

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**IANA A. STACY'S**  
Defendant — Appellee – Appellant in Cross Appeal  
**APPLICATION FOR FURTHER APPELLATE REVIEW**

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## TABLE OF CONTENTS

<b>I.</b>	<b>REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW .....</b>	<b>4</b>
<b>II.</b>	<b>STATEMENT OF PRIOR PROCEEDINGS.....</b>	<b>5</b>
<b>III.</b>	<b>STATEMENT OF FACTS.....</b>	<b>7</b>
<b>IV.</b>	<b>POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT .....</b>	<b>7</b>
<b>V.</b>	<b>STATEMENT OF REASONS FOR FURTHER APPELLATE REVIEW .....</b>	<b>8</b>
A.	Contrary to the Opinion of Appellate Court, the Massachusetts Statute Contained in the Language of Premarital Agreement Was Never Intended to be a Waiver of Spousal Rights to Separate Property .....	9
B.	Numbered Paragraph 4 Does Not Constitute A Waiver of Spousal Rights in the Event of Death .....	10
C.	Pisano v. Pisano.....	14
D.	The Probate Court has Plenary Authority to make Distributions of Estate Assets Pursuant to its Equity Jurisdiction.....	15
E.	Massachusetts Statute Supports Distribution of the Son's Disclaimed, Intestate Share to His Descendants, Not the Decedent's Will .....	16
F.	As a Result of the Reversal by the Appellate Court of the Spouse's Right to Separate Property, Other Decisions by the Probate Court, that are Also Dependent on the Outcome Were Erroneously Reversed.....	18

## TABLE OF AUTHORITIES

### Cases

Balles v. Babcock Power Inc., 476 Mass. 565, 571 (2017).....	12
Boland v. George May International Company, 81 Mass. App. 817 (2012) .....	13
DeCristofaro v. DeCristofaro, 24 Mass. App. Ct 231 (1987).....	4
Eyster v. Pechenik, 71 Mass. App. Ct. 773 (2008) .....	5
Eyster v. Pechenik, 71 Mass. App. Ct. 773, 783 (2008) .....	14
James B. Nutter & Co. v. Estate of Murphy, 478 Mass. 664 (2018) .....	13
Phelps v. Simons, 159 Mass. 415 (1893).....	11
Pisano v. Pisano, 87 Mass. App. Ct. 403 (2015).....	14
Southworth v. Edmands, 152 Mass. 203 (1890) .....	11, 12
Sullivan v. Burkin, 390 Mass. 864 (1984).....	4, 11, 12
Taverna v. Pizzi, 430 Mass. 882 (2000) .....	15

### Statutes

G.L. c. 190B, § 2-101 .....	16
G.L. c. 190B, § 2-801 .....	17
G.L. c. 190B, § 3-709 .....	6, 18
G.L. c. 190B, § 3-917 .....	16
G.L. c. 208, § 34 .....	9
G.L. c. 209, § 1 .....	7, 8, 9, 10, 14
G.L. c. 215, § 6 .....	15, 16

### Rules

Mass. R. App. P. 27.1 .....	3, 4
Mass. R. Civ. P. 12 .....	6

### Other Authorities

American Law Institute, <i>Principles of the Law of Family Dissolution: Analysis &amp; Recommendations</i> § 7.02 (2002) .....	4
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## **I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW**

Pursuant to Mass. R. App. P. 27.1, Appellee – Appellant in Cross Appeal, Iana A. Stacy, respectfully requests that the Court grant further appellate review of the Appellate Court’s opinions issued November 8, 2019. As grounds hereto, Iana A. Stacy [hereafter “Wife”], states that further appellate review is necessitated by substantial reasons affecting public interest and the interests of justice. Mass. R. App. P. 27.1(a). The Appellate Court’s erroneous reversal of the lower court’s decisions may profoundly alter the intestacy rights of all married persons to separate property of the decedent spouse, the distribution of intestate assets to descendants, and the authority of the probate court to distribute estate assets pursuant to its equity jurisdiction. In the area of property law, the retroactive invalidation of an established principle is to be undertaken with great caution. [Sullivan v. Burkin](#), 390 Mass. 864, 871 (1984) (citations omitted). The resolution of inconsistent and confusing language in a separation agreement has critical legal consequences. [DeCristofaro v. DeCristofaro](#), 24 Mass. App. Ct 231, 239 n. 10 (1987). The treatment of statutory language in a Premarital Agreement as a waiver of spousal rights is equally compelling, affecting all persons subject to the statute and new precedent. "Family contracts set aside otherwise applicable public policies while commercial agreements do not." *American Law Institute, Principles of the*

*Law of Family Dissolution: Analysis & Recommendations* § 7.02 comment (c) (2002) (*ALI Principles*). With respect to family contracts, "the law can reasonably require greater assurance that the parties understand and appreciate what they are doing ... and may require rules that limit the enforcement of private agreements that significantly infringe upon [those public policies]." It is not enough to know that marriage confers some undefined rights. A practical understanding of those rights is essential. [Eyster v. Pechenik](#), 71 Mass. App. Ct. 773, 783, 786 (2008).

## **II. STATEMENT OF PRIOR PROCEEDINGS**

Although the two cases were argued separately, they were consolidated by the Appellate Court due to overlapping facts and legal issues. The Wife, accepts the procedural history set forth by the Appellate Court with the exception of procedural omissions between July 23, 2015 and March 13, 2017. The following procedural background should be inserted on page 7 of the Appellate opinion, at the beginning of numbered paragraph 2. The date entered by the Appellate court (July 23, 2015) should be replaced with March 13, 2017. Contrary to the report provided, the following procedures occurred from July 23, 2015 to March 13, 2017 as follows: On July 23, 2015, the Plaintiff, Deborah Stacy, as Personal Representative of the Estate of David E. Stacy, filed a Complaint in Equity naming Iana Stacy as Defendant. The Complaint was subsequently amended.

On August 21, 2015, the Defendant filed a Motion to Dismiss the Complaint in Equity pursuant to Mass. R. Civ. P. 12 (b) (6) and an Affidavit in Support of said Motion.

On September 29, 2015, the Court allowed the Amended Motion to Dismiss and entered a Judgment of Dismissal, which provided that the Complaint was dismissed with prejudice.

On December 9, 2016, the Appellate Court originally issued a Memorandum and Order which provided that the Judgment of Dismissal was reversed, concluding that the “contract suggests that the reference to divorce did not exclude the applicability of the agreement to other events, such as death. To the extent that the personal representative wishes to argue the prenuptial language is ambiguous, she is free to make the argument and proffer extrinsic evidence on remand.”

On March 13, 2017, the Plaintiffs filed a Further Amended Complaint in Equity (hereinafter "the Further Amended Complaint"), which alleged the following counts: (I) Constructive Trust; (II) Conversion; (III) Unjust Enrichment; (IV) Violation of G. L. c. 190B, § 3-709; and (V) Declaratory Judgment. The Further Amended Complaint also named Elaine and David Kelley as additional Plaintiffs. Contrary to the findings of the 2016 Appellate Court, the amended complaint did not argue that the premarital agreement was ambiguous.

On July 21, 2017, the parties appeared before the probate court for a two-day trial. After trial, the judge deemed the premarital agreement null and void upon the decedent's death and concluded that it "shall have no applicability relative to the estate of David E. Stacy."

### **III. STATEMENT OF FACTS**

The questions set forth herein are mainly questions of law and first impression. The Applicant hereby accepts the Factual Background as presented by the Appellate Court<sup>1</sup>.

### **IV. POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT**

Whether the Appellate Court erred in reversing the findings of the probate court that found a premarital agreement, expected by the Wife and her deceased husband to be null and void upon the decedent's death. The Appellate Court interpreted a Massachusetts probate statute contained in the Agreement, as a waiver of married persons rights to the separate property of their spouse. This opinion is inconsistent with the legislative intent and long history of the statute in question, [G.L. c. 209, § 1](#), which mirrors the evolution of the rights of married women. Should this finding be allowed to become precedent, the future application of the statute would be unjust and have significant repercussions affecting all

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<sup>1</sup> Mass. R. App. P. 27.1(a)

married persons and therefore, public interest, particularly where they found no other provision in the premarital agreement that clearly and unmistakably waives a spouse's rights to estate assets at death<sup>2</sup>. Opinion p. 11.

Whether the Appellate Court erred in reversing the lower court's distribution of estate assets to the Spouse in opposition to the probate court's authority under equity jurisdiction. Slip Opinion p. 8. Due to these reversals, other claims dependent upon their outcome were also reinstated against the spouse.

Whether the Appellate Court erred in distributing a disclaimed, intestate share designated for the decedent's disinherited son, to devisees under the will.

Whether the Appellate Court erred in remanding the Kelleys' claims by failing to consider the determination by the Probate judge that the Kelleys testimony lacked credulity.

## **V. STATEMENT OF REASONS FOR FURTHER APPELLATE REVIEW**

The Appellate opinion sets forth an interpretation of Numbered paragraph 4 in the premarital agreement as a waiver of rights to separate property in the event of death. In contrast, language that is almost identical in words and format to paragraph 4, is contained in [G.L. c. 209, § 1](#), and the legislative history and intent of this statute is far different than the interpretation arrived at by the Court.

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<sup>2</sup> "We agree with the wife that no provision of the premarital agreement clearly and unmistakably waives one spouse's rights of intestacy."



**A. Contrary to the Opinion of Appellate Court, the Massachusetts Statute Contained in the Language of Premarital Agreement Was Never Intended to be a Waiver of Spousal Rights to Separate Property**

G.L. c. 209, § 1: Married Persons; Separate Property and Property Held as

Tenants by Entirety; Liability for Debts, states in pertinent part, that:

*The real and personal property of any person shall, upon marriage, remain the separate property of such person, and a married person may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if such person were sole...*

Compare the statute to the language in numbered paragraph 4 of the Premarital Agreement, (attached at Addendum B) titled “G.L. c. 208, § 34 Agreement” which states:

*4. After the marriage takes place, each of the parties shall separately retain all rights in his or her property owned at the time of the marriage, including appreciation attributable to such property that may occur during the marriage, with the same effect as if no marriage had been consummated between them. Each party shall have the absolute and unrestricted right to dispose of his or her separate property, free from any claim of the other based upon their marriage. (emphasis added)*

Based on the language of Numbered paragraph 4, the Appellate Court determined that although the Agreement does not contain an express waiver of rights in the event of death, paragraph 4, constitutes a permanent waiver of any claim by the spouse to separate property identified by the parties in the Agreement, as if they had not married. Slip Opinion P. 13-14. However, the legislative interpretation of the same statutory language was never intended to be a waiver of

either spouse's rights beyond the marriage, applies to ALL married persons in the Commonwealth, and contains no reference to death. The Premarital Agreement even adds the language "that may occur during the marriage", leaving open the opportunity for the spouse to claim the appreciation attributable to the separate property if the marriage is terminated by death. The Appellate opinion states that "nothing in the agreement suggests that the Wife's waiver terminated upon the death of her spouse", however, in light of the intended interpretation of the statutory language in question, nothing in the agreement suggests that the Wife's waiver applied in the event of death, either. The interpretation that the couple permanently waived their interests or that it applied after the marriage was implied by the Appellate Court. There is no express waiver of rights in G.L. c. 209, § 1, or Paragraph 4.

**B. Numbered Paragraph 4 Does Not Constitute A Waiver of Spousal Rights in the Event of Death**

A review of the evolution of the property rights of women, demonstrates the intention of the legislature and the error of the Appellate Court. The early common law recognized that real and personal property in the wife's possession upon marriage passed to the husband, and could be levied upon for his debts, or bequeathed by him to strangers, and he also took during coverture<sup>3</sup> a sole estate in

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<sup>3</sup> Coverture: the condition of being a married woman.

her lands which she could not alien unless he joined, or devise even with his assent. In 1890, by Pub.St. c. 147, § 1, the society and statute evolved and provided that “the real and personal property of a woman shall upon her marriage remain her separate property, ... as if she were sole, except that she shall not, without the written consent of her husband, destroy or impair his tenancy by the curtesy in her real estate.” Pub.St. c. 147, § 2. Southworth v. Edmands, 152 Mass. 203, 210 (1890). Phelps v. Simons, 159 Mass. 415, 419 (1893). The estates of dower and curtesy were subsequently abolished pursuant to 2008 Mass. Acts c. 521, § 6, effective March 31, 2012.

This Court held that “[i]n this Commonwealth a husband has an absolute right to dispose of any or all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share under the statute of distributions ... under his will, or by virtue of a waiver of his will. Therefore, under common law and subsequent statute, a spouse reserves a right to dispose of his or her separate property and in doing so, may preclude the other spouse from an interest in that property at death. Sullivan v. Burkin, 390 Mass. 864, 870 (1984).

The legislative history establishes that the language of the G.L. c. 209, § 1, applies to a spouse’s control of separate property during marriage only. For

example, the express references to the husband's rights in curtesy<sup>4</sup> and a wife's obligation in coverture contained in earlier versions of the statute and legislative history demonstrate the intent to allow the wife control of her property interests during marriage while ensuring distribution of her assets to the husband at her death. Southworth, at 210. Given the nearly identical language and arrangement of the statute and paragraph 4, the Court should interpret this provision in a manner consistent with the legislative intent, and conclude that Numbered paragraph 4, does not contain a waiver of spousal rights to separate property beyond the marriage.

To the extent that Numbered paragraph 4 is susceptible to more than one interpretation regarding a waiver, it is ambiguous. "Contractual language is ambiguous when it can support a reasonable difference of opinion as to the meanings of the words employed and the obligations undertaken ... To determine whether the language is ambiguous, we look both to the contested language and the text of the contract as a whole". [Balles v. Babcock Power Inc.](#), 476 Mass. 565, 571 (2017). (internal quotations and citations omitted). It is pertinent to note that the Appellate Court found the same Premarital Agreement to be "ambiguous" in 2016 (Statement of Prior Proceedings *supra*), but "unambiguous" in 2019.

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<sup>4</sup> Curtesy: the estate to which by common law a man is entitled, on the death of his wife.

As acknowledged by the Appellate Court, the Agreement as a whole contains no express waiver of spousal rights to intestacy<sup>5</sup>, and paragraph 4 relied upon by the Court, has a demonstrably different interpretation by the Massachusetts Legislature. Therefore, it is implausible that the agreement contains an “express waiver”<sup>6</sup> of rights to separate property in the event of death, and the language that the Court relied upon was either misapprehended, or ambiguous as to its application in the event of death. As the Wife argued below, if ambiguous, the Court, like the lower court, must then credit the testimony by the drafting attorneys and the surviving spouse that no waiver was discussed, contemplated, or negotiated by the attorneys representing the parties. Slip Opinion p. 13 fn. 13. “The unyielding rule of law in such cases is to give effect to the intention of the parties.” [Boland v. George May International Company](#), 81 Mass. App. 817, 825 (2012). “[W]e construe a contract as a whole, so as to give reasonable effect to each of its provisions.” [James B. Nutter & Co. v. Estate of Murphy](#), 478 Mass. 664, 669 (2018) (citations omitted). It is also pertinent to note, the paragraph in question makes no reference to death. The Agreement as a whole only mentions “death” twice in regard to the termination of health insurance and alimony. In contrast, it

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<sup>5</sup> Slip Opinion dated November 8, 2019, P. 11

<sup>6</sup> Id.

uses the term “divorce” twenty two times and “alimony” twelve. Premarital Agreement, p. 12, no. 10; and p. 13, no. 13.

### **C. Pisano v. Pisano**

The Court relies on [Pisano v. Pisano](#), 87 Mass. App. Ct. 403 (2015), which is easily distinguishable from the matter at hand, because alimony is not a statutory right like the waiver of property rights of a surviving spouse, which requires a “clear and unmistakable waiver”.<sup>7</sup> Slip Opinion p. 11, 13; [Eyster v. Pechenik](#), 71 Mass. App. Ct. 773, 783 (2008).

While the Pisano premarital agreement did not “contain a waiver of alimony per se”, the agreement included explicit language suggesting the intent of the parties to waive claims for alimony, which in turn, supported the court’s conclusion that the parties waived claims for alimony.<sup>8</sup> In contrast to the matter at hand, a similar provision in the Pisano Agreement, to the one set forth above, specifically added a waiver to the language of [G.L. c. 209, § 1](#), “each of the parties agrees and covenants that he or she will not challenge the granting of an administration upon the personal effects and the estates of the other party.” There are no comparable provisions in the Agreement at issue herein. Slip Opinion p. 11.

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<sup>7</sup> The Appellate Court agreed with the wife, “that no provision of the premarital agreement clearly and unmistakably waives one spouse’s rights of intestacy. Slip Opinion p. 11.

<sup>8</sup> For example, the Pisano premarital agreement stated “*in the absence of this agreement...* a court could provide for payment of alimony”. Id. 413 (original emphasis).

### **D. The Probate Court has Plenary Authority to make Distributions of Estate Assets Pursuant to its Equity Jurisdiction**

In addition to the Appellate Courts misinterpretation of statutory language in the premarital agreement, the Court also erroneously concluded that the probate court erred in making a distribution of estate assets under statute and its equity jurisdiction.<sup>9</sup> Opinion p. 21. However, the Supreme Judicial Court determined that, “[w]e need not ponder over the precise course of the judge’s authority...The judge clearly had the power, pursuant to the general equity jurisdiction conferred on the Probate Court Department by G.L. c. 215, § 6, if from no other source”. [Taverna v. Pizzi](#), 430 Mass. 882, 885 (2000) (re: probate judge’s authority to order retroactive child support payments). Pursuant to [G.L. c. 215, § 6](#), the Probate Courts have jurisdiction “of all cases and matters in which equitable relief is sought relative to: (i) the administration of the estates of deceased persons; ... (iv) cases involving in any way the estate of a deceased person...”. “If the court finds that partial distribution of the property of an estate, in process of settlement can, without detriment to such estate, be made to the persons entitled thereto, the court may, subject to the rights of creditors and after notice, order such partial distribution to be made.” [G.L. c. 190B, § 3-917](#). Appellee Brief, P. 28. Therefore,

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<sup>9</sup> “[i]t was error to give the wife the option to keep assets and take a deduction for their value from her portion of the estate. Under the code, it is the option of the personal representative to require the wife to return those items or to deduct those items from the wife’s intestate share. See G. L. c. 190B, § 3-709 (a).”

there was no error by the probate court and its decision with regard to the optional distribution of estate assets must be affirmed.

**E. Massachusetts Statute Supports Distribution of the Son's Disclaimed, Intestate Share to His Descendants, Not the Decedent's Will**

Pursuant to the Appellate Opinion, there is nothing in the statute that suggests that the way the decedent treated his descendants in his will alters the statutory calculation of a spouse's intestate share. Slip Opinion p. 20. However, the Opinion also states that the Decedent excluded his only son from his will and trust. Slip Opinion p. 2. [G.L. c. 190B, § 2-101](#)(b) states in pertinent part that, “(b) A decedent by will may expressly exclude or limit the right of an individual ... to succeed to property of the decedent passing by intestate succession. If that individual survives the decedent, the share of the decedent's intestate estate to which that individual would have succeeded passes as if that individual had disclaimed the intestate share. (emphasis added) The legislative comment for section (b) (Attached at Addendum C), explains the consequence of disinheritance: “the share of the decedent's intestate estate to which the disinherited individual ... would have succeeded passes as if that individual ... had disclaimed the intestate share. Thus, if the decedent's will provides that brother Hector is to receive \$50.00 and no more, Hector is entitled to the \$50.00 bequest ..., but the portion of the decedent's intestate estate to which Hector would have succeeded passes as if



Hector had disclaimed his intestate share. The consequence ... is governed by [G.L. c. 190B, § 2-801](#) (g), which provides that Hector's intestate share passes to Hector's descendants by representation.” Contrary to the Appellate decision, the intestate share of the disinherited son would pass to his descendants and not under the will. Should the child have no dependents, it would then pass to the Decedents next of kin, including the spouse, but not under the will.

**F. The Probate Court Found that the Kelley’s Testimony Lacked Credibility and Failed to Satisfy their Burden of Proof**

According to the Appellate Court, “it is unclear whether the judge declined to credit the Kelleys’ testimony...”. As a result, the Kelleys’ claim against the Wife was remanded for further findings. However, according to Probate Findings of Fact and Rationale, No. 2018-P- 872, “... The decedent's home was apparently in foreclosure, he was not working, ... [Elaine Kelley] even sold her jewelry... in order to help David keep the mortgage current.” “While these affidavits were credible, what became *not* credible at all were the assertions ... that Mrs. Kelley, at her age of 81, had to return to work because she exhausted her savings in paying the decedent's bills, while [decedent was] not selling some of the artwork, collectibles, or other items. The conclusion the court reaches is that the artwork, etc. was *not* in the home.” Probate Findings of Fact and Rationale, p. 12, no. 68. “Further, and relative to the numerous photographs of various assets which were

taken by the Kelleys ... these photographs are not probative of whether the assets were in the decedent's possession at the time of his death.” Probate Findings of Fact and Rationale, p. 19, iii., No. 2018-P- 872. The lack of credibility attributed to both the Kelleys’ testimony and pictorial evidence was sufficient to reject their claims against the Wife. This issue was settled at trial and should not be remanded.

**G. As a Result of the Reversal by the Appellate Court of the Spouse’s Right to Separate Property, Other Decisions by the Probate Court, that are Also Dependent on the Outcome Were Erroneously Reversed**

The Probate Court dismissed claims for Conversion, Unjust Enrichment, Constructive Trust, and a claim under [G.L. c. 190B, § 3-709](#), set forth by the personal representative against the Wife, because no provision of the Premarital Agreement applies at death. When the Appellate Court reversed this decision, it also expressly reinstated those claims, and disregarded the Spouse’s counterclaim for Breach of Fiduciary duty. Slip Opinion p. 22 & 24. However, as shown above, there is no common law or statute to support the waiver cited in the Appellate decision. Therefore, the Probate Court’s rejection of those claims must be affirmed, the Breach of Fiduciary Duty must be determined, and the Pigeon Trust assets must be calculated as part of the Wife’s intestate share.

For the foregoing reasons, Iana Stacy, the surviving spouse of the decedent respectfully urges the Supreme Judicial Court to allow this application for Further

Appellate Review and any other relief that is just and proper.

Respectfully Submitted,  
Iana A. Stacy  
By her attorneys,

/s/ Heidi A. Grinsell

/s/ Eugene R. Curry

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### **CERTIFICATION OF COMPLIANCE**

Pursuant to Mass. R.A.P. Rule 16(k), I, Heidi A. Grinsell, hereby certify that this brief complies with the rules of the court that pertain to the filing of an Application for further appellate review.

/s/ Heidi A. Grinsell

### **CERTIFICATE OF SERVICE**

I, Heidi Grinsell, hereby certify that on this 27th day of November, 2019, I caused to be served a true and accurate copy of the foregoing documents, upon the following counsel of record in hand to:

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ADDENDUM A

SLIP OPINION APPELLATE COURT

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18-P-871  
18-P-872

Appeals Court

IN THE MATTER OF THE ESTATE OF DAVID E. STACY.

DEBORAH A. STACY, personal representative,<sup>1</sup> & others<sup>2</sup> vs. IANA  
A. STACY.<sup>3</sup>

Nos. 18-P-871 & 18-P-872.

Barnstable. March 1, 2019. - November 8, 2019.

Present: Green, C.J., Neyman, & Henry, JJ.

Devise and Legacy, Intestacy, Personal property. Husband and Wife, Antenuptial agreement. Contract, Construction of contract, Antenuptial agreement. Trust, Distribution.

Petition for probate of a will filed in the Barnstable Division of the Probate and Family Court Department on February 26, 2014.

A petition to render an inventory and account, filed on April 7, 2016, was heard by Robert A. Scandurra, J., on a statement of agreed facts.

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<sup>1</sup> Of the estate of David E. Stacy.

<sup>2</sup> Elaine Kelley and David Kelley.

<sup>3</sup> Although the two cases were argued separately, because they have overlapping facts and legal issues, we have consolidated them for purposes of decision.

Complaint in equity filed in the Barnstable Division of the Probate and Family Court Department on July 23, 2015.

The case was heard by Robert A. Scandurra, J.

R. Alan Fryer for the plaintiffs.

Heidi A. Grinsell for the defendant.

HENRY, J. At the heart of these cases is the proper distribution of the assets of the decedent, David E. Stacy, in light of a premarital agreement executed by him and his wife, Iana Stacy (Iana or wife),<sup>4</sup> and the fact that his will did not provide for his wife and expressly excluded his son from a prior marriage. These issues have arisen in the context of two separate cases: (1) a petition brought by the wife against the personal representative of the estate to render an inventory and account (in 18-P-871, which we shall call the inventory action), and (2) an equity action commenced by the personal representative to recover items belonging to the estate that are in the wife's possession (in 18-P-872, which we shall call the estate asset recovery action). Because our de novo review of the premarital agreement differs from that of the Probate and Family Court judge, which in turn impacts the outcome of the decedent's estate plan, we vacate and modify portions of the

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<sup>4</sup> We use the first names of those who have a common surname.

judgment and decree and remand for further proceedings as necessary.

Factual background. The decedent died on February 12, 2014. He was survived by his wife of approximately six years, Iana, and his minor son from a prior marriage. He was also survived by his biological mother, Elaine Kelley (Elaine); his sister, Deborah Stacy (Deborah); and his adoptive mother, Joan Bentinck-Smith, who adopted the decedent in 1995 when he was thirty-four years old.

1. The decedent's last will and the David E. Stacy Revocable Trust of 2001. The decedent executed his last will on August 19, 2003 (decedent's will), and nominated Deborah as the executor of his will. Subsequently, she was appointed personal representative of his estate. The decedent's will bequeathed all of his property to the trustee of the David E. Stacy Revocable Trust of 2001 (2001 Trust). The decedent expressly omitted from his will his son, a former wife, and his adoptive mother, Bentinck-Smith.

As amended in 2003, the 2001 Trust named as sole beneficiary the decedent's biological mother, Elaine. The decedent also excluded from the 2001 Trust his son, former wife, and adoptive mother as beneficiaries. The 2001 Trust, as amended, appointed Deborah as trustee.



The wife is not named as a beneficiary in either the decedent's will or the 2001 Trust, which were both executed prior to their 2008 marriage.

2. The premarital agreement. The decedent and the wife entered into a premarital agreement on July 18, 2008. The parties dispute the interpretation of this agreement. However, it is undisputed that the premarital agreement enumerated the parties' separate property owned by each of them at the time of the marriage.<sup>5</sup> The decedent included in his list of assets something called "Pigeon Trust." Bentinck-Smith created the Pigeon Trust, an irrevocable life insurance trust, naming as "the beneficiaries" only one beneficiary: David E. Stacy, the decedent. Article VI of the Pigeon Trust, identifying the decedent as the beneficiary, did not expressly identify the decedent's estate as a beneficiary should he predecease the donor, although other provisions did identify the decedent's estate. The decedent's list of assets in the premarital agreement described the Pigeon Trust, (a) identifying himself as the beneficiary, (b) identifying the successor beneficiary as

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<sup>5</sup> "Separate property of a party" is defined in the premarital agreement in part as "all property owned by that party prior to the marriage in his or her name individually, in trust or otherwise, including but not limited to property owned or to become owned as a beneficiary of any trust, or in any form of ownership whatsoever with any other person (other than the other party)."

"\_\_\_\_," (c) stating the principal value of this asset as of July 14, 2008, and (d) noting there would be no distribution of trust principal until the death of the donor, who was his adoptive mother, Bentinck-Smith.<sup>6</sup>

As already stated, Bentinck-Smith survived the decedent. The surrender value of the life insurance policy held by the Pigeon Trust as of December 5, 2016, was \$1,648,879.45.

We reserve recitation of additional terms of the premarital agreement and the Pigeon Trust for discussion below.

Procedural background. The largest asset in dispute is the Pigeon Trust. Thus, before turning to the two lawsuits on appeal, we first address an earlier action that the personal representative filed concerning disposition of the Pigeon Trust.

1. Litigation regarding the Pigeon Trust. In May 2015, Deborah, as personal representative of the decedent's estate, filed a petition to terminate the Pigeon Trust early. Later, the trustees of the Pigeon Trust (Pigeon trustees) filed a petition for instructions as to whether the rightful beneficiary of the trust was the decedent's estate or the decedent's

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<sup>6</sup> The decedent's list of assets in the premarital agreement also included several real properties, the "2003 D.E.S. Support Trust (Irrevocable)," a \$990,990 judgment, jewelry worth \$186,000, a coin collection, other collections, tools and equipment, several specific bank accounts and investments, three automobiles, a boat, arts and antiques, loose gemstones, and a business, Stacy Imports, Inc.

descendant.<sup>7</sup> The court consolidated these two petitions. After mediation, Deborah, individually and in her dual capacities as personal representative of the decedent's estate and as trustee of the 2001 Trust; the Pigeon trustees; a guardian ad litem for Bentinck-Smith; and a guardian ad litem for the decedent's son eventually came to a "Non-Judicial Settlement Agreement" (settlement agreement). This settlement agreement essentially called for dividing the trust res in half, minus fees, and distributing one half to a trust for the son's benefit, and the other half to Deborah, as trustee of the 2001 Trust, the remainder beneficiary of the decedent's will.

The wife objected to only so much of the settlement agreement as called for distribution of Pigeon Trust principal to Deborah as trustee of the 2001 Trust, rather than to Deborah as personal representative of the decedent's estate. The judge approved the settlement agreement, reserving, with Deborah and the wife's agreement, the question whether the Pigeon Trust distribution to Deborah should be in her capacity as personal representative of the decedent's estate or in her capacity as

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<sup>7</sup> While the terms of the Pigeon Trust limited amendments to correction of scrivener's errors and prohibited amendment to the article designating a beneficiary, several amendments were executed over the next two decades changing the terms of the mandatory distribution article, including who would benefit from mandatory distribution.

trustee of the 2001 Trust. This question was to be resolved in the inventory action.

2. Estate asset recovery action. On July 23, 2015, Deborah, in her capacity as personal representative, filed an equity complaint alleging that the wife had taken from the marital home personal property belonging either to the estate or to Elaine and her husband, David Kelley (David). The amended complaint asserted claims against the wife for constructive trust, conversion, unjust enrichment, and violation of G. L. c. 190B, § 3-709.<sup>8</sup> The complaint also sought a declaratory judgment interpreting the premarital agreement as it related to the wife's interest in the estate's assets and the wife's obligations to return property, as well as the wife's liability for the value of any property taken and all damages caused to the estate. The amended complaint included the decedent's mother, Elaine, and her husband, David, as plaintiffs seeking to recover their property from the wife. The wife also filed a counterclaim asserting that the personal representative committed a breach of her fiduciary duty toward the wife.

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<sup>8</sup> General Laws c. 190B, § 3-709 (b), provides that "[w]ho ever injuriously intermeddles with any personal property of a deceased person, without being thereto authorized by law, shall be liable as a personal representative in his own wrong to the person aggrieved."

After a trial, the judge deemed the premarital agreement null and void upon the decedent's death and concluded that it "shall have no applicability relative to the estate of David E. Stacy." Additionally, the judge found that the wife possessed certain enumerated pieces of the decedent's personal property worth \$76,875 and additional property of unknown value, and credited the wife's denial that she possessed other items. Per the personal representative's request, the judge ordered that the wife return all of the decedent's property to the personal representative. However, sua sponte, the judge also ordered that if the wife did not return the property, the personal representative could deduct the value of assets in the wife's possession from the wife's share of the estate.

The judge further found that the personal representative's claims of conversion, unjust enrichment, and violation of G. L. c. 190B, § 3-709, and request for imposition of a constructive trust were based on the assertion that the premarital agreement applied in the event of death and took precedence over the otherwise applicable provisions of G. L. c. 190B, §§ 2-102, 2-301, 2-403 (a), and 2-404 (a). Given his conclusion that the premarital agreement was null and void, the judge concluded that those claims failed. Finally, the judge dismissed the wife's counterclaim, finding that the personal representative had not

breached her duty toward the wife. In this matter, all parties appealed.

3. Inventory action. On April 7, 2016, the wife brought a petition to order the personal representative of the estate to render an inventory and account. As noted above, consolidated with this petition was the issue of the capacity in which Deborah would receive the distribution of the Pigeon Trust settlement agreement proceeds: as personal representative of the decedent's estate or as trustee of the 2001 Trust.

Based on the parties' legal briefs and an agreed statement of facts, to which the Pigeon Trust and its multiple amendments were attached, the judge determined that the Pigeon Trust settlement agreement proceeds should be distributed to the decedent's estate. The judge also allowed the personal representative's account, with the judge's amendments, and concluded that the wife "as surviving spouse is entitled to the first \$100,000 plus one-half of the balance of the decedent's probate estate."<sup>9</sup> The judge further concluded that after the wife received her share, the remainder of the estate assets

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<sup>9</sup> See G. L. c. 190B, § 2-102 (4) ("the first \$100,000 plus 1/2 of any balance of the intestate estate, if 1 or more of the decedent's surviving descendants are not descendants of the surviving spouse").

would pour over into the 2001 Trust. In this matter, the wife and personal representative both appealed.

Discussion. In 2008, the Legislature overhauled the law governing the probate process by adopting nearly the entire Uniform Probate Code (code). See St. 2008, c. 521, §§ 9 and 44, as amended by St. 2011, c. 224, and made effective March 31, 2012; G. L. c. 190B. As relevant here, G. L. c. 190B, § 2-301 (a), of the code provides that where a surviving spouse married the testator after the testator executed a will, as occurred here, "the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate the spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who is born before the testator married the surviving spouse and who is not a child of the surviving spouse [nor a descendent of such child] . . . ." This right is subject to the terms of the premarital agreement. See generally Austin v. Austin, 445 Mass. 601, 603-604 (2005). We begin our discussion there.

1. The premarital agreement. The wife argues that, as in other contexts involving waivers of statutory rights, any waiver of her statutory right of intestate succession must be clear and unmistakable. See, e.g., Crocker v. Townsend Oil Co., 464 Mass. 1, 14 (2012) ("[an agreement] purporting to release all possible

existing claims . . . will be enforceable as to the statutorily provided rights and remedies conferred by the Wage Act only if such an agreement is stated in clear and unmistakable terms"); Warfield v. Beth Israel Deaconess Med. Ctr., Inc., 454 Mass. 390, 398 (2009) (same for G. L. c. 151B rights and remedies).

We agree with the wife that no provision of the premarital agreement clearly and unmistakably waives one spouse's rights of intestacy. That, however, does not end our inquiry.

The premarital agreement identified each party's separate property and expressly provided that after the marriage, that property was to remain the individual's property, was to be treated as if no marriage had occurred, and would not be subject to any claims arising from the marriage. It is well settled that through a premarital agreement, future spouses may relinquish claims to assets identified by each at the time of the marriage. See Rostanzo v. Rostanzo, 73 Mass. App. Ct. 588 (2009) (death). See also DeMatteo v. DeMatteo, 436 Mass. 18 (2002) (divorce).

Notwithstanding the express waiver of any interest in the decedent's separate property, the wife contends that the agreement applies only in the event of divorce, and not in the event of death. The wife points to numerous provisions in the premarital agreement that address divorce in support of her



argument.<sup>10</sup> "[W]e construe a contract as a whole, so as 'to give reasonable effect to each of its provisions.'" James B. Nutter & Co. v. Estate of Murphy, 478 Mass. 664, 669 (2018), quoting J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 795 (1986).

The premarital agreement contained provisions related to divorce,<sup>11</sup> but the entire agreement was not expressly limited to divorce. Numbered par. 4 contains broad language, providing that after the marriage, the parties shall retain all right and title to their separate properties as if the marriage had never taken place.<sup>12</sup> As previously stated, the Pigeon Trust and other assets were identified as the decedent's separate property.

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<sup>10</sup> The premarital agreement is titled "G. L. c. 208, § 34 AGREEMENT," which pertains to divorce, but the parties agree that it was mistitled.

<sup>11</sup> For example, numbered par. 1 provided in pertinent part:

"The parties intend at this time and by this instrument to make a final and complete settlement of all matters relating to the interest and obligations of each with respect to all future property matters, including but not limited to alimony, support, maintenance, property assignment, and the rights of the parties under G. L. c. 208, § 34, as amended, in the event of a divorce."

<sup>12</sup> Specifically, numbered par. 4 provides:

"After the marriage takes place, each of the parties shall separately retain all rights in his or her property owned at the time of the marriage, including appreciation attributable to such property that may occur during the marriage, with the same effect as if no marriage had been consummated between them. Each party shall have the absolute and unrestricted right to dispose of his or her

There is no ambiguity as to how the parties chose to define and treat their separate property upon the marriage.<sup>13</sup> As in Pisano v. Pisano, 87 Mass. App. Ct. 403, 412-413 (2015), "[w]e start with the observation, made clear from paragraph[] [4] of the premarital agreement, that each party sought to protect from the other his or her separate property, . . . and any appreciation in value of . . . that property. That the parties were to control all aspects of their separate property . . . is . . . manifest in paragraph [4], which allows the parties to control, use, and dispose of their separate property in the same manner as if the marriage had not taken place." In Pisano, we concluded that although the agreement at issue did not contain express language waiving alimony, the foregoing provision ensured that the wife's separate property was not available to the husband for any alimony claim. Id. at 414. Similarly, here, although the premarital agreement did not contain an express waiver of the wife's intestate share of the decedent's

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separate property, free from any claim of the other based upon their marriage."

<sup>13</sup> The wife points to extrinsic evidence from the attorneys involved in drafting the agreement to support her claim that application of the premarital agreement at death was not discussed. However, the wife does not expressly argue that the agreement is ambiguous; thus, her reliance on extrinsic evidence is misplaced. See Redstone v. O'Connor, 70 Mass. App. Ct. 493, 498 n.14 (2007). We do not consider the extrinsic evidence.

estate, she did agree that certain identified assets would remain the decedent's separate property "free from any claim . . . based on their marriage."<sup>14</sup>

Even if the possibility of divorce was the guiding force behind the premarital agreement, the parties, with the advice of counsel, chose to permanently waive any interest in one another's identified property throughout the marriage and afterwards without condition "as if no marriage had been consummated between them."<sup>15</sup> Moreover, the wife waived any future claim to the decedent's separate property "based upon their marriage." Nothing in the agreement suggests that the wife's waiver terminated upon the death of her spouse. To now

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<sup>14</sup> Numbered par. 4 is not the only provision of the premarital agreement that applies in a context other than divorce. Numbered par. 15 on page six of the agreement (there are two paragraphs labeled 15, one on page five and one on page six) sets forth waivers of one another's qualified joint and survivor annuities, qualified preretirement survivor annuities, and all retirement plans. The wife correctly concedes in her brief that par. 15 would apply even in the absence of divorce.

<sup>15</sup> By agreement, the wife did not, at any time during the marriage, gain any interest in the property identified in the premarital agreement as the husband's separate property. That intention is further demonstrated in the provisions directed at divorce, which repeated that the spouses' separate property would remain the property of each spouse to the exclusion of the other spouse and, depending on the length of the marriage, provided for progressive monetary payments to the wife. Any alimony obligation would terminate in any event upon the decedent's death. In no event contemplated by the agreement would the wife obtain a title interest to the decedent's separate property.

claim an intestate share in those assets through the decedent's estate is in contravention of the premarital agreement. Indeed, the wife asks us to insert language into the premarital agreement that provides that she and the decedent agreed to treat their separate property as if there had been no marriage unless one of them died. This we cannot do.

Based on the plain language of the premarital agreement, we hold that the wife waived any right to the Pigeon Trust and all of the other property identified in the premarital agreement as the decedent's separate property. In other words, the decedent's interest in the Pigeon Trust is treated upon the occasion of his death as though the parties were never married, to the effect that the wife can claim no entitlement to a share of that property from his estate through intestacy by virtue of her status as spouse. While this separate property is part of the decedent's estate, it cannot be used for purposes of calculating or receiving the wife's intestate share of the decedent's estate.

2. The Pigeon Trust settlement agreement proceeds. We look to the terms of the Pigeon Trust to determine the proper distribution of the Pigeon Trust settlement agreement proceeds. As originally drafted, the Pigeon Trust is not a model of clarity as to the distribution of trust assets in the event that the decedent predeceased the donor, Bentinck-Smith. Two things

are certain, however. First, the instrument provides that under no circumstances shall the trust property revert to the donor or her estate, in essence eliminating Bentinck-Smith as the intended contingent beneficiary.<sup>16</sup> Second, when the Pigeon Trust was created, the 2001 Trust did not exist, nor did any subsequent amendment of the Pigeon Trust purport to add the 2001 Trust as a beneficiary, contingent or otherwise. Thus, at no point was the 2001 Trust a contingent beneficiary of the Pigeon Trust.<sup>17</sup>

We agree with the judge that the decedent's estate was the contingent beneficiary in the event, as occurred, the decedent predeceased Bentinck-Smith. Read together, several provisions in the original trust instrument reflect Bentinck-Smith's intent to distribute the Pigeon Trust assets to the decedent's estate

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<sup>16</sup> No party argues that the gift to the decedent lapsed and the Pigeon Trust should be distributed to the donor. See Redstone, 70 Mass. App. Ct. at 494, 500-501. Bentinck-Smith's guardian, in any event, disclaimed any interest in the Pigeon Trust in the settlement agreement.

<sup>17</sup> The personal representative also contends that the 2001 Trust is the proper beneficiary because the decedent "could have been expected to place in[to] the 2001 . . . Trust any amounts distributed to him from the Pigeon Trust so as to minimize the exposure of his estate to estate tax liability." She cites no authority, however, for the proposition that we may speculate as to what the decedent might have done with the Pigeon Trust proceeds had he survived the donor. The argument is unavailing.

in the event that the decedent predeceased her.<sup>18</sup> See Redstone v. O'Connor, 70 Mass. App. Ct. 493, 499 (2007), quoting Harrison v. Marcus, 396 Mass. 424, 429 (1985) ("A trust should be construed 'to give effect to the intention of the settlor as ascertained from the language of the whole instrument considered in the light of the attendant circumstances'").

For example, under art. VIII § D of the Pigeon Trust, distribution of trust principal was mandatory after the death of the donor and

"[i]f the Trustee shall not have distributed all of the Trust Principal during the lifetime of the said Beneficiaries, then at the death of the first Beneficiary (living at the time of the execution of this Trust and at the time of my death) to die, the Trustee shall distribute all of the Trust Principal to the Beneficiaries or their estates, in equal shares, free of all Trust, and this Trust shall terminate."<sup>19</sup>

Additionally, had the trust principal fallen below \$50,000 after Bentinck-Smith's death and before mandatory distribution pursuant to § D, art. VIII § F permitted the trustees to

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<sup>18</sup> Because we rely on the original terms of the Pigeon Trust, we need not reach the personal representative's argument that the judge's conclusion is wrong because the parties had not agreed upon whether the trust amendments "were validly executed or remained in effect."

<sup>19</sup> We recognize that § D is problematic in that there was only one named beneficiary and yet this provision came into play only if there was a beneficiary living at the time of the donor's death. That incongruity does not detract from the donor's intent to benefit the beneficiary's estate.

terminate the trust and "distribute the Trust Principal to the Beneficiaries (or their estates, if any such Beneficiary has predeceased me), in equal shares." The trust instrument also contemplated that both the donor and David might die before the Pigeon Trust assets were fully distributed, and named David's estate as the contingent beneficiary in that eventuality. Significantly, the trust instrument disavowed a reversionary interest to the donor or her estate.<sup>20</sup>

Accordingly, we conclude that there were sufficient indicia of the donor's intent to determine that the decedent's estate was the intended contingent beneficiary of the Pigeon Trust should the decedent predecease Bentinck-Smith. Therefore, the

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<sup>20</sup> We recognize that in Redstone, 70 Mass. App. Ct. at 499-500, we noted that our courts have rejected arguments that a donor's intention to make a gift to an identified individual based upon one contingency was an adequate basis upon which to conclude that the donor would have made the same gift to the same individual where a different, unanticipated contingency came to pass. Here, however, the donor explicitly prohibited any gift from reverting to the donor.

Pigeon Trust settlement agreement proceeds should be distributed to Deborah, as the estate's personal representative.<sup>21,22</sup>

3. Wife's intestate share. As a result of the adoption of the code, a will executed prior to marriage is no longer void in this Commonwealth.<sup>23</sup> Because the wife is not a beneficiary of the will, the next question is the size of the wife's intestate share. Here, where the decedent was survived by his wife, his son (who is not a descendant of the surviving spouse), and his adoptive mother, we agree with the judge that the wife's

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<sup>21</sup> The personal representative also argues that pursuant to Bongaards v. Millen, 440 Mass. 10, 17 (2003), because the Pigeon Trust was created by a third person, the trust assets should not be considered part of the decedent's probate estate. Although Bongaards is distinguishable in several respects, for our purposes it suffices to say that Bongaards addresses a trust with a schedule of contingent beneficiaries that did not designate the decedent's estate as the contingent beneficiary. Id. at 12. Accordingly, we discern no merit in the personal representative's argument.

<sup>22</sup> Given our conclusion, we need not address the personal representative's argument that the judge made an erroneous finding as to whether the 2001 Trust was funded prior to the decedent's death.

<sup>23</sup> Pursuant to the former G. L. c. 191, § 9, see St. 1892, c. 118, repealed by St. 2008, c. 521, § 10, marriage acted as a revocation of a will made prior to the marriage, "unless it appears from the will that it was made in contemplation thereof." The code applies to the decedent's will. See St. 2008, c. 521, § 43 (1) (providing, "[T]his act shall apply to pre-existing governing instruments, except that it shall not apply to governing instruments which became irrevocable prior to the effective date of this act").



intestate share is "the first \$100,000 plus 1/2 of any balance of the intestate estate." G. L. c. 190B, § 2-102 (4). See G. L. c. 190B, § 2-301 (a).

The wife contends that because (1) the son and adoptive mother joined in the settlement agreement, (2) the son in essence received a distribution pursuant to that agreement, and (3) the decedent expressly omitted his son from his will, all the remaining estate should pass to the wife, notwithstanding the decedent's will. We disagree. There simply is nothing in the statute that suggests that the way the decedent treated his descendants in his will alters the statutory calculation of a spouse's intestate share, and nothing in the settlement agreement suggests that the parties agreed that the wife is entitled to all the remaining assets of the estate.<sup>24</sup> Moreover, the spousal share is derived from only that portion of the testator's estate, if any, that is not devised to the testator's child. See G. L. c. 190B, § 2-301 (a). Thus, the statutory provisions already take into account any distribution to a child in creating the formula for the wife's intestate share. Once the wife's intestate share is established, the remainder of the estate passes according to the will.

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<sup>24</sup> The wife's reliance on statutory provisions related to disclaimed shares of an estate or intestacy, other than the wife's intestate share, is unavailing.

4. Administration of the estate. a. Credibility determinations. The personal representative argues that the judge erred in crediting the wife's testimony as to the decedent's assets allegedly in the wife's possession in light of evidence that the wife had been dishonest in other matters, particularly where, at trial, the wife had first denied having certain assets but then admitted to having them when faced with photographs or other evidence. The Supreme Judicial Court rejected a similar argument in Buster v. George W. Moore, Inc., 438 Mass. 635, 644 (2003), concluding that "[t]he judge was free to credit and discredit portions of each party's testimony." Accordingly, we defer to the judge's credibility determinations. See G.B. v. C.A., 94 Mass. App. Ct. 389, 395 (2018).

b. Estate assets in the wife's possession. The judge found that the wife possesses some assets that were identified in the premarital agreement as the decedent's separate property and that the personal representative requested that the wife return such assets. It was error to give the wife the option to keep assets and take a deduction for their value from her portion of the estate. Under the code, it is the option of the personal representative to require the wife to return those items or to deduct those items from the wife's intestate share. See G. L. c. 190B, § 3-709 (a) (upon request "every personal

representative has a right to, and shall take possession or control of, the decedent's property").

c. Conversion, unjust enrichment, and G. L. c. 190B, § 3-709. The judge found that the personal representative's claims of conversion, unjust enrichment, and violation of G. L. c. 190B, § 3-709, against the wife failed because the premarital agreement does not apply at death. Given our holding to the contrary, those claims must be reinstated.<sup>25</sup>

d. Estate assets in Elaine's possession. According to the agreed statement of facts, the State Police removed the decedent's guns from his home and brought them to Elaine and David Kelley's home. Elaine testified that because she holds an appropriate license, she took possession of the decedent's gun collection for the benefit of the estate. So far as the record reveals, the personal representative had not asked her to return the collection. See G. L. c. 190B, § 3-709 (a) (personal

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<sup>25</sup> The wife argues that the judge failed to make allowances for joint assets other than an Avalanche automobile. She adopted the judge's recitation of the facts, however, and has not identified joint assets to which she claims she is entitled. In addition, although she claims that she has the right under G. L. c. 190B, § 2-403, to select property of the estate up to \$10,000, the wife has not cited anywhere in the record indicating that she purported to do so. Nor do her requests for findings and rulings suggest she raised this issue below. As a result, we do not reach these arguments. To the extent the personal representative pursues the claims that have been reinstated, however, nothing we have said should preclude the wife from raising these issues in defense.

representative may leave decedent's property with "the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property will be necessary for purposes of administration"). Although not requested by the parties, the judge nonetheless ordered Elaine to return the gun collection or the value of the collection to the personal representative "forthwith," providing, in the alternative, that if this were not done, the value of the collection would be deducted from Elaine's eventual share of the decedent's estate.<sup>26</sup> While we agree that, upon request, Elaine must transfer the gun collection to the personal representative, so much of the judgment as compels Elaine to return the collection now is premature. See G. L. c. 190B, § 3-709 (a).

e. The Kelleys' property. The Kelleys claimed and testified that the wife took items they owned but were in the decedent's home when he died.<sup>27</sup> The judge found that "[w]ith the

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<sup>26</sup> We note that in the event a personal representative is also an heir or legatee, G. L. c. 140, § 129C (n), permits a firearm to be transferred from the decedent to said heir or legatee even if they do not possess the requisite license, so long as they obtain said license within 180 days of the transfer. Here, the record indicates that the personal representative does not have an appropriate license but is silent as to whether she has applied to obtain one. See G. L. c. 269, § 10 (h) (1) (it is illegal to own, possess, or transfer a firearm without the requisite license).

<sup>27</sup> The items include three pieces of artwork, a rototiller, a chainsaw, and a generator.

exception of the testimony provided by Mr. and Mrs. Kelley, no other evidence was presented with respect to these items." It is unclear whether the judge declined to credit the Kelleys' testimony or erroneously concluded that the Kelleys had to produce corroborating evidence to sustain their claim. A witness's testimony alone, without corroboration, may meet a party's burden of proof. See generally Cooper v. Keto, 83 Mass. App. Ct. 798, 808 (2013) ("the mother's testimony alone properly supported [the judge's] findings").

In addition, the judge made no credibility determinations or findings concerning a cognac diamond pendant that Elaine testified she loaned to the wife for a photograph for a newspaper story; the wife admitted that she possessed the pendant but claimed that Elaine and the decedent had given it to her as a gift. We conclude that the matter must be remanded for further findings on these issues in the estate asset recovery action.

5. The wife's counterclaim. Finally, the judge rejected the wife's claim that the personal representative committed a breach of her duties toward the wife and should be removed as unsuitable and hostile to the wife. The personal representative's position that the wife was not entitled to escrowed Pigeon Trust settlement agreement proceeds, albeit for different reasons, was correct. We discern no basis, therefore,

for the wife's claims and thus no error in the judge's decision to dismiss the wife's counterclaim.

Conclusion. 1. Docket no. 18-P-872 -- estate asset recovery action. So much of par. 1 of the judgment as declares the premarital agreement null and void is vacated, and the paragraph shall be modified to declare that the assets identified in the premarital agreement as the separate property of the decedent cannot be used for purposes of calculating the wife's intestate share of the decedent's estate. The judgment shall be further modified to declare that said separate property passes in accordance with the decedent's will.

Paragraph 2 of the judgment shall be modified by deleting the second sentence and substituting therefor a declaration that, unless the personal representative agrees to allow the wife to retain the property described therein and credit the value toward the wife's intestate share of the decedent's estate, the wife shall return the property to the personal representative within thirty days of issuance of the rescript of this decision. The second sentence of par. 2 of the judgment shall be further modified by adding a declaration that Elaine Kelley must return the estate property in her possession described therein, including, without limitation, the guns and gun accessories (gun collection) to the personal representative within thirty days of any written request by the personal

representative that she do so; that, absent such a request, Elaine may continue to store estate property, including, without limitation, the gun collection, provided that Elaine still holds a valid firearms license; that, if the personal representative takes physical possession of the gun collection, she shall store the firearms with a licensed holder or first obtain the appropriate license(s); and that, in her inventory, the personal representative must also account for the estate's personal property in any third party's possession.

The second sentence of par. 3 of the judgment shall be modified to declare that the wife shall return the property described therein to the personal representative within thirty days of issuance of the rescript of this decision.

So much of par. 4 of the judgment as dismisses the personal representative's claims for conversion, unjust enrichment, violation of G. L. c. 190B, § 3-709, and imposition of a constructive trust is vacated, and those claims are reinstated.

As so modified, the judgment is affirmed, and the matter is remanded for further proceedings consistent with this opinion, including for further findings on the Kelleys' claims.

2. Docket no. 18-P-871 -- inventory action. Paragraph I of the decree shall be modified to add a declaration that the Pigeon Trust settlement agreement proceeds cannot be used for

purposes of calculating the wife's intestate share of the estate of David E. Stacy.

The first sentence of par. V of the decree shall be modified by striking the phrase "which includes the Pigeon Trust settlement proceeds" and substituting therefor: "excluding the Pigeon Trust settlement agreement proceeds and any other separate property of the decedent identified in the premarital agreement executed by David E. Stacy and Iana Stacy dated July 18, 2008."

As so modified, the decree is affirmed.

So ordered.<sup>28</sup>

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<sup>28</sup> All parties' requests for attorney's fees are denied.



ADDENDUM B  
PREMARITAL AGREEMENT

G.L. c. 208, §34 AGREEMENT

This Agreement made this 18 day of July, 2008, by and between David E. Stacy of 34 Fairhaven Lane, Marstons Mills, Massachusetts (hereinafter "David") and Iana Bostanica of 34 Fairhaven Lane, Marstons Mills, Massachusetts (hereinafter "Iana").

WITNESSETH:

WHEREAS, the parties to this Agreement intend to be married in the near future; and

WHEREAS, each of the parties have provided to the other written statements of the nature, extent, and value of his or her respective assets and liabilities, which statements are attached hereto, incorporated herein, and marked Exhibits 'A' and 'B' for reference; and

WHEREAS, David is gainfully employed; and

WHEREAS, Iana is not currently able to be employed in this country; and

WHEREAS, this is the third marriage for David and the first marriage for Iana; and

WHEREAS, David has an eight year old son who resides in the state of New Hampshire with the child's mother; and

WHEREAS, the parties desire that all property owned by each of them at the time of the marriage and all property acquired by each of them after the marriage shall, except as expressly provided to the contrary, be free from any claim of the other for alimony, support, maintenance, and property assignment that may arise by reason of a divorce following their contemplated marriage; and

WHEREAS, Iana has not contributed tangibly or intangibly to the acquisition, preservation or appreciation in value of the assets or liabilities owned by David as reflected in Exhibit "A";

WHEREAS, David has not contributed tangibly or intangibly to the acquisition, preservation or appreciation in value of the assets or liabilities owned by Iana as reflected in Exhibit "B"; excepting the engagement ring given by David to Iana, and as more fully described herein; and

WHEREAS, David has made a gift to Iana in contemplation of their marriage, which gift is her engagement ring, a tanzanite engagement ring (# 10, 4.5 karat, w/1 diamond karat) with an appraised value of \$17,000.00, which Iana shall retain as hers free and clear from any claim by David in the event of a divorce;

WHEREAS, this Agreement is not intended to be and is not to be construed as an inducement of divorce or separation and at all times pertinent hereto, the parties respect the public policy in favor of the solemnity of marriage, and each enters into the marriage with full intention that the marriage shall succeed;

NOW, THEREFORE, in consideration of the love and affection of the parties hereto and the mutual waivers hereinafter set forth, the parties hereto agree as follows:

1. The parties intend at this time and by this instrument to make a final and complete settlement of all matters relating to the interest and obligations of each with respect to all future property matters, including but not limited to alimony, support, maintenance,

property assignment, and the rights of the parties under G.L. c. 208, §34, as amended, in the event of a divorce. The parties further declare that this Agreement is intended to make permanent the provisions hereof with respect to all such matters between the parties for the future. The terms and provisions of this Agreement represent the terms and provisions of a final and complete settlement between the parties for the future, and the parties intend that this Agreement operate as such. Hereafter, in the event of a divorce, the parties shall have no rights and obligations with regard to each other, relative to all future property matters, including but not limited to alimony, support, maintenance, property assignment, and other rights of the parties under G.L. c.208, §34, other than those rights and obligations which are specifically set forth in writing in this Agreement.

2. Each party declares and acknowledges that each understands the positions, circumstances, and prospects of the other, that each understands the terms, provisions, and conditions of this Agreement, and that each believes the terms, provisions and conditions of this Agreement to be fair, adequate, and reasonable. Each party understands that this Agreement provides for waiver of important rights conferred under M.G.L. c. 208, §34. The parties further state that each has participated directly and indirectly in the negotiation of the terms of this Agreement; that each has had independent advice by counsel of his or her own choosing; and that after consultation with their respective attorneys, and after being advised fully and fairly as to all the facts and circumstances herein set forth, and after having read this Agreement line by line, each party freely and fully accepts the terms, conditions, and provisions hereof and enters into this Agreement voluntarily and without coercion whatsoever. The parties further acknowledge and declare that this Agreement contains the entire agreement between the parties hereto and that there are no agreements, promises, terms, conditions, or understandings, and no representations or inducements leading to the execution hereof, express or implied, other than those herein set forth. No oral statement or prior written matter extrinsic to this Agreement shall have any force or effect.

3. Each party represents and acknowledges that throughout the negotiation of the terms of this Agreement with his or her own counsel, each has been provided with all requested information concerning the assets, liabilities, expenses, and income of the other. Each party, with the benefit of his or her own attorney, has carefully considered the projected income, past income, financial resources, liabilities, assets (and their values), and expenses of both parties, and each party enters into this Agreement of his or her own accord and as a result of his or her own judgment, based on his or her understandings of the financial circumstances of the other party and of himself or herself. Any good faith omission or error of either party to disclose any asset, liability, expense or source of income shall be deemed to have been omitted by virtue of inadvertence or mistake and shall not be deemed to have been a misrepresentation sufficient to justify the voiding of the contractual obligations and rights of the parties under this Agreement. The parties agree and understand that each has been afforded the opportunity for full discovery of any and all pertinent data regarding the other party, and that each has been afforded such opportunity prior to the execution of this Agreement.

4. After the marriage takes place, each of the parties shall separately retain all rights in his or her property owned at the time of the marriage, including appreciation attributable to such property that may occur during the marriage, with the same effect as if no marriage had been consummated between them. Each party shall have the absolute and unrestricted right to dispose of his or her separate property, free from any claim of the other based upon their marriage.

5. Each party, in complete satisfaction of any rights he or she might have in the future to alimony, support, maintenance, property assignment, and any other rights that he or she may have pursuant to G.L. c. 208, §34 and cases decided thereunder, hereby accepts the covenants made in this Agreement and hereby discharges and releases the other from any claims for alimony, support, maintenance, property assignment, except as set forth herein. Neither party shall make or assert against the other any claims or demands, including claims or demands for alimony, support, maintenance, property assignment, counsel fees, or other claims under G.L.

c. 208,§34, except as provided herein. Each party agrees to hold the other free and harmless from, and indemnify from and against any claims or demands for payments in excess of what is provided in this Agreement.

6. The following words shall have the following definitions for purposes of this Agreement:

A. "Separated" shall mean that either of the parties has instituted an action for divorce, dissolution of the marriage or separate support; and

B. "Divorce" or "divorced" shall mean that Judgment of Divorce has entered and that said Judgment of Divorce has become final; and

C. "Separate property of a party" shall consist of all property owned by that party prior to the marriage in his or her name individually, in trust or otherwise, including but not limited to property owned or to become owned as a beneficiary of any trust, or in any form of ownership whatsoever with any other person (other than the other party). Property acquired after the marriage (except property owned as tenants in common with the other party and property jointly owned by the parties) shall be deemed the separate property of that person if the property has been derived from separate property by means of a transfer of funds, or from a transfer of any separate property (tangible or intangible) in the individual name of that party, or in property held in trust or otherwise, including but not limited to property owned or to become owned as a beneficiary of any trust, or of property held in his or her own name in any form of ownership with any person (other than the other party). Separate property shall include any property (i) acquired after the marriage by gift, bequest, descent or devise; (ii) all property acquired in exchange for or with the proceeds of a gift, bequest, descent or devise; and (iii) any appreciation in value of separate property, as hereinbefore defined.

D. "Property jointly owned by the parties" shall mean all property acquired after the marriage which is not separate property and shall include property to which the parties take title as "joint tenants with rights of survivorship" and "tenants by the entirety." In such case, the property shall be deemed to be owned "jointly" by the parties to this Agreement. The disposition of property to which the parties take title as "tenants in common" shall be governed by Paragraph 7C below.

E. "Net proceeds" shall be defined as the balance remaining after deduction of the following amounts from the gross sales price of any real estate owned by the parties:

- (1) real estate and transfer taxes due and payable;
- (2) real estate broker's commission, if any;
- (3) the principal balance due to any mortgagee on any then existing mortgage;
- (4) and all other miscellaneous costs of fix-up, closing and adjustments including reasonable attorneys' fees; and
- (5) the repayment to each party of funds contributed by each party to the initial purchase of the property.

7. Upon the termination of the marriage by divorce, all real property, personal property, and other assets, whether heretofore or hereafter acquired shall be divided as follows:

A. Any separate property of a party shall remain the property of such person to the exclusion of the other party.

B. The net proceeds of all property owned jointly by the parties shall be divided equally between the parties and any liens, mortgages and encumbrances on said property shall become the joint and equal responsibility of the parties.

C. The net proceeds of property which is owned by the parties as "tenants in common" shall be divided between the parties in the same proportion as their stated ownership interests.

8. Upon the termination of the marriage by divorce, all liabilities, whether heretofore or hereafter incurred, shall be determined as follows:

A. All liabilities incurred by either party individually shall remain the obligation of the party who incurred same, and the other party shall have no responsibility for same.

B. All liabilities incurred jointly by the parties shall remain the joint responsibility of the parties, and both parties shall be equally responsible for the payment of same.

9. Upon the termination of the marriage by divorce, each party waives alimony to the fullest extent possible under the law, except as otherwise provided in paragraph 13.

10. As consideration for this waiver of alimony under paragraph 9 above, in the event that the parties are divorced, David shall pay for and maintain in force for Iana a medical insurance plan which provides substantially equivalent benefits to any medical insurance plan covering her at the time of their separation. Iana shall pay for any uninsured medical expenses that are or may be incurred and shall pay for any and all out-of-pocket related expenses which may be incurred in connection with such medical insurance; if no such medical insurance is in effect at the time of their separation, such medical plan shall provide substantially equivalent benefits as individuals at the same station in life as the parties typically would carry, and as offered by one of the major health insurance carriers in the Commonwealth. It is the intention of the parties that any payment for premiums by David hereunder shall not be deductible from income by David or taxable as income to Iana.

David's obligation under this paragraph 10 shall terminate at the earliest to occur of the following:

A. Iana's remarriage or death; or

B. David's death; or

C. When the same number of years has elapsed since the date of the final judgment of divorce as the number of years from the date of the marriage of the parties to the date of the final judgment of divorce.

11. In the event that the parties are separated on or before the tenth (10<sup>th</sup>) wedding anniversary of the parties, all real property, personal property, and other assets, whether heretofore or hereafter acquired shall be divided as follows:

A. Any separate property of a party shall remain the property of such person to the exclusion of the other party.

B. The net proceeds of all property owned jointly by the parties shall be divided equally between the parties and any liens, mortgages and encumbrances on said property shall become the joint and equal responsibility of the parties.

C. The net proceeds of property which is owned by the parties as "tenants in common" shall be divided between the parties in the same proportion as their stated ownership interests.

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12. In the event that the parties become separated after their tenth (10<sup>th</sup>) wedding anniversary, in addition to the provisions as set forth in paragraph 10 above, Iana shall receive, in the event of such divorce, payable by David on or before the judgment nisi of divorce enters, the following: If the parties are separated after their tenth (10<sup>th</sup>) wedding anniversary, but prior to their eleventh (11<sup>th</sup>) wedding anniversary, Two Hundred Fifty Thousand Dollars (\$250,000.00);

B. If the parties are separated after their eleventh (11<sup>th</sup>) wedding anniversary, but prior to their twelfth (12<sup>th</sup>) wedding anniversary, Two Hundred Seventy Five Thousand Dollars (\$275,000.00);

C. If the parties are separated after their twelfth (12<sup>th</sup>) wedding anniversary, but prior to their thirteenth (13<sup>th</sup>) wedding anniversary, Three Hundred Thousand Dollars (\$300,000.00); and so forth, in yearly increments of Twenty-Five Thousand Dollars (\$25,000.00); until

D. If the parties are separated after their twentieth (20<sup>th</sup>) wedding anniversary, Five Hundred Thousand Dollars (\$500,000.00).

It is the intention of the parties that these payments as set forth above are not to be taxable as income to Iana nor be deductible from income by David on their respective income tax returns. The parties also affirm that the amounts set forth in paragraphs 12A-D inclusive, are not cumulative.

13. In the event that the parties become separated after their twentieth wedding anniversary, the parties agree that a court of competent jurisdiction shall determine whether Iana should receive alimony, and if so, the amount of alimony that she should receive. The parties agree that any alimony obligation imposed by a court of competent jurisdiction pursuant to this provision shall terminate upon the earliest to occur of: Iana's remarriage, the death of either party or David's 75<sup>th</sup> birthday. Any such alimony obligation shall be taxable to Iana as income and deductible from income by David on their respective tax returns, pursuant to Section 71 of the Internal Revenue Code of 1986, as amended.

14. Neither party shall seek an award of counsel fees *pendente lite*, or at the conclusion of any proceedings for alimony, support, dissolution of marriage, divorce or separate support.

15. The parties agree, declare and acknowledge that if any children shall be born to them or should the parties legally adopt any children, then the Probate and Family Court of the Commonwealth of Massachusetts shall have jurisdiction over said children, and nothing contained in the within Agreement shall be deemed to usurp any rights which either party may have with regard to said children, including but not limited to child support, custody or visitation.

16. The within Agreement is not intended to prevent either or both parties from voluntarily purchasing gifts, providing support, or loaning money to the other party. However, it is understood that any monies or property so transferred from one party to the other, in whatever form or for whatever purpose, shall in the event of a termination of the marriage by legal proceedings, be deemed to have been a gift to that party with the intent of not having said money or property returned, unless a promissory note or other written instrument to the contrary is executed between the parties with respect to same. Notwithstanding anything to the contrary elsewhere in this Agreement or implied, each of the parties may, in his or her sole and uncontrolled judgment and discretion, make any documented inter vivos transfer, including the written transfers in trust or by any other written instrument. Any such documented inter vivos transfer by either of the parties in favor of the other shall be valid and effective and shall be carried out and performed, notwithstanding this Agreement or any provisions otherwise herein contained. Notwithstanding the foregoing, no document or writing shall be required for an inter vivos transfer by one party to the other of clothing, furs or jewelry.

15 This Agreement shall constitute a qualified waiver by David and by Iana, to the extent permitted by law, of the qualified joint and survivor annuity and the qualified pre-retirement survivor annuity pursuant to §417 of the Internal Revenue Code of 1986, as amended from time to time. The foregoing waivers by David and Iana shall apply to all retirement plans in which the other party has an interest at the time of the marriage, if any. To implement the waivers, each party agrees to sign such documents as are necessary to ensure that each party may designate a person other than the surviving spouse as beneficiary of an interest in a retirement plan which was in existence at the time of the marriage. Each party agrees to sign such documents at any time following the marriage, when called upon to do so. Each party acknowledges that signing such documents in advance of the marriage would not constitute a waiver under law.

16. Each of the parties hereto agrees that he or she will do any and all acts and will execute, acknowledge and deliver the reasonable request of the other without cost or expense to the other any and all deeds, releases and/or other instruments, assurances or writings which may at any time be reasonably necessary to evidence and give full force and effect to this Agreement and the proceedings hereof.

17 In any action for divorce or dissolution of the marriage or separation of the parties, neither party shall cause to be inserted or request that there be inserted in any decree, order or judgment that may enter, any provision inconsistent with any of the provisions of this Agreement. Each party shall indemnify the other and hold each other harmless from and against any terms of such judgment, decree or order inconsistent with the provisions of this Agreement. This Agreement shall not be extinguished by merger as a result of incorporation in any decree or order or judgment irrespective of any court decree, order or judgment to the contrary that it shall merge, that this Agreement shall in all events survive such decree, order or judgment and be forever binding upon the parties. In the event that hereafter a Judgment of Divorce is entered in any court of competent jurisdiction resulting from a Complaint for Divorce brought by either of the parties against the other, this Agreement may be made part of such judgment, if the court so allows, but in any event, this Agreement shall not merge in such judgment but shall at all times be construed as an agreement having independent legal significance irrespective of any order of the court that it shall merge.

18. No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement. Any provision of this Agreement that is found to be unenforceable by any court in the Commonwealth of Massachusetts or elsewhere shall not effect the validity of any other provisions of this Agreement.

19. This Agreement shall take effect only upon the solemnization of the marriage now contemplated by the parties.

20. This Agreement has been executed and delivered in Massachusetts and is a Massachusetts contract; all matters effecting its interpretation and the rights of the parties hereunder shall be governed by the laws of the Commonwealth of Massachusetts. In the event that one or both of the parties are or ever shall become domiciled in a jurisdiction other than the Commonwealth of Massachusetts, the status of all property owned by such party shall be controlled to the maximum extent possible by the terms of this Agreement, interpreted under the laws of the Commonwealth of Massachusetts as exists at the time of contracting or as it may hereafter exist, whichever permits the broadest enforcement of this Agreement.

21. All rights, duties and obligations under this Agreement are in all things performable and enforceable in the courts of the Commonwealth of Massachusetts. In the event of litigation arising out of or relating to this Agreement or its subject matter between the parties hereto, then the parties consent to the exclusive personal and subject matter jurisdiction of the

state and Federal courts of the Commonwealth, the parties hereby stipulating to the convenience of such forum, unless neither party continues to reside there.

22. This Agreement is executed in four (4) counterparts, each of which shall be deemed to be an original, and all constituting together one in the same instrument, this being one of said counterparts.

David E. Stacy  
David E. Stacy

Bostanica  
Iana Bostanica

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

July 18, 2008

On this 18<sup>th</sup> day of July, 2008, before me, the undersigned notary public, personally appeared David E. Stacy, who proved to me through satisfactory evidence of identification, which was his Massachusetts Driver's License No. 578307947, to be the person whose name is signed on the preceding document, and acknowledged to me that he signed it voluntarily for its stated purpose.

Lawrence J. Cohen  
Lawrence J. Cohen, Notary Public  
My Commission Expires: July 28, 2010

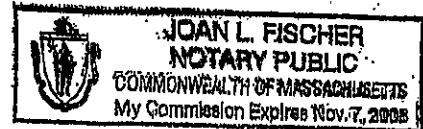
COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss:

July 18, 2008

On this 18<sup>th</sup> day of July, 2008, before me, the undersigned notary public, personally appeared Iana Bostanica, who proved to me through satisfactory evidence of identification, which was her passport from the Country of Moldova No. A2472194, to be the person whose name is signed on the preceding document, and acknowledged to me that she signed it voluntarily for its stated purpose.

Joan L. Fischer  
Joan L. Fischer, Notary Public  
My Commission Expires: 11/7/08



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CERTIFICATE OF ATTORNEY FOR IANA BOSTANICA

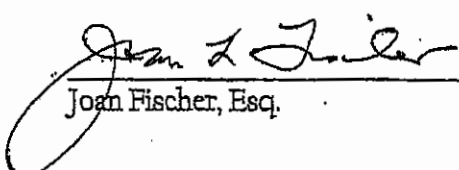
The undersigned, a Massachusetts attorney, hereby certifies that I have been retained by Iana Bostanica (hereinafter "Iana") prior to her execution of a certain Agreement with David E. Stacy and that:

1. I have explained to Iana the relevant law of Massachusetts relative to the rights of prospective spouses and spouses in connection with ante-nuptial agreements and separation and divorce proceedings, including, without implied limitation, the provisions of Massachusetts General Laws, chapter 208, Section 34, as amended, and DeMatteo v. DeMatteo, 436 Mass. 18 (2002) and subsequently decided Massachusetts case law relating to this subject matter.

2. Iana has stated to me that she has read the Agreement and after responding to her questions, she has represented to me that she understands the same fully and agrees that the Agreement is fair to her and reasonable under all the circumstances.

3. Iana has also stated to me that she is executing the same of her own free will and without any undue influence, coercion or duress.

DATE: 7/18/08

  
Joan Fischer, Esq.

Bostanica

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CERTIFICATE OF ATTORNEY FOR DAVID E. STACY

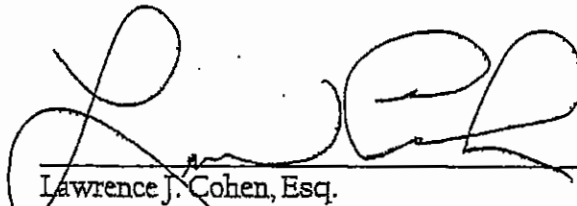
The undersigned, a Massachusetts attorney, hereby certifies that I have been retained by David E. Stacy (hereinafter "David") prior to his execution of a certain Agreement with Iana Bostanica and that:

1. I have explained to David the relevant law of Massachusetts relative to the rights of prospective spouses and spouses in connection with ante-nuptial agreements and separation and divorce proceedings, including, without implied limitation, the provisions of Massachusetts General Laws, chapter 208, Section 34, as amended, and DeMatteo v. DeMatteo, 436 Mass. 18 (2002) and subsequently decided Massachusetts case law relating to this subject matter.

2. David has stated to me that he has read the Agreement and after responding to his questions, he has represented to me that he understands the same fully and agrees that the Agreement is fair to him and reasonable under all the circumstances.

3. David has also stated to me that he is executing the same of his own free will and without any undue influence, coercion or duress.

DATED: 7/18/08

  
Lawrence J. Cohen, Esq.  
Bostanica

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EXHIBIT "A"

Financial Statement of David E. Stacy  
(As of July 14, 2008)

ASSETS:

Real Estate:

41 Fairhaven Lane, Marstons Mills, MA  
FMV: \$379,000.00  
MTG: \$200,000.00  
EQUITY: 179,000.00

1688 Rt. 5A, West Charleston, VT  
FMV: \$430,000.00  
MTG: \$160,000.00  
EQUITY: 270,000.00

Time Share  
Sea Mist, Mashpee MA  
FMV: \$12,500.00  
MTG: \$ 0  
EQUITY: 12,500.00  
461,500.00

Trusts:

2003 D.E.S. Support Trust (Irrevocable)  
Citizens Bank  
Beneficiary: David Stacy  
Successor Beneficiary: \_\_\_\_\_  
1,222,864.54  
1,222,864.54

(Total of Principal as above; current payment is \$16,660. per month from trust. )

Pigeon Trust  
Beneficiary: David Stacy  
Successor Beneficiary: \_\_\_\_\_  
3,500,000.00  
3,500,000.00

(Total of Principal - no distribution of trust principal until death of settlor)

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Judgments/Liens:

Judgment Against \_\_\_\_\_ & \_\_\_\_\_ 990,990.00  
990,990.00  
(Total of Unsatisfied Judgment - remote likelihood of recovery)

Jewelry:

Various 186,000.00  
186,000.00

Contents of Safe Deposit Box:

Coins  
Eastern Bank  
A/C No. 281 47,500.00  
47,500.00

Collections:

Gems  
Eastern Bank  
A/C No. 281 6,450.00  
\$6,450.00

Other collections

Various 68,500.00  
68,500.00

Tools/Equipment:

JD Tractor 25,000.00  
25,000.00

Savings & Checking Accounts:

Citizen's Bank (SAVINGS) 500.00  
Citizen's Bank (CHECKING) 15,000.00  
Cash on Hand 500.00  
16,000.00

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Investments:  
(Valued as of June 30, 2008)

CISCO SYSTEMS, INC.	6,978.00
EBAY, INC.	53,293.50
GENERAL STEEL HLDGS INC.	15,700.00
GERON CORP.	3,450.00
INGERSOLL RAND CO CL A	37,430.00
LIMITED BRANDS, INC.	16,850.00
METABOLIX, INC.	4,900.00
MS EMERGING MKTS DOMESTIC DEBT	91,440.00
RAMBUS INC. (DEL)	19,070.00
SMITH MICRO SOFTWARE, INC.	2,850.00
VALERO ENERGY CP DELA NEW	28,826.00
VAN KMPN DYNAMIC CR OPP FUND	<u>35,625.00</u>
	316,412.50

Automobiles/Boats:

2008 Hummer H2 EXA	
Year of Purchase: 2008	
Purchase Price: 75,000.00	
Fair Market Value: 45,940.00	
Outstanding Loan: 0.00	
Equity	45,950.00
2003 Chevrolet Corvette	
V8 - 6 speed/AT Hardtop 2D Z06	33,675.00
2002 Chevrolet Avalanche Trust	
1/2 3/4 Ton V8-4WD Crew Cab 1500	14,925.00
2005 Sea Ray Boat 270 Amberjack	<u>93,480.00</u>
	188,030.00

Furniture and Furnishings:

Various	<u>106,000.00</u>
	106,000.00

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Arts and Antiques:

Various	<u>187,000.00</u>
	187,000.00

Miscellaneous:

Tanzanite - Loose Stones	
Eastern Bank	
38.88 CTS.	
A/C No. 281	<u>155,440.00</u>
	155,440.00

Businesses:

Stacy Imports, Inc.	<u>0.00</u>
	0.00

LIABILITIES NOT ACCOUNTED FOR ABOVE:

Child Support Payments:

Child support paid by David for 8 yr. old son	(\$2,400.00) (per month)
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The above is a true and accurate accounting of my current income, assets and liabilities.

David E. Stacy  
David E. Stacy

Dated: July, 2008

I have examined this multi page document representing the current income, assets and liabilities of  
David B. Stacy

Iana Bostanica  
Iana Bostanica this 18 day of July, 2008.

2007 Tax Return for David Stacy Provided Separately To Counsel

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EXHIBIT "B"

Financial Statement of Iana Bostanica  
(As of July 16, 2008)

ASSETS:

Real Estate:

Flat (owned with mother, parents reside there)  
Moldova, Chisinev 2070  
Str. Ialovenskaya 96 - v ap. -53  
FMV (no mortgage) (based on estimated 57,500 EUR,  
1.00 EUR = 1.5856 USD as of 7/16/08)

\$91,175.00 USD

Savings or Checking Account:

\_\_\_\_\_ Bank, Moldova

\$20,000.00 USD

Jewelry:

Tanzanite engagement ring

\$17,000.00 USD

Annual Earned/Unearned Income:

2007 0 IB DES

On K-1 Visa, currently unable to work in United States

Liabilities:

None

The above is a true and accurate accounting of my current income, assets and liabilities.

Bostanica  
Iana Bostanica

Dated: July 18, 2008

I have examined this one page document representing the current income, assets and liabilities of Iana Bostanica this 18 day of July, 2008.

David E. Stacy  
David E. Stacy

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## ADDENDUM C

G.L. C. 209, § 1, WITH LEGISLATIVE COMMENT



## **Section 2-101. [Intestate Estate.]**

(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this part, except as modified by the decedent's will.

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed the intestate share.

### **COMMENT**

Subsection (b) authorizes the decedent, by will, to exclude or limit the right of an individual or class to share in the decedent's intestate estate, in effect disinheriting that individual or class. By specifically authorizing so-called negative wills, subsection (b) reverses the usually accepted common-law rule, which defeats a testator's intent for no sufficient reason. See Note, "The Intestate Claims of Heirs Excluded by Will: Should 'Negative Wills' Be Enforced?", 52 U.Chi.L.Rev. 177 (1985).

Whether or not in an individual case the decedent's will has excluded or limited the right of an individual or class to take a share of the decedent's intestate estate is a question of construction. A clear case would be one in which the decedent's will expressly states that an individual is to receive none of the decedent's estate. Examples would be testamentary language such as "my brother, Hector, is not to receive any of my property" or "Brother Hector is disinherited".

Another rather clear case would be one in which the will states that an individual is to receive only a nominal bequest, such as "I give \$50.00 to my brother, Hector, and no more".

An individual need not be identified by name to be excluded. Thus, if brother Hector is the decedent's only brother, Hector could be identified by a term such as "my brother". A group or class of relatives (such as "my brothers and sisters") can also be excluded under this provision.

Subsection (b) establishes the consequence of disinheritance - the share of the decedent's intestate estate to which the disinherited individual or class would have succeeded passes as if that individual or class had disclaimed the intestate share. Thus, if the decedent's will provides that brother Hector is to receive \$50.00 and no more, Hector is entitled to the \$50.00 bequest (because Hector is not treated as having predeceased the decedent for purposes of testate succession), but the portion of the decedent's intestate estate to which Hector would have succeeded passes as if Hector had disclaimed his intestate share. The consequence of a disclaimer by Hector of his intestate share is governed by Section 2-801(g), which provides that Hector's intestate share passes to Hector's descendants by representation.

Example: G died partially intestate. G is survived by brother Hector, Hector's 3 children (X, Y, and Z), and the child (V) of a deceased sister. G's will excluded Hector from sharing in G's intestate estate. Solution: V takes half of G's intestate estate. X, Y, and Z split the other half, i.e., they take 1/6 each. Sections 2-103(3); 2-106; 2-801(g). Had Hector not been excluded by G's will, the share to which Hector would have succeeded would have been 1/2. Under section 2-801(g), that half, not the whole of G's intestate estate, is what passes to Hector's descendants by representation as if Hector had disclaimed his intestate share.