

Guy R. DeFrances
Kenneth W. Mango
Dennis F. Gaffney
E. Jack Shorr
Thomas S. Luby
Bruno R. Morasutti
Of Counsel:
Robert M. Luby
Gary O. Olson
Kimberly Mango Thompson

LUBY • OLSON, P.C.

Attorneys & Counselors at Law

Founded 1939

405 Broad Street, P.O. Box 2695, Meriden, CT 06450

203-639-3560 • 860-343-0909 • Fax: 203-639-3569

Real Estate Line:

203-238-3600

Real Estate Fax:

203-235-6945

Website:

www.lubyolson.com

E-Mail:

attorneys@lubyolson.com

Report From Counsel

Insights and Developments in the Law

Fall 2006

Trial Preparation . . . Experience Counts!

By Dennis F. Gaffney

Proving the Cause of an Accident

Our middle aged client was operating his 1985 Honda Accord in a northerly direction on Center Street in Meriden at approximately 4:00 p.m. in May, 2003. At the same time, a teenager was operating his 1989 Isuzu Trooper SUV in an easterly direction on Pratt Street in Meriden. The traffic at the intersection of Pratt and Center Streets is controlled by an overhead traffic control signal.

Apparently neither operator observed the other approaching the intersection and, as a result, the teenager's vehicle collided violently into the driver's side door of our client's vehicle. After the collision, both vehicles were displaced toward the northeast from the center of the intersection and impacted several parked vehicles located in the Meriden Glass Company parking lot.

Our client was knocked unconscious as a result of the collision and was extracted from his vehicle by emergency personnel using the "jaws of life." He was transported by ambulance to the Hartford Hospital.

The teenager was not injured in the accident and he told the investigating officer that he was approximately one (1) car length south from the white line (stop bar) located at the intersection when the traffic light for his lane turned yellow. He released his foot on the gas pedal and continued through the intersection. At that point, he observed our client's vehicle, but it was too late and the collision occurred.

After regaining consciousness several hours after the accident, our client told the investigating officer that he was near the Miller Company on Center Street and saw that he had a green light. He continued into the intersection where the collision occurred. He did not remember anything else about the accident. Our client suffered substantial injuries.

There were no witnesses to the ac-

cident. The traffic lights were monitored and found to be in proper working order. A police report was prepared based upon statements of the parties.

The Problem

How can it be proven that the teenager was responsible for the cause of this collision?

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Premarital Agreement

By Bruno R. Morasutti

An Overview

A premarital agreement, sometimes called a prenuptial agreement, is a contract between two prospective spouses made in contemplation of marriage. In Connecticut it is sanctioned and governed by statute. The agreement must be in writing and signed by both parties. It may provide for the rights and obligations of each of the parties with regard to real or personal property. It may also spell out exactly what the disposition of any such property would be in the event of a divorce, separation or death of one or both of the parties. It will often determine whether and in what amount alimony will be paid, including by whom and to whom. In general, the agreement deals with any

other matters that involve the personal rights and obligations of each party.

The effective date of a premarital agreement is the date of the marriage unless the agreement provides otherwise. A premarital agreement may be amended, modified or revoked after the marriage only by a written agreement signed by both parties.

Who Needs a Premarital Agreement?

Although we normally think of premarital agreements being utilized by very wealthy individuals who seek to protect their wealth in the event of a divorce, it is also advisable for the not-

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Inadequate Notice of Tax Sale

Gary bought a house that he and his wife lived in for 26 years. When the couple separated, Gary moved out, but he continued to pay the mortgage for another four years until it was paid off in full. The loan was gone, but not the property taxes—they went unpaid when the mortgage company that had previously been paying them was out of the picture.

The state attempted to notify Gary of the delinquency and of his right to redeem the property. It mailed a certified letter to him at the address of the subject property. Since nobody was home to sign for the letter, it was returned to the state marked “unclaimed.” Two years later, and only weeks before the property was sold to pay the taxes, the state published a newspaper notice of public sale of the property. A buyer came forward, and the state sent Gary another certified letter stating that his house would be sold if the taxes were not paid. It, too, was returned unclaimed to the state. Only when the new owner served a notice on Gary’s daughter at the house did Gary finally learn about the tax sale, but it was after the fact.

Gary sued the state, arguing that the state had sold his property for taxes without first affording him procedural due process, and the United States Supreme Court agreed with him. The Court did not lay down an ironclad rule on what procedures are to be followed in all cases. It did say that, upon the return of a notice as undeliverable, the government must take additional, reasonable steps to attempt to provide notice before it takes the drastic step of extinguishing someone’s interest in his or her property.

While the extent of what is required will vary with the particular circumstances, the Court’s comments indicate that it hardly expects the government to put a detective on the case of a “missing” property owner. Open-ended requirements, such as searching a telephone book or other government records, are not required of the govern-

ment. But it is not too much to ask the government to do, in the Court’s words, “a bit more.” There were some follow-up options that the state should have explored and used. They include such simple measures as sending a notice by regular mail, for which no signature is required, posting the notice on the front door, or addressing the otherwise undeliverable mail to “occupant.” Presumably, even a non-owner occupant would alert the owner of such a notice.

The Court drew an analogy to a state official handing notices meant for delinquent taxpayers to a mail carrier, then watching as they were accidentally dropped down a storm drain. One would expect new notices to be prepared and sent again. Just as it would be unreasonable for the official under those circumstances simply to shrug his shoulders and say “I tried,” the state in Gary’s case owed him more than inaction when the notices meant for him were returned “unclaimed.”

Nonowner Can Be Liable Under FHA

Among the kinds of conduct prohibited by the federal Fair Housing Act is the making of any statement with respect to the sale or rental of a dwelling that indicates a preference, limitation, or discrimination based on race, religion, sex, handicap, familial status, or national origin. The most common violators of this law are the actual owners of dwellings or individuals acting as agents for owners. A federal appellate court, however, reinstated a lawsuit brought by the United States against an individual who had spoken neither as an owner nor as an agent for an owner.

The defendant worked as a housing information vendor, compiling information from classifieds and providing assistance to prospective tenants looking for rooms to rent. In the episode that got the attention of the authorities, a deaf man used a relay services operator to call the defendant for assistance. The defendant flatly told the caller that he did not provide assistance to disabled people. When the caller persisted, the defendant responded with profanity and hung up. Similar inquiries from “testers” were met with essen-

tially the same response. In fact, the jury heard “a virtual tsunami of evidence” that the defendant routinely treated disabled people differently from those not disabled, often using profanity to underscore the point.

The court rejected the reasoning that applying the prohibition on discriminatory statements only to owners or their agents would be in keeping with the purposes of the statute. On the contrary, the statute was meant to protect against the “psychic injury” done by discriminatory statements made in connection with the broader housing market, not just statements that directly affect a housing transaction. The limitation argued for by the defendant is not in the statute itself, which broadly refers to “any” discriminatory statement.

As for a First Amendment argument put forward by the defendant, it may be available for some forms of speech, such as a private individual’s vocal opposition to having children living on his block. The defendant’s speech, however, was commercial in nature, giving it less protection from government regulation.

Experience Counts

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The Solution

Our firm has worked with Gene Baron, an accident reconstructionist, for many years with much success. Mr. Baron is a Navy veteran and was a member of the Connecticut State Police from 1967 to 1984. For a good deal of that time, Trooper Baron was assigned to accident investigation and reconstruction, injury mechanisms and forensic studies. He studied accident reconstruction and related topics at Northwestern University Traffic Institute and attended classes at the University of New Haven. In 1984, Mr. Baron left the Connecticut State Police to form a private engineering firm to provide a full range of traffic studies. In addition, he continued to teach accident investigation and reconstruction to police officers at the Municipal Police Training Council in Meriden.

Mr. Baron analyzed all aspects of the accident in question. From reviewing the weight of both vehicles, the angle of impact on the vehicles, the manner in which the vehicles traveled after the impact and crash tests results from motor vehicle manufacturers, Mr. Baron determined that the teenager was exceeding the posted speed limit (25 m.p.h.) at the time of the accident. In addition, Mr. Baron's studies confirmed that if the teenager was approximately a car length (15.05') west of the stop bar on Pratt Street when his light turned to caution, as he told the investigating officer, then he would have had plenty of time to stop his vehicle prior to the point of impact. Furthermore, the northbound approach of our client's vehicle was clear and unobstructed to the operator of the other vehicle. As a result of the foregoing, Mr. Baron concluded that it is reasonably probable that excessive speed and inattention of the operator of

the 1998 Isuzu Trooper was the proximate cause of the impact, producing severe injuries to our client.

The Result

After reviewing Mr. Baron's report and taking his deposition (testimony under oath) the attorney for the insurance company requested mediation of the case. The parties agreed that retired Supreme Court Justice Angelo Santaniello should serve as mediator. With assistance from Justice Santaniello, the parties reached a settlement earlier this year resulting in a substantial award for our client.

The Lesson

A Police Accident Report is simply that — a report. It is a compilation of information regarding the accident, but it is not an investigation. The acci-

dent reconstructionist collects all the information from the accident case and interprets the evidence. In a complex motor vehicle accident case it is imperative to obtain the services of an honest and experienced accident reconstructionist.

Of course, for best results the reconstructionist should be retained as soon as possible after the accident so that the evidence may be preserved. In the instant case, our client retained us a number of months after the accident. Fortunately, Mr. Baron was able to collect sufficient evidence to perform a thorough investigation which reached a favorable conclusion for our client.

Editor's note: Attorney Gaffney is a partner in the law firm of Luby Olson. He has been an experienced trial lawyer for over 40 years.

The Dangers of Employee Internet Use

By some accounts, a large majority of employees access the Internet on company computers for personal reasons while at work. The obvious adverse effects of this on productivity are only the tip of the iceberg with regard to the potential headaches that such activities can cause for employers. Personal Internet activity by employees can pose security risks to the company's computer network itself, such as by exposing a network to a computer virus.

Less immediate but just as serious is the threat of legal liability of the employer to injured third parties. Some scenarios are not difficult to imagine. An employee uses his computer as a tool for sexually harassing fellow

workers by visiting pornographic websites. Or, an employee embroiled in a bitter domestic dispute uses his office computer to communicate threats to his spouse, and the employer fails to take action.

In a recent case, one such nightmare scenario was all too real for an employer that had to defend itself against the alleged victims of an employee who used a workplace computer for conduct that was criminal, not just indicative of poor judgment. This case may be the first reported decision on the matter of an employer's liability to a third party for having failed to take action to stop an employee from using

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Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Premarital Agreement

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so-wealthy who may have children from a previous marriage. It is also useful where there is a disproportionate amount of wealth between the parties at the time of marriage. In fact, my experience has shown that (1) the presence of children from a previous marriage and (2) a disproportionate amount of wealth between the parties comprise a significant number of those couples who choose a premarital agreement. However, even if a couple is not wealthy and if there are no children from a previous marriage, the parties may still desire to define their financial rights and other obligations before they marry. A premarital agreement is the right vehicle for these situations.

What Are the Pitfalls?

Although a premarital agreement is a contract between two parties in contemplation of marriage, there are circumstances under which it may be unenforceable. For instance, the enforceability of a premarital agreement depends not only upon the circumstances of the parties at the time the agreement was signed, but also upon the circumstances of the parties at the time enforcement of the agreement is sought. For example, assume a premarital agreement provides that upon a divorce neither spouse will be obligated to pay alimony to the other. At the time that the agreement was signed both parties were healthy and fully employed. Later, at the time the parties are divorcing, one spouse is unemployed and has no assets to live on. If at the time of divorce the unemployed spouse is eligible for support under a program of public assistance, a court may require the other spouse to provide support to the extent necessary to avoid such eligibility.

A reviewing court will also determine whether the agreement was signed voluntarily, whether it was fair when it was signed, and what the effect of the agreement would be if it were enforced. The court will also determine whether an agreement is deemed

unconscionable as a matter of law. So even though a premarital agreement may seem perfectly fair, reasonable and enforceable at the outset, it may be deemed unfair or illegal as a matter of law at the time of divorce.

Steps to Take to Minimize Potential Problems

Because premarital agreements are governed by statute, it is imperative that the statute be consulted and its requirements met. In so doing, it is important to retain separate legal counsel. Under no circumstances should both parties use the same attorney for the premarital agreement. While one attorney may draft the agreement and represent one of the parties, the other party should consult with a different attorney to obtain appropriate advice. If one of the parties chooses not to retain his or her own legal counsel, the agreement should recite that that party

acknowledges that he or she was afforded a reasonable opportunity to consult with independent counsel.

Next, at the outset, the parties should be scrupulous in disclosing their assets and liabilities to each other as completely and accurately as possible. Connecticut law recites that the disclosure of the amount, character and value of assets and income must be fair and reasonable. The financial obligations of the parties must be disclosed in the same way. In addition to consulting the statute, there are many published court decisions that should be reviewed and used as guidance to create an enforceable premarital agreement.

Editor's note: Attorney Morasutti is a partner in the law firm of Luby Olson, P.C. For over 23 years, his practice has concentrated in the areas of personal injury, municipal law and family law.

Employee Internet Use

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a company computer in a manner that harmed the third party. It most certainly will not be the last such case.

The case involved an employee who used his company's computer at work to visit pornographic sites, including some relating to child pornography. Over a period of time, a supervisor and some coemployees became aware of this activity and complained to management. Eventually, the offending employee was confronted and was told to stop such use of the computer, but, a few months later, he was again discovered to have accessed pornographic sites.

Eventually, the employee was arrested on child pornography charges, including allegations that he had transmitted nude pictures of his 10-year-old stepdaughter over his office computer to a child pornography site. The employee's wife, who divorced him, sued

the employer for failing to investigate and for failing to report the employee's viewing of child pornography. The case was settled, but not until a precedent was set when the lawsuit survived attempts to have it dismissed before trial.

There are limits to what companies can or should do to prevent improper use of company computers, but it is only prudent to take at least some basic measures. It makes sense to have a written e-mail and Internet use policy that clearly informs employees of what, perhaps, they should already know—that the employer has and reserves the right to monitor employees' use of the company's computers and to discipline violators. In addition, there needs to be even-handed enforcement of the policy. Even the best written policy will do little to convince a jury, if it comes to that, that a company has done all it reasonably could have done, if the evidence is that the policy was toothless or rarely enforced.