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FROM THE CHAIR

EVOLUTION OF DIVORCE LAW SHOWS MUCH PROGRESS

By Steven S. Hurvitz, Esq.
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Greetings from Happy Valley. And thank you for allowing me the privilege of serving as your section chair during the ensuing year.

Like many of you, I did not plan to become a family lawyer following my graduation from college and law school. I initially envisioned myself as becoming business and real estate lawyer. My senior partner had a very good (aka wealthy) client who was seeking divorce representation. As the newest associate in the firm and having a thick skin and a penchant for financial matters, I was slotted to be "the divorce guy." But once I had a taste of family law, there was no looking back.

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Steven S. Hurvitz

My career as a family lawyer began in earnest almost 40 years ago. At that time, the only thing more irrational than our clients was the statutory law regulating marriage and divorce in the Commonwealth of Pennsylvania. To secure a divorce, a plaintiff had to establish a "fault" ground, which included adultery, desertion for a period of two years, cruel and barbarous treatment or "indignities" that rendered the life of an "innocent and injured spouse" intolerable and life burdensome. In the absence of fault grounds, the court had no authority to enter a divorce decree. Thus, even cooperative couples, both of whom wanted the divorce, couldn't escape the mandate of establishing fault. As a result, it became common for divorcing couples to perjure themselves, by testifying ex parte before a divorce master of embellished incidents of alleged fault

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based on scripted testimony that challenged the master's imagination to assign blame to either party, let alone finding either party to be an "innocent or injured" spouse. In Centre County, the divorce masters were well-compensated for their creativity funded by master's fees that were paid to our local bar association and were used to cover the cost of monthly (and well attended) lobster dinners for all bar members.

Nor was there legislation in place regulating the division of property acquired during the marriage. In contrast to present law, property ownership post-divorce was based entirely on title. Since men at the time were generally the primary bread winners, they also typically held title to the pension and retirement benefits. And because our courts had no authority to change title to assets following divorce or to issue an award of alimony, there was no way to compensate women for their significant contributions to the marriage. Women were thus assigned to being the primary caretakers of the parties' children, aided by various gender-based judicial presumptions, such as the "tender years doctrine," which relied upon the materialistic view that young children grow into better citizens if they remain in the primary care of their mothers.

As a result of this primitive notion of marriage and custody, the dissolution of marriages often turned into a game of legalized blackmail. Private investigators were routinely hired to secure evidence of infidelity or other moral compromise that would constitute grounds for a party to secure a divorce or that might bar a spouse's entitlement to spousal support. Armed with this evidence, a competent divorce lawyer could hold the opposing parties' life in limbo for years. To make matters worse (assuming they could get any worse), the Rules of Civil Procedure did not afford family lawyers any right of pre-trial discovery. Accordingly, the term "trial by ambush" gained real meaning. Family lawyers were considered second class citizens, left to deal with the clients nobody else wanted to represent.

We've come a long way in the past 40 years, due in no small part to the efforts of the Family Law Section. Thanks to the hard work and strong leadership of many of my predecessors, Pennsylvania joined the modern era through the enactment of the Pennsylvania Divorce Code of 1980, which eliminated the need to establish fault grounds for divorce in the commonwealth and first introduced the concept of equitable distribution of marital property regardless of title.

Throughout the years, the Family Law Section has been at the vanguard of every significant change in Pennsylvania family law. And as a member of the section, I was able to participate in the debate and enactment of the Pennsylvania Divorce Code of 1980, through which Pennsylvania joined the rest of the modern world by eliminating the requirement that a party prove fault in order to secure a divorce. My membership in the section afforded me the opportunity to meet and develop life-long friendships with the many talented lawyers throughout the state that shared my view that the laws regulating marriage and divorce in Pennsylvania were in serious need of reform.

Today, the Family Law Section constitutes the third largest and one of the most active sections of the Pennsylvania Bar Association, with over 1,000 active members located throughout the state. The section holds conferences two times each year, where several hundred members join together to learn, exchange ideas, socialize and network. Through the lobbying efforts of the PBA, our membership enjoys a powerful voice in framing the legislation that impacts the practice of family law — from grandparent's custody to same sex marriage to assisted reproductive technology.

As I embark on my year as chair of the section, I give thanks to the prior section leadership who gave so much of their time and energy to move Pennsylvania to the forefront of family law reform. Particular thanks go to Mark Ashton who led us through the onslaught of legislative initiatives and served as my mentor in preparing me for this position. While Mark refuses to take credit, it was through his leadership that our legislature finally shortened the separation period for divorce to one year.

Which leads me to what we have to look forward to in the months ahead. Since I first became an officer in 2011, I've been talking about taking the membership to New Orleans during my tenure as section chair. The time has finally arrived, and I very excited to announce that the Winter 2018 Section meeting will take in the Big Easy from Thursday, Jan. 11 through Sunday, Jan. 14 at the Roosevelt Hotel — A Waldorf Astoria property, which is only blocks away from the historic French Quarter. The PBA staff has negotiated a great room rate of only $229 per night for this historic four-star hotel, and as of this date flight costs are VERY reasonable — between $200 and $300 from Philadelphia, Pittsburgh or Baltimore. This conference will have slightly different format that our normal winter conferences, as it will take place from Thursday to Sunday with educational programs being held only in the mornings to allow members time to enjoy the broad cultural sites and culinary experiences of the Big Easy. Those of you who have been to New Orleans know it is a unique city, with a broad array places to see, from the incredible World War II Museum, to Preservation Hall (the birthplace of jazz) to Frenchman's Quarter. We expect that rooms will go quickly, so you'll want to make reservations as soon as you receive your brochures. And our program chairs (Gerry Shoemaker and Hillary Moonay), are in the process of completing a lineup of speakers including a plenary session co-sponsored by the Pa. Chapter of the American Academy of Matrimonial Lawyers featuring Roger Dodd, a nationally known expert on cross-examination that will be both informative and entertaining. Further details will follow in future editions of the *Family Lawyer*. Once again, I thank you for the opportunity to serve as your chair this year, and look forward to seeing everyone in New Orleans in January.

FROM THE EDITOR

THE EDITOR'S WIFE SPEAKS

By Rita L. Pollock
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David S. Pollock

Over the past 21 years that David has edited this journal, as well as the 43 years he has practiced law, I have seen the best of my dear husband. He invests his boundless energy, heart, soul and intellect into *Pennsylvania Family Lawyer* with his passion for continuing education, devotion to more just laws, commitment to giving voice to fellow family law practitioners and an exacting focus on form and punctuation. This publication keeps him in the office till late at night, wakes him in the middle of the night, and consumes more than a few hours each quarter. The *Family Lawyer* also allows David to do two of the many things he most enjoys: taking pictures and talking to people doing worthy work. And, the *Family Lawyer* is all about what David cherishes most: family.

Editor's Note: Not the special income, estate and gift tax planning treatise at pages 162-195 provided by Justin T. Miller, J.D., BNY Mellon.

David and Rita on an adventure

Candice Komar and Rita Pollock on their adventure

You, the readers and contributors to the *PA Family Lawyer*, are members of David's extended family. You like, love, support and enjoy each other just as you often disagree, provoke and exacerbate one another. That, as I will, but need not remind you, is all part of being a family. As a very special member of David's family, I thank you for what you do, for your commitment to the family in family law, your respect for fellow practitioners and making David's work a labor of love.

Rita L. Pollock

David S. Pollock is a co-founder of the Pittsburgh firm of Pollock Begg Komar Glasser & Vertz LLC, Editor-in-Chief of Pennsylvania Family Lawyer, *past chair of PBA Family Law Section, past chair of ACBA Family Law Section, current treasurer of PA Chapter, AAML, Fellow of both the AAML and IAFL (and U.S.A. Chapter, member Budget and Finance Committee) and past treasurer, JCC of Pittsburgh. dpollock@pollockbegg.com, 412-471-9000*

Meeting Scholarship Available

The Family Law Section offers the Wilder scholarship to any PBA member who wishes to attend the 2018 Winter Meeting but cannot for financial reasons. Scholarship application is available at www.pabar.org.

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From time to time, the *Pennsylvania Family Lawyer* will publish articles that it receives for submission. The views expressed in those articles are solely those of the authors of the articles and do not reflect the views or policies of the editors, the *Pennsylvania Family Lawyer*, the Family Law Section or the Pennsylvania Bar Association, and no endorsements of those views should be inferred therefrom.

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THE RICH AND THE SUPER RICH

WHY YOU MAY NEED TO KNOW SOMETHING ABOUT VENTURE CAPITAL AND PRIVATE EQUITY

By Mark R. Ashton, Esq., *mashton@foxrothschild.com*

Ten years ago, before the Great Recession, most of us had never heard about "private equity", and few understood its older cousin, "venture capital." Every once in a while, we might run across a deal where we were told that the investors needed to be "accredited" in order to participate. Back then, most of these were real estate deals involving large housing or commercial development projects. "Accredited" meant "not for mere mortals."[1] You need lots of income and capital to be "accredited." But, the deals were fairly straightforward. Put forth a lot of money that you could afford to lose; watch to see if the project was built out and, if it was; the armored car of cash would one day arrive. Not all of these deals succeeded. Real estate troughs in the early 1990s caused more than a few of these deals to crater, but many came back to life after a few thin years.

To this author, while venture capital and private equity have been around for a long time, they really gained traction again after the Great Recession. The Federal Reserve printed and issued trillions of dollars to stimulate the economy and interest rates receded to near zero. Wealthy investors do not tolerate "no" interest very well and the economy of the past 30 years created an entire class of investors who had so much money that capital preservation was not really an issue. These investors want returns that they could gloat about at cocktail parties. The stock market was boring and then, as now, publicly traded companies tend to hoard their cash. As this is being written in May 2017, Apple (AAPL) is reporting cash holdings of $256 billion dollars. It pays a dividend at a rate (1.62%) that is less than the rate of inflation (2.9%).

The other stimulant to venture capital and private equity investments has been the changing economy. As we all know from the election debates, "old world" companies are shedding jobs by the hundreds of thousands. Manufacturing has been in decline for 30 or more years. This recession, coupled with the rise of online shopping, is now destroying much of American retail. In April 2007, just as the recession was taking hold, Sears Holdings approached $200 a share. Today, offer $9.00 and you'll have sellers lined up outside your door.

Meanwhile, Amazon started in 1995 as a bookseller. Its initial public offering was in 1997. Today it trades at 480x its initial opening price. Facebook was founded in 2004 and opened on the NASDAQ in May 2012 at $38 a share. Today $150. Stories like this prompt wealthy investors to ask: "Why not me?" And if you hang out in golf club bars, there is no shortage of great ideas. The trouble is that Motley Fool and Kiplinger only rarely talk about the failures. The one most speculated about today has not yet failed; the electric automaker Tesla. For almost a decade, the press has routinely decreed that the end is near. Tesla was a business primarily owned by tech-savvy investors and venture capital firms until June 2010, when it raised $226 million in a NASDAQ IPO. In March 2017 a group of Chinese investors infused $1.8 billion into the business. But, the doomsayers still linger. As Sears, J.C. Penney and the late Borders (bookstore) demonstrate, access to public markets is no guarantee of survival in an economy that is changing at a rate not seen since the Industrial Revolution of the early 19th century.

But, the thirst for quick and handsome profits never abates. Driverless cars, 3D printers that will assemble shoes, and anything described with the adjectives "remote" or "robotic" are just around the corner. Then there is the health care industry where medications are being touted to address influenza, Zika, and a myriad of cancers while the replacement of human joints has become as common as a new set of tires. Investment in these businesses was historically the province of the world's largest corporations. Today, however, these businesses prefer to let others endure the risk of bringing the invention on line. It does not bother these companies to make many investors multimillionaires through acquisition because they do not have the risk of seeing a new product or system fail. Big business prefers to focus energy upon marketing and distributing products because that is the skill-set that America is known for.

Let's use an example to illustrate. Tory Robinson grew up on the Main Line of Philadelphia. She graduated from Penn in 1988 and then moved to N.Y. where she did public relations for prominent fashion houses such as Ralph Lauren and Vera Wang. In 2004, married to Chris Burch, Tory launched a fashion line with a retail store just outside Little Italy. Fourteen months later, Oprah Winfrey sang the praises of Tory Burch designs, and her website got 8 million hits the next day. She was 29. Her husband at the time was 52 and had already made a modest fortune in the leisurewear industry. By 2009, the Burches sold a minority stake to a Mexican private capital group. Today there are over 200 stores around the world and 3,000 retailers carrying the line. Burch today remains privately capitalized. No bank was going to fund a fashion house on the basis of Oprah hits. Private equity does.

Venture capital requires patience. Today, you can buy a share of Ralph Lauren for about $77. If you become skittish about Ralph or his duds you can call your broker or log in and get your money back with a gain or loss in a matter of days. With venture capital you enter a world where your money is typically locked up for

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years mainly because it is being employed to incubate a product, process or idea with the understanding that there will be no quick turn-around.

Recognizing that start-ups and emerging companies have high mortality rates and that many great projects with large potential payoffs have huge funding needs over time, venture capital likes to lever investments by investing broadly, essentially making a relatively large number of small bets (compared, for example, to private equity which does the opposite).

Suppose you have formed your own venture capital firm. A woman meets you with an invention that makes automotive airbags much less explosive while equally effective. She has applied for a patent but has no capital and no real entrée to the automotive market. That market produces 94 million vehicles a year concentrated heavily in China, the U.S. and Japan. Those countries have roughly 50 manufacturers. So, the potential is huge, and many think that current technology is inadequate. You look at your rolodex and you have 40 investors who, in the aggregate, have $80 million to invest. But, you are not going to get all 40 to come through with all of their invested capital. If you could wrench $6-8 million out of your posse, that would be very promising. Before anyone is going to take this business seriously, there needs to be working prototypes and a huge investment in overcoming regulatory hurdles. Your job is going to be to find others in the venture capital community who will join in funding this business. These investors can be very fickle. Some might agree to put up capital only if you have a serious presence in the Chinese market. Others may condition their participation on the basis that you raise a total of $25 million because they don't think the project is viable without that kind of capital. The market has specialist firms that raise venture capital for the automotive field. Some investors will want to see participation by credible auto "capitalists" before they will open their checkbooks.

Venture capitalists needs to assemble a coalition of the willing. Once that starts to gel, lawyers are engaged to write agreements that cover everything from protecting the patent to lawyering how and when capital will be contributed or "called." Venture capital often comes from around the world so the agreements are circulated and often re-negotiated as investors come in and/or drop out. Ultimately, all pieces of the puzzle need to come together. If the capital need is $20 million, you don't want to find the coffers empty at the $17 million mark.

It is easy to see why these projects also require massive inputs of labor from the founders. They will cover the world searching for investors and the "talent" needed to put the project together. That talent includes intellectual property lawyers in a variety of countries, engineers to design the product in a commercially useful way and any machinery needed to produce it. It may mean identifying a manufacturer to produce prototypes and more lawyers to handle regulations related to vehicle safety. Then, consideration needs to be given to how or whether to manufacture or merely distribute. A marketing study is "a must" and requires constant revision.

So, who pays for all this? The venture capital investors do. And, they pay for venture capitalists to put all of this together. The typical "commission" due in connection with these investments is a management fee of 2 percent of capital committed (shifting to capital invested late in each VC fund's lifecycle) and a carried interest of 20 percent of the profits earned (after a "hurdle" rate on the investors' money has been achieved"). Thus if the capital committed by investors to the venture capital fund is $50 million, the annual management fee charged to the fund and payable to the "house" is $1 million. If an investment comes into the money and is sold for a $10 million profit (typically, assuming the hurdle rate has been satisfied on the investment and on over-all to-date basis), the "house" gets another $2 million.

These are big numbers. If you turn your money over to a typical investment company/mutual fund manager trading in common stocks, the annual fee is typically 1 percent of assets under management (AUM), also termed funds under management (FUM). But the difference between mutual fund management and venture capital is the difference between hunting for deer at the local game preserve and hunting big game in Africa. The returns are completely different in Africa. But, so are the investment minimums and other associated risks.

My first education in venture capital came in an odd way. I represented a gentleman in the subscription publishing business. He had an independent board of directors that included a venture capitalist, and he insisted that I talk with the venture capitalist as part of the discussion about the value of my client's business. The two worlds could not be more different. A subscription publisher typically incurs big debt to create a publication. Usually the method is to give the publication away or offer subscriptions for little or no money hoping to hook subscribers. But, if you are successful, the subscriber pays for an annual subscription "up front." You get the subscription money and you "owe" the subscriber a year of the publication. Usually, in 12-24 months you will know whether your dogs hunt.

Venture capital is more like 17th century piracy. The head pirate assembles a crew of worthy shipmates who understand how to operate a ship and how to conduct "operations" intended to bring home the gold. He also needs to secure capital to acquire and fit out the ship because even sailing ships need provisions to sustain the crew. Experienced pirates attract capital more readily than neophytes. When all is aligned, articles of agreement are drafted describing who will do what, and how any "booty" will be di-

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vided.

Both the worthy shipmates and their landlubberly investors have to understand that it is rarely clear when or how returns will be achieved. When Blackbeard cleared Port Royal, Jamaica, and headed to sea, he did not know whether he would encounter a Spanish galleon for a day, a month or a year. He might engage several potential "prizes" without capturing any of them.

This is also the world of venture capital. You are invited to "sign on" for an investment that may be $500,000 in capital committed and without limit (at least in theory) at the top. You sign on to Blackbeard Investments. They have promised to raise $50 million and to invest in companies intended to address the opioid crisis in America. They plan to look at drug therapies intended to help address addiction and to help fund treatment centers to wean those already under the spell of these drugs. Typically, you agree to pay them the 2 percent and 20 percent described above and they have agreed to report to you in three-four years about what investments they have made and what has happened with them. That is not to say that you are in the dark for that period of time. They will keep you apprised of what they are doing with your money. If you put a lot of money into the venture, chances are you will be consulted about how the money is invested. But that means a lot of money. Agreements often provide that even after three-four years of sailing in the Sea of Venture Capital Investments, Blackbeard has the right or the ability to insist on more time.

There is method to this. Perhaps after three years, the drug therapy investments show promise while the treatment centers are overwhelmed with cheap capital from real estate investment trusts searching for a substitute for mall and strip center income that had sustained them for decades. So Blackbeard is asking for an additional two-three years beyond the original investment horizon of three-four to see if the drug therapies will pay off. Some gamblers will throw their chips in and cash out at a substantial loss. Others may decide to sign on to more sailing in the hope that the big returns are only a year or two away.

All of this is fraught with risk. Suppose Blackbeard Investments identifies a company with an effective drug addiction therapy that weans people from opioids effectively and that therapy secures regulatory approval. Chances are good that Pfizer, or Johnson &Johnson or Bayer will pay hundreds of millions of dollars for each 10 million invested in order to secure a license to market and distribute that approved treatment. Yes, tens of millions invested in "treatment centers" may be charged off as a total loss, but the gain on the opioid therapy program washes that loss away with enormous returns on the capital invested. This is essentially how venture capital works. You never expect big returns on each dollar invested. You just hope that one in four or two in nine venture capital investments pay off handsomely.

In recent years, venture capital has gone more mainstream with many capitalists choosing to buy substantial stakes in publicly traded companies with the plan to "reform" the management or direction of these companies. You may see this if you represent a client who works in senior management of one of these companies. This usually means that the senior executive holds stock that is by no means "common" but tailored to the investment goals of the venture capitalists. Just be aware that there is common stock and preferred stock and then there is stock specially tailored to the goals of the venture capital group targeting the publicly traded company.

Venture capital has another dark alley beyond those set forth here. It has to do with earnings and cash flow; both of which are the numbers upon which business valuations are commonly based. In the world of business valuation, willing buyers pay premiums for businesses because there are measurable earnings and/or cash flow to value on a forward-looking basis. In the past generation, we have seen the rise and triumph of business values based upon revenue (e.g., gross income) rather than profit. At first blush, this is counterintuitive. If business revenue grows by 10 percent a year but the company has never made a dime of profit, why would I buy an unprofitable company? But, we live in a day when buyers assume that they know how to take a revenue stream and make it into a profit stream. The analysis is often chimerical both in theory and in practice, but we are seeing businesses that have never earned any kind of profit selling for a multiple of revenue because the buyer is convinced that he or she can fix the problems that impede profitability. This is an enigma. The business valuation expert can discuss transactions where profit is zero or close to zero but a similar business still sold for a multiple of revenue. But, to say that the business you are dealing with would have the same experience and to have such an opinion to a reasonable degree of certainty is pure folly.

So what does this mean for the lowly divorce attorney? Several things. If you are dealing with a case involving venture capital here are some rules to consider.

1. Venture capital investments are not easily transferrable because the typical fund limited partnership agreement has lots of restrictions on transfer and many dependent spouses will not be accredited investors (or, if applicable, qualified purchasers).[2]
2. Venture capital investments are inherently illiquid because the "venture" is not supposed to yield returns over the short term. That is not to say they can't. Occasionally, the pirate ship captures a Spanish galleon within days of heading out to seas. But that is the rare, rare exception.
3. Hire a business valuator to value early stage venture capital at your risk. Businesses are typically valued on earnings or cash flow. Most of these businesses have neither. And when they start to "turn" cash or profit, investors may value the

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business more highly than any competent business valuator can justify.

4. Book value almost never reflects market value and earnings or cash flow never really keep up with value. For a medical device or pharma company, an FDA approval signals value far sooner than the income statement or balance sheet will ever show. For an internet marketing company, hits or clicks signal value long before earnings or cash ever appear.
5. Unlike publicly traded securities, there is not a ready market to sell venture capital limited partnership interests. This typically means that a seller will end up absorbing a significant marketability discount even in a setting where the investment otherwise has favorable numbers.
6. Because the market to sell is usually very thin with buyers and because the typical dependent spouse is not an eligible transferee either because of partnership restrictions or because the spouse is not a qualified investor, most of these assets will have to be divided "if, as and when" there is an event permitting the asset position to be liquidated.

So how can you measure the size of the fish on the line to ascertain whether it is a minnow or a whale? As noted above, if the investment is recent the likelihood of quick profit is quite remote. But if you want to understand whether the fish is big enough to bring into the boat, a good place to look is at the tax data of the general partner.

We have discussed the 2 & 20 rule — 2 percent as a pure management fee, 20 percent (or perhaps even as much as 30 percent) as the "carried interest." Most venture cap funds are run by a general partner. The investors are limited partners. The general partner is the captain of the ship. The captain decides on where to invest; how to manage the investment and when to sell or fold an investment. The general partner ordinarily a very limited amount of the capital committed (typically 1 percent or less). It is providing "talent" in terms of raising capital, identifying target investments and helping to manage those investments into big gains. The limited partners are putting up the capital and trusting the general partner to deliver liquidity and profits either through sale or taking public of the portfolio investment. Typically, when defined thresholds (termed "hurdles") are met, the general partner takes 20 percent (but in some funds as much as 30 percent) of the return as a kind of commission. In order to qualify for this major payday, the general partner is commonly expected to secure a return of the limited partners' capital plus a specified rate of return, called a hurdle rate. Those hurdle rates are set out in the fund limited partnership agreement. Needless to say, the general partner is looking to find ways to monetize and maximize its carried interest. Carried interest has nothing to do with interest. It is the general partners right to a cut of the profits, due and payable after the hurdle rate has been met.

So if the general partner is earning real money beyond the 2 percent management fee, it means that the investment pool in the venture capital fund has begun to turn real profits either through operations or sales of assets. The carried interest is the 20 percent (or even as much as 30 percent in some funds) of the profits of the limited partnership after return of capital and the hurdle rate of return goals have been met. If the general partner is getting paid on its "carried" interest, it has succeeded. Recognize that because most venture capital funds invest in several businesses, the fact that the general partner is getting paid for its carried interests may not tell the entire story. They may have brought several tuna into the boat but there may still be a whale on the line.

Income from these funds come in several forms. Let's assume your client puts up $1 million in Venture Fund I. His $1 million gets him a 2 percent interest as a limited partner. The general partner identifies and invests in five different companies searching for capital. One is a $10 million investment in a battery operated riding mower that can run for days on a single charge. The typical goal of such a venture is to sell the product or the company to a company like Toro, Honda and Ariens. These companies are not biting, but the company has found distribution centers that allow it to make serious profits. The goal remains to sell to one of the big boys but, in the meantime, the company has profits to distribute and they flow through the Venture Fund to the investors. Meanwhile, Venture Fund I's investment in a manufacturer of water pumps is failing miserably. The losses in the water pump business eclipse the gains from lawn mowers. But then a British lawnmower maker decides that it wants to enter the U.S. market by buying Venture's electric lawn mower. There is a sale and a huge capital gain on the $10 million invested. The general partner is going to look at the agreement to see if it has attained the hurdles to get a payment on its carried interest. All is well until, just prior to closing, the U.S. government decides that it is going to oppose the sale and the Brits withdraw. Such are the tides of venture capital. Understand as well that while Venture Fund I has invested heavily in its lawn mower of the future, another venture capital group is pitching Monsanto and the Scott's Company with a lawn seed that produces grass that never grows higher than three inches. Hmmmmmmmm.

These are tricky investments. They can utterly fail or become the next Uber.

[1]An accredited investor is actually a term that comes from Regulation D of the Securities Act of 1933. In a poorly composed nutshell, it currently means $200,000 a year in income (or $300,000 in joint income with spouse) in each of the two past years or net worth of $1 million or more excluding home equity.

[2]Because venture capital funds and private equity funds are structured to be exempt from the registration and other requirements applicable to registered investment companies (including mutual funds) under the Investment Company Act of 1940, any venture capital fund or private equity fund that is structured to have more than 100 investors has to include only "qualified purchasers" (also referred to as

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"QPs"), which for individuals means a natural person with $5,000,000 or more in investments (including investments held jointly with a spouse). To further confuse matters, the U.S. securities laws also contain definitions of "qualified client" and "qualified institutional buyer", which luckily we do not need to get into here.

Mr. Ashton gratefully acknowledges the editorial guidance of his former partner John Cappetta, Esq. John practices in Downingtown, Pennsylvania and is affiliated with the Stamford, Conn., law firm of Martin, LLP.

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REVIEW OF THE BUSINESS VALUATION BENCH BOOK

By Steven Bravo, Apogee Business Valuations, Inc.

Judges are expected to know a lot about the matters that come before them. A judicial decision implies the trier of fact listened, analyzed, and understood all of the evidence presented before issuing a ruling on the matter. Judges are intelligent and are generally thought to have agile minds capable of receiving and interpreting large amounts of data that typically accompany most cases; however, they are not necessarily business appraisers.

Judges are often presented with very different opinions of value. When it comes to deciding a business's worth, which valuation expert's analysis is most believable? What are the important factors a judge needs to consider?

In their most recent book, *The Business Valuation Bench Book*, William Morrison and Jay E. Fishman help to answer these questions. The book is concisely organized and written primarily for judges. The authors had two goals in mind for the book:

1. To serve as a reference guide of fundamental business valuation concepts for judges; and
2. To provide a methodology to identify component parts and then to drill into an expert's factual and theoretical support for his or her conclusions.

Below are some of the important factors a judge should consider when evaluating appraisers' opinions of value and coming to his or her own decision on a business's value:

- Has the proper premise of value has been used, be it value in exchange or value to the holder?
- What is the appropriate standard of value: fair market value, fair value, or something else?
- Have the market, income, and asset-based approaches been considered?
- Is there a need to adjust income statements to achieve normalized earnings, and are these adjustments reasonable and well-documented? What are the typical areas that require adjustments?
- Is a capitalization of earnings (a single year) or discounted cash flow analysis (multiple years) more appropriate?
- How does a business's tax classification (C or S status) affect income, and has it been correctly incorporated into the analysis?
- Has the business's risk been appropriately incorporated into the discount rate? Have the models used to develop the discount rate been correctly applied and are the assumptions reasonable?
- If the excess earnings method is used, has it been applied correctly? What are the important assumptions and are they reasonable?
- Have the guideline transactions been properly applied to the business's performance? What adjustments, if any, need to be made?
- How sensitive is a business's value to differences in certain assumptions— such as the growth rates, discount rate, normalizing adjustments, taxes, etc.?

There are six chapters (75 pages in total):

1. "Business Valuation Concepts"
2. "Approaches to Value"
3. "Income Approach"
4. "Asset-Based Approach"
5. "Hybrid-Excess Earnings Method"
6. "Market Approach"

Each chapter begins with "Points Covered in the Chapter," where important concepts are summarized in bullet format, followed by a discussion and analysis of the critical components of the valuation process and ending with "Questions to Ask" (questions the judge can ask the expert). Throughout each chapter, there are two

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case studies (a clothing store and a real estate holding company) that further illustrate key valuation concepts.

There are 12 appendices:

1. "Charting Goodwill Jurisprudence"
2. "Normalization Adjustments Comparison"
3. "Income Capitalize Comparison"
4. "Cap Rate Comparison"
5. "Discounted Cash Flow Comparison"
6. "Net Asset Comparison"
7. "Excess Earnings Comparison"
8. "Transaction Multiple Comparison"
9. "The Basics of Discounts"
10. "Glossary of Business Valuation Terms"
11. "Business Valuation Bench Book Questions"
12. "Business Valuation Bench Book Reference Guide"

The goodwill jurisprudence (Appendix 1) is a state-by-state breakdown referencing each state's basic position about enterprise and professional goodwill. The comparison appendices (Appendices 2 through 8) present a process whereby the trier of fact can separate the business valuation into key component parts to analyze an expert's support for his or her conclusions. Appendix 9 discusses the basics of discounts, beginning with the levels of value, then moving to the discount for lack of control, the discount for lack of marketability (DLOM), and finally a list of other discounts. There are numerous examples of the powers of control, degrees of control, a list of sources of lack of control, and factors affecting the size of the DLOM. The glossary of business valuation terms (Appendix 10) is included to emphasize the importance of properly communicating the valuation process and conclusion in a manner that is clear and not misleading. Appendix 11 lists 15 questions that every judge should ask the expert. The final appendix (Appendix 12) is a reference guide that provides a summary list (and definition) of the essential factors that embody every good business valuation conclusion of value.

The authors do an excellent job of "pulling back the curtain" on business valuations, showing judges where they need to spend time querying experts on their appraisals. This book will prove to be extremely handy and helpful to judges trying to sort out opposing experts' conclusions of value. It can be equally beneficial to attorneys and experts in their case preparation.

The Business Valuation Bench Book is available at www.bvresources.com/products/thebusiness-valuation-bench-book.

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Morrison founded and was president of the forensic accounting firm, Morrison & Co. (merged with WS+B in December 2010). He has over 35 years of experience as an investigator, forensic accountant, and business valuator. He has served as a special agent for the Federal Bureau of Investigation (FBI), an internal auditor, and a certified public accountant. Morrison has been qualified as an expert for the Supreme Court, Superior Court, and Federal Court of New Jersey and has been appointed as an expert for the federal and state courts in New Jersey in hundreds of matters as a forensic accountant, valuation expert, and mediator. He has provided expert witness services in complex civil and criminal matters involving stockholder oppression; high net worth divorces; economic damage claims; and federal, criminal, and tax matters, among others.

He has lectured to organizations such as The New Jersey Institute of Continuing Legal Education, American Society of Appraisers, National Association of Certified Valuation Analysts (NACVA), and the New Jersey Society of Certified Public Accountants (NJSCPA) on topics such as the maintenance of attorney trust accounts and forensic accounting. He has published numerous articles on business valuation and forensic accounting for Fairshare, Valuing Professional Practices and Licenses, and the Encyclopedia of Matrimonial Practice. He is the co-author with Jay Fishman and Shannon Pratt of Standards of Value, Theory and Application.

A graduate of Boston College with a Bachelor of Arts degree in history, he also earned his master's degree in business administration from Fairleigh Dickinson University. He is a member of the AICPA, NJSCPA, and the Society of the Former Agents of the Federal Bureau of Investigation.

Jay E. Fishman, FASA, is a managing director of Financial Research Associates and has been actively engaged in the appraisal profession since 1974. He specializes in the valuations of business enterprises and their intangible assets. Fishman has co-written several books, including the highly acclaimed Guide to Business Valuations (with Shannon Pratt and James Hitchner) and Standards of Value (with Shannon Pratt and William Morrison).

He has also written numerous articles on business valuations as well as qualifying as an expert witness and providing testimony in 12 states. He has taught courses on business valuation to the Internal Revenue Service, the National Judicial College, the Hong Kong Society of Accountants, and on behalf of the World Bank in St. Petersburg, Russia. He recently taught courses in Moscow, Russia, for Kwinto Management and for the Slovenian Institute of

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He holds a bachelor's degree and master's degree from Temple University as well as an MBA from LaSalle University. Fishman is a Fellow of the American Society of Appraisers, a Fellow of the Royal Institution of Chartered Surveyors, a former chairman of the Business Valuation Committee of the American Society of Appraisers, editor of the Business Valuation Review, an editorial advisory board member of Business Valuation Update, chair of ASA's Government Relations Committee, a former trustee of The Appraisal Foundation, and is a member of the Appraisal Standards Board of The Appraisal Foundation. He finished his term as a member of the Appraisal Practice Board of The Appraisal Foundation in July 2016. He recently was awarded the Chairman's Public Service Award from The Appraisal Foundation. The award was established in 2005 to recognize individuals who have worked with the foundation for the benefit of the appraisal profession and who, in the process, have gone above and beyond the call of duty. Fishman was recently appointed as a member of the board of trustees of the International Valuation Standards Council (IVSC).

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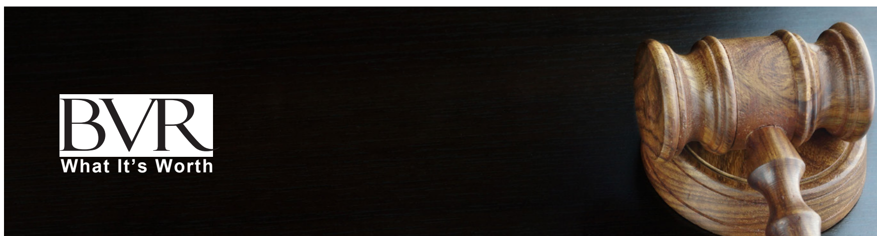
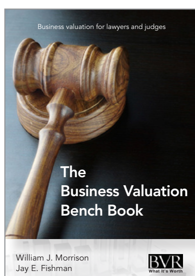


A practical reference guide every attorney, judge, and appraiser should have on their bookshelf



The Business Valuation Bench Book, which is already used by leading judges who need to evaluate expert testimony, provides the guidance and tools to better assess the facts and analysis made by business valuation experts. Written by top thought leaders William J. Morrison and Jay E. Fishman who have appeared in front of hundreds of judges, frequently in high-profile cases, this must-have resource addresses fundamental business valuation concepts in an easy-to-use format. Take advantage of the authors' decades of experience with in-depth insight into the business valuation process and detailed explanations of valuation approaches.

Highlights of the guide include:

- Main valuation concepts in a bulleted format followed by detailed explanations and worksheets
- Two thorough case studies on a clothing store and real estate holding company
- 12 appendices, including 7 worksheets, which can be used to dissect and compare the experts' opinions. Also includes appendices which provide suggestions on the questions to ask valuation experts

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Federal/Military Corner:

By Mark E. Sullivan, Esq., mark.sullivan@ncfamilylaw.com

THE CLOCK IS TICKING — DATES AND DEADLINES IN THE MILITARY DIVORCE CASE (PART TWO)

The first part of this article dealt with deadlines and time problems with submission of the military pension division order and the two distinct deadlines for registration of a court order for the Survivor Benefit Plan with the retired pay center.

Separation and the Entitlement to Military Benefits

Does the date of separation matter? "Separation" is generally not a recognized measurement point under federal law. Whether the issue is garnishment and the 10/10 rule, ID cards or medical care, federal and military rules in general are written with regard to the divorce decree or the judgment of dissolution, not the date when the parties separate.

Of course, the separation of the parties will also have an impact on continued entitlement to on-base housing. If there is a marital separation, the rules require the family members to check out of family housing; the SM will be assigned single quarters.

On the state level, the separation date certainly can play an important part in the military divorce case. In states such as California and North Carolina, the acquisition of community or marital property stops at the date of separation; thus that date may be an important state law issue in determining the marital or coverture fraction which is often used to divide the pension.

Commissary and Exchange Privileges

Shopping in a military base's commissary (akin to a grocery store) and exchange (i.e., department store) can be valuable for the nonmilitary spouse, since both of these provide items for sale at substantial savings and with no state sales tax. These exchange privileges are retained until the divorce of the parties.

To qualify for continuation of these benefits, the unremarried spouse must meet the "20/20/20" test—that is, 20 years of creditable service by the SM, 20 years of marriage, and an overlap of 20 years between these. If a former spouse remarries, she loses the entitlement during the period of that remarriage. An unremarried former spouse of a SM may use the commissary and the post or base exchange as if she were the surviving spouse of a retired SM of the military.[1]

ID Cards and Military Medical Coverage

A former spouse who qualifies for any of these benefits may apply for an ID card at any military ID card facility.[2] He or she must complete DD Form 1172, "Application for Uniformed Services Identification and Privilege Card." When an eligible family member receives an ID card, that information is transferred to the Defense Eligibility Enrollment Reporting System (DEERS) to ensure that the cardholder may utilize TRICARE and other medical benefits.[3]

If there have been 20 years of marriage, 20 years of military service qualifying for retirement, and an overlap of at least 20 years, then an unremarried FS will qualify for full medical benefits as a "20/20/20" spouse. For shorter marriages, the former spouse should look into CHCBP (Continued Health Care Benefit Program) as a means of providing health insurance coverage.[4] If the FS has not remarried before age 55, she will be eligible for coverage if she pays the premium (around $425 as of 2015) and receives either court-ordered pension division or else SBP coverage. It is recommended that she obtain both.

The Department of Defense designated the Air Force as the proponent agency for publishing the regulations about military privileges and entitlements. The rules about these issues, as well as regarding military ID cards for military dependents and former spouses will be found in a joint service regulation, AFI [Air Force Instruction] 36-3026. One may access a copy by using an internet search engine to search for "AFI 36-3026".

A judgment of divorce or dissolution will affect the privileges, legal rights, and entitlements of the nonmilitary former spouse in many ways. A table showing the benefits and entitlements of former spouses is found at the Appendix below, adapted from that found at Appendix 6-C, THE MILITARY DIVORCE HANDBOOK (American Bar Assn., 2nd Ed., 2011).

Federal Benefits, Negotiations and Advocacy

It is important to remember that most federal rights and benefits — such as medical coverage — are statutory entitlements. They should not be looked upon as bargaining tools that are given, traded, conceded, or withheld during the negotiation process. They belong to any nonmilitary spouse who meets the requirements set out in the applicable statute. As to other benefits that are dependent on length of service and the date of a court order, such as SBP coverage, constant vigilance and knowledge of the critical deadlines should be part of the attorney's duty of advocacy for

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the client.

[1]10 U.S.C. § 1062.
[2]The nearest military support office for a spouse or former spouse to visit can be found at the Real-Time Automated Personnel Identification System (RAPIDS) Site Locator on the web at http://www.dmdc.osd.mil/rsl.
[3]That is, TRICARE plus treatment on a space-available basis at military medical treatment facilities.
[4]10 U.S.C. 1078a; see also 32 C.F.R. 199.20.

APPENDIX: FORMER SPOUSE BENEFITS CHART

[This chart and the footnotes immediately below it were prepared by the Administrative and Civil Law Department, Legal Assistance Branch, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. They are used as part of the Basic and Advanced Officer Courses at TJAGLCS.]

Uniformed Services Former Spouses' Protection Act[1*]	**Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes[3*]**			
	Number of Years			
Benefits for Former Spouses[2*]	**0 to <10**	**10 to <15**	**15 to <20**	**20 or more**
Division of Retired Pay[4*]	X	X	X	X
Designation as an SBP Beneficiary[5*]	X	X	X	X
Direct Payment from Pay Center[6*]				
Child Support	X	X	X	X
Alimony	X	X	X	X
Property Division[7*]		X	X	X
Health Care[8*]				
Transitional[9*]			X	
Full[10*]				X
Insurance[11*]	X	X	X	X
Commissary[12*]				X
Post Exchange, Base Exchange[12*]				X
Dependent Abuse				
Retired Pay Property Share Equivalent[13*]		X	X	X
Transitional Compensation[14*]	X	X	X	X

FOOTNOTES

1* Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, Pub. L. 103-160 (1993).

2* For guidance on obtaining a military identification card to establish entitlement for health care, commissary, and PX benefits, see appropriate service regulations (e.g., AR 640-3). Former spouses of reserve component members may be entitled to these benefits; see the following notes for applicable benefits.

3* Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the Armed Forces (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program [statutory authority for this program expires in 1999]).

4* At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired, Konzen v. Konzen, 103 Wash.2d 470, 693 P.2d 97, cert denied, 473 U.S. 906 (1985).

5* Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation as an SBP beneficiary.

6* See 10 U.S.C. §§ 1408(d) & 1408(e) and 32 C.F.R. part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the appropriate finance center.

7* While eligibility for direct payment does not extend to former spouses whose overlap of marriage and service is less than ten years, this is not a prerequisite to award of a share of retired pay as property to the former spouse (see Note 4).

8* To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and must not be covered by an employer-sponsored health care plan; see 10 U.S.C. §§ 1072(2)(F), 1072(2)(G) & 1072(2)(H). Department of the Army interpretation of this provision holds that termination of a subsequent marriage by divorce or death does not revive this benefit, but an annulment does. These remarriage and employer-insurance restrictions do not limit eligibility to enroll in the civilian health care insurance plan discussed in Note 11.

9* "Transitional health care" was created by Pub. L. 98-625, § 645(c) (not codified), as a stop-gap measure while a civilian health care plan was negotiated for former spouses and other who lose an entitlement to receive military health care (see Note 11). The program subsequently was modified and narrowed by the National Defense Authorization Act, Fiscal Year 1989, Pub. L. 100-456, Title VI, § 651, 102 Stat. 1990 (1988). Current program benefits are described at 10 U.S.C. § 1078a.titled "Continued Health Benefits Coverage." Qualifying former spouses are those who are unremarried, who have no employer-sponsored health insurance, and who meet the "20/20/15" requirement (i.e., married to the member for at least 20 years, and the member has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service). Transitional health care now includes full military health care for 1 year after the date of the divorce, and during this period the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD (see Note 11).

Note that for health care purposes, 10 U.S.C. § 1072(2)(G) treats a 20/20/15

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former spouse as if he or she were a full 20/20/20 former spouse (20 years of marriage, 20 years of service, and 20 years of overlap) if the divorce decree is dated before April 1, 1995. A 20/20/15 former spouse of a reserve component retiree with a divorce decree prior to April 1, 1985, can receive full health care too, but only if the member survives to age 60 or if he or she elected to participate in the Reserve Component Survivor Benefit Program upon becoming retirement eligible.

10* "Full health care" includes health care at military treatment facilities and that provided through the TRICARE insurance program. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60th birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. § 1076(b)(2).

11* The Department of Defense Continued Health Care Benefit Program (CHCBP) may be found at 10 U.S.C. § 1078a. It is a premium-based program of temporary continued health benefits coverage available to eligible beneficiaries. Medical benefits mirror those available under the standard TRICARE program, but CHCBP is not part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or go to http://www.tricare.mil/chcbp.

12* Pursuant to statute and service regulations, commissary and PX benefits are to be available to a former spouse "to the same extent and on the same basis as the surviving spouse of a retired member..." Pub. L. 97-252, Title X, § 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, § 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act § 1006(d)). The former spouse must be "unmarried," and, unlike the rules for health care, any termination of a subsequent marriage revives these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-3). Notwithstanding the provision of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

13* When a retirement-eligible member receives a punitive discharge via court-martial, or is discharged via administrative separation processing, the member's retirement benefits are lost. In certain cases where the court-martial or separation action was based on dependent abuse, eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. Authority for these payments was created in the National Defense Authorization Act, Fiscal Year 1993, § 653, Pub. L. 103-484. An overlap of marriage and service of at least ten years is a prerequisite to receipt of payments. The National Defense Authorization Act, Fiscal Year 1994, § 555, Pub. L. 103-160, clarifies that eligibility begins on the date the sentence is approved and does not have to wait until the member is actually discharged.

14* The National Defense Authorization Act, Fiscal Year 1994, § 554, Pub. L. 103-160, also creates authority for monthly transitional compensation to dependents of a non-retirement eligible member separated from the service by reason of dependent abuse.

Mark E. Sullivan, a retired Army Reserve JAG colonel who practices family law in Raleigh, N.C., is the author of "The Military Divorce Handbook (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

Family Law Section Summer Meeting 2017

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DEPENDENT ON CHILD SUPPORT IN DEPENDENCY

By James W. Cushing, Esq., jwc@fayerivacohen.com

It is widely known that it is public policy is to ensure children receive the support they need from their parents. In the vast majority of cases, a child support obligation terminates when a child reaches the age of majority (age eighteen) or graduates from high school, whichever is later, however the Superior Court of Pennsylvania, in the recent matter of *Somerset County Children and Youth Services v. H.B.R.*, 155 A.3d 627 (Pa.Super.2017), has addressed the atypical situation when a child reaches the age of majority yet still remains subject to a dependency order.

In *H.B.R*. the child-at-issue ("Child") was put into placement following a dependency action. Consequent to the same, Children and Youth Services ("CYS") filed a complaint for child support against the Child's father and, accordingly, an order for child support was entered. A little over two years after the child support order was entered, the father filed a petition to modify the child support order, requesting termination of the same, because the Child, having reached the age of majority and graduated from high school, was emancipated. Despite reaching the age of majority and graduating from high school, the Child voluntarily chose to remain in the custody of CYS until age 21, which is his right to do.

After the child support modification conference, the trial court entered an order terminating the child support order as the Child is emaciated due to reaching the age of majority and graduating from high school. In response, CYS demanded a hearing contesting the termination of the child support order because, although having reached the age of majority and graduating from high school, the Child continued to be dependent and in the custody of CYS and, therefore, financially subsidized by CYS. After the hearing mentioned above, the trial court affirmed the order mentioned above flowing from the conference terminating the support order. As a result, CYS appealed the matter to Pennsylvania Superior Court.

On appeal, CYS essentially argued that as it must still outlay money for the support of the Child, due to his remaining dependent, the father should contribute to the same through a child support order. Furthermore, CYS claimed that the child support process may be the only mechanism available to it to seek recoupment of its costs for the emancipated Child.

In rendering its decision, the court first noted that the Pennsylvania Supreme Court has ruled that a parent has no legal duty to provide educational support to an emancipated child. Based on this, Superior Court, specifically agreeing with the trial court, said that "a parent has no duty in Pennsylvania to provide support to a college-age child who has graduated from high school and who suffers from no infirmities which would prevent that child from earning income to help support himself."

In light of the above, the court ruled that CYS failed to convince it that the trial court's order, described above, is "manifestly unreasonable or based on bias, ill will, prejudice, and partiality." Instead, Superior Court noted, the trial court's order is precisely consistent with applicable law, especially considering that the Child is emancipated and capable of self-support. Therefore, the father has no legal obligation to continue paying child support.

As part of its analysis, the court distinguished this case from the matter of *Erie Cnty Office of Juvenile Prob. v. Schroeck*, 721 A.2d 799 (Pa.Super.1998). In *Schroeck* the parent was obliged to pay the cost of care for the child-at-issue in that case even though the child was over 18 years old and graduated from high school and was therefore emancipated. Despite meeting the two primary factors for emancipation, the child was also adjudicated delinquent and placed in a court ordered residential program. In ordering support for this child, the court's reasoning in *Schroeck* was that, due to being adjudicated delinquent and in a residential program, the child was rendered effectively unemployable and incapable of self-support. By contrast, Superior Court noted, the Child in *H.B.R*. has no such limitations which would trigger a support obligation. The court pointed out that his decision to remain in the custody of CYS is not mandatory does not render the Child incapable of self-support.

Ultimately, Superior Court affirmed the termination of the father's child support obligation. The court observed that CYS may have other avenues to pursue under 62 Pa.C.S. Section 704.1 and/or an action to seek reimbursement due to the Child being able to engage in self-support, but elected not to provide any guidance as it does not issue advisory opinions.

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PARTIES IN DEPENDENCY — PROPER NOTICE AND PARTICIPATION IS ESSENTIAL

By James W. Cushing, Esq., jwc@fayerivacohen.com

The stakes in a dependency matter are extremely high. Indeed, one's parental rights over his child could be forever terminated in such a matter, so it is imperative that the parties involved receive sufficient notification of the hearings which take place and are given a full opportunity to participate. The trial court, in *In the Interest of K.S., a Minor, Appeal of: A.L.W.,* 2017 WL 1162449, has made it clear that proper notice and participation of the parties is absolutely essential in a dependency case.

In *K.S*., the child-at-issue ("Child") was placed into a series of homes due to mistreatment and/or an inability of the Child's parents to care for the Child. Due to the instability of the Child's housing, Children and Youth Services ("CYS") eventually filed a Shelter Care Application requesting temporary placement of the Child into the custody of CYS. A hearing was scheduled for the Shelter Care Application, however the Child's mother (hereinafter "Mother") and father were both incarcerated at the time of that hearing.

The attorney for Mother appeared at the hearing and requested a continuance of the same because, while Mother wanted to attend the hearing, she was unable to do so due to her incarceration and, perhaps more importantly, the prison in which she was incarcerated refused to allow her to participate at the hearing by telephone. CYS opposed the continuance request on the basis that Mother, regardless of whether she could participate at the hearing, could not receive custody of the Child due to her incarceration. In other words, as placement was the subject of the hearing, and Mother could not receive placement, her participation would not result in her receiving placement regardless of whether she appears and/or participates.

The trial court agreed with CYS and denied the continuance. CYS then proceeded to request an adjudicatory hearing, with Mother's attorney objecting again due to her unavailability. The trial court overruled Mother's attorney's objection and granted CYS's request to adjudicate the Child dependent.

The trial court, at the conclusion of the hearing, adopted CYS's recommendations, issued a shelter care order, granted CYS custody of the Child, and issued a dependency order. Mother subsequently filed a timely notice of appeal of the above-described court orders. Mother raised two issues on appeal: (1) she believed the trial court erred in denying her ability to participate in the above-described hearing; and (2) she believed the trial court erred in determining that the best interests of the Child would be served by denying her due process. Mother pointed out that there were no exigent circumstances which required an immediate adjudication of the case before affording her opportunity to participate.

On appeal, Mother argued that the clear operation of the relevant procedural rules regarding notice and service were violated which justifies vacating the trial court's adoption of CYS's recommendation. In making her argument, pointed out three procedural rules. First, Mother argued that there was a lack of compliance with Pennsylvania Rules of Juvenile Court Procedure Rule 1331. Rule 1331(A) states that "[u]pon the filing of a petition, a copy of the petition shall be served promptly upon the child, the child's guardian, the child's attorney, the guardian's attorney, the attorney for the county agency, and the county agency." Furthermore, even if the parent is not a child's guardian, she still must receive service of a dependency petition. Second, Mother points to a failure to abide by Pa.R.J.C.P. 1361 which requires the following: "[t]he court shall give notice of the adjudicatory hearing to…(4) the parents…." Third, Mother also argues that the requirement of the terms of Pa.R.J.C.P. 1360(A), namely, "[t]he court shall issue a summons compelling all parties to appear for the adjudicatory hearing" was not complied with by the trial court. Rule 1360 goes on to say: "[t]he summons shall: (1) be in writing; (2) set forth the date, time, and place of the adjudicatory hearing; (3) instruct the child and the guardian about their rights to counsel, and if the child's guardian is without financial resources or otherwise unable to employ counsel, the right to assigned counsel; (4) give a warning stating that the failure to appear for the hearing may result in arrest; and (5) include a copy of the petition unless the petition has been previously served." Fourth, pursuant to Pa.R.J.C.P. 1406(A)(1)(a), the trial court was to specifically ascertain whether the notice requirements of Pa.R.J.C.P. 1360 and 1361 were met (the Rule specifically states "(1) Notification. Prior to commencing the proceedings, the court shall ascertain: (a) whether notice requirements pursuant to Rules 1360 and 1361 have been met…."

Upon the Superior Court's review of the underlying matter, it observed that the trial court failed to comply with the rules noted above. First, the dependency petition in this case was filed the same day as the shelter hearing and appears in the record after the entry of the shelter care order. Obviously Mother could not have received service of the petition per Rule 1331. Second, due to the timing of the petition, as compared to the applicable shelter care order, Mother simply could not have received service per Rule 1331. Third, the notice of the adjudicatory hearing was, strangely, entered on the same day as the hearing itself, and therefore obviously could not have provided Mother notice per Rule 1361. Fourth, while there appears to have been a summons issued per Rule 1360, no affidavit of service was filed for the same pursuant to Pa.R.J.C.P. 1363. As a result, there is nothing in the record suggesting Mother was properly served with the summons. Furthermore, nothing in the record reflects any reasonable efforts

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PARTIES IN DEPENDENCY: PROPER NOTICE AND PARTICIPATION IS ESSENTIAL

(continued from page 140)

to notify Mother of the above were made (see Rule 1363(E)). To that end, Superior Court observed that due to the prison's inability to provide Mother with the opportunity to telephonically appear at the hearing, she could not have been provided notice during the hearing itself. Finally, the trial court never even took the opportunity to ascertain if the service requirements of Rules 1360 and 1361 were met before moving forward with the Adjudicatory Hearing.

Based on the above, the Superior Court held that the trial court abused its discretion by holding an adjudicatory hearing without ensuring strict compliance with the service rules noted above. Consequently, the Superior Court vacated the trial court's order and remanded the case for a new hearing ensuring Mother can participate. Ultimately, for practitioners, this decision makes it abundantly clear that the service requirements noted above will be strictly enforced requiring that ensuring compliance is paramount.

James W. Cushing is an associate at the Law Office of Faye Riva Cohen PC, with a focus on family law. He is licensed to practice law in both Pennsylvania and New Jersey; he is a regular contributor to the Philadelphia Bar Association's publication, Upon Further Review *and an ezinearticles.com Expert Author. He is a volunteer attorney for the Christian Legal Clinics of Philadelphia Inc. jwc@fayerivacohen.com; 215-563-7776.*

Family Law Section Summer Meeting 2017

Technology Corner:

Alicia A. Slade, *slade@plummerslade.com*
Joel B. Bernbaum, Esq.
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FALL 2017

By Joel B. Bernbaum, Esq, joel@bernbaumfamilylaw.com

For over 25 years, I have been an avid user of technology of all kinds and all purposes. I have written articles and presented workshops for many organizations. One thing that did not happen during that time happened recently. I was hacked! That's right, I was hacked! How embarrassing, humiliating and ironic it felt, but it happened. After the clean-up, I decided to write about it and more importantly, what you can do to prevent someone from hacking your technology.

The first thing you should do is inventory or devices; desktops, tablets and phones. Are they up to date? Operating systems, applications, hardware and accessories current. Do not put this off for another day.

On your desktop, check to make sure your system is protected by a firewall. Most operating systems have this feature available within the security features and can easily be enabled if this is not your current configuration. There are third party application available for purchase, if needed. Tablets and phones do not have this feature because of the difference in the operating systems of the devise.

Next, scan your desktop for viruses, malware or other varmints that can cause major problems with your data, etc. Be cautious with free downloads promising coverage but require expensive add-ons to be fully functional or continue to function after a trial period. This is not something to buy on the cheap. A good example is the package offer from Norton by Symantic.

It goes without saying that pirated or "borrowed," old or out of date software should be deleted. Make sure you follow the best practices for deleting software as provided in the instillation materials. Never download or copy anything from someone or left on an old devise or from the internet without verification as to its authenticity.

While we are at it, your internet access it a potential culprit. Wi-Fi, email, online data, etc.

1. Email: Please use a standard, well-known provider like Yahoo, Gmail or Hotmail. They have excellent materials, customer service and keep their software current and safe. It is user error that causes most breaches.
2. I know it is a pain, but create a strong user name and password. Keep it secure, not on a yellow sticky attached to the computer. Change it often. This is a tip to pass onto your clients, especially if they are still living in the same house with their spouse. If you allow email or text communication with your clients (who doesn't?), I suggest that your client register a new email address with you and delete it after the case concludes. Do not use a carrier (i.e. Gmail) that was previously used to avoid problems.
3. Your Wi-Fi network needs protection as well. Again, review all the security information and settings to maximize protection. A strong network name and password with changes are recommended as with your email address and domain.
4. If you are hacked, immediately change all passwords that you are using for email, internet and network access. Next, contact the responsible provider or company. For domain, network or Wi-Fi issues, they would be your first responders. Certain internet protocols need to be put in place. Scan your devise as stated above. In other inoculate and delete any suspicious email, application or program. Anything deeper like code added to your system configuration is beyond you and is best left to a professional.

In general, be suspicious of any email or downloads or attachments of any kind to you or from surfing internet websites.

Good luck, this is merely an overview but hopefully helps you understand and prevent serious problems.

Alicia A. Slade, MS, MBA, is the president of Plummer Slade Inc., which has been providing compuer networking and IT solutions to law offices since 1988, and Technology Corner co-editor of the Pennsylvania Family Lawyer. *Alicia has been a technical consultant for more than 20 years. She can be reached by email slade@plummerslade.com, 412-261-5600, ext. 202, or fax 412-261-1528. Plummer Slade is endorsed for IT solutions by the Allegheny County Bar Association.*

Joel Bernbaum is the founder of the Bala Cynwyd family law firm of Bernbaum Family Law Group. He is a Fellow of the American Academy of Matrimonial Lawyers, serving as president of the Pa. Chapter in 2007. He is a member of the American, Pennsylvania, Illinois and Montgomery bar associations with active participation in their respective family law sections and/or committees.. He was formerly co-chair of the PBA's Technology Taskforce. He is a former director and chair of the Family Law Section of the Montgomery Bar Association and served two terms on Council of the PBA Family Law Section. He can be reached by email joel@bernbaumfamilylaw.com, 610-667-7902 or fax 610-879-3745.

Legislative Update:

Yvonne Llewellyn Hursh, Esq.
yhursh@legis.state.pa.us

This article updates the legislative history of bills summarized in Vol. 39, Nos.1 and 2 of the Legislative Update. In addition, this article summarizes other domestic relation bills introduced in the General Assembly since the release of the last issue of the Pennsylvania Family Lawyer. Status of each bill is as of September 4, 2017. The full text of the bills, as well as their legislative history, may be found at:

http://www.legis.state.pa.us/cfdocs/legis/home/bills/.

Previously Reviewed Legislation - Unchanged

The following bills have not advanced any further in the legislative process than was previously reported:

Adoption

- House Bill 56: counties to provide adoption-related counseling services to parents of children who are being relinquished or who have been relinquished for adoption, including putative fathers
- House Bill 57: expedites the adoption hearing and provides procedures for a diligent search for the putative father, and defines procedure to challenge the validity of the consent to adoption
- House Bill 58 shortens the time period in which the mother can revoke her consent and restricts future challenges to the consent
- House Bill 60: reimbursement of adoption expenses
- House Bill 61: permits the consent to an adoption by an incarcerated person to be witnessed by a correctional facility employee
- House Bill 62: eliminates the requirement of holding a hearing to confirm a consent to an adoption when the birth parent or parents of the child being placed for adoption have executed valid consents to an adoption. The court would be authorized to confirm the consent without a hearing and enter a decree of termination of parental rights and duties
- House Bill 63: (amends the definition of adoption "intermediary" to include licensed attorneys and licenses social workers
- House Bill 243: control substance abuse as grounds for termination of parental rights
- House Bill 289: adds reasonable living expenses to the list of items that can be reimbursed to the birth mother by the adoptive parents, and lists additional demographic information to be included on the petition for adoption
- Senate Bill 62: provides protection for incarcerated persons from having their parental rights involuntarily terminated and their children placed for adoption
- House Bill 704: provides protection for incarcerated persons from having their parental rights involuntarily terminated and their children placed for adoption

Alimony and Support

- House Bill 42: Suspension of driving privileges for violation of domestic relations orders
- House Bill 139: Indirect criminal contempt for willful failure to pay support order
- Senate Bill 46: reporting of support arrearages to consumer credit reporting agencies, to allow obligors to update their records to reflect prompt payments
- House Bill 474: removes the concept of filial obligations - the requirement of financial obligation for family members for the care of indigent parents
- House Bill 721: excludes public assistance, Social Security disability and Social Security benefits from the death of a parent received by a child in determining financial support needs under the state guidelines
- House Bill 969: publication in media in general circulation in the county each January and June of the names, photographs and amount of arrearages of each obligor who has been in arrears in their support obligations for 12 months or more
- House Bill 983: prohibits requiring a party to a divorce proceeding to pay alimony pendente lite or spousal support to a party convicted of a personal injury crime against the first party
- House Bill 1250: revisions to alimony pendente lite

Custody

- House Bill 443: modification of custody order when parent in contempt

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Yvonne Llewellyn Hursh is counsel with the Joint State Government Commission, the primary and central non-partisan, bicameral research and policy development agency for the General Assembly of Pennsylvania in Harrisburg, and the Legislative Editor of the Pennsylvania Family Lawyer*; 717-579-4223; yhursh@legis.state.pa.us.*

LEGISLATIVE UPDATE
(continued from page 143)

- House Bill: adopts the Parent Involvement Leave Act
- House Bill 585: expands grandparents' standing
- Senate Bill 511: adopts the Uniform Deployed Parents Custody and Visitation Act in Pennsylvania
- House Bill 1047: gives grandparents standing in dependency proceedings

Divorce

- House Bill 572: requires that, within 45 days of commencing an action in divorce or annulment, the parties must file financial records (tax, income and investment) from the last two years and a detailed list of living expenses

Domestic Violence

- House Bill 44: provides notice to the court from the petitioner in a protection from abuse action whether the person has any knowledge of a child abuse investigation involving the defendant. If so, the petition would set forth the name of the investigative agency and any other information in possession of the plaintiff.
- Senate Bill 196: allows GPS monitoring of persons subject to a protection from abuse order
- House Bill 321 (Printer's No. 318): requires cosmetologists, nail technicians, esthetician and natural hair braiders to complete one hour of domestic violence and sexual assault training in order to be licensed
- Senate Bill 312: provides for sentencing enhancement when violent crimes are committed under a protection from abuse order
- Senate Bill 313: allows domestic violence victims to break telephone contracts held jointly with their abuser
- Senate Bill 314: creates a statewide registry of domestic violence predators (Robin's Law).
- House Bill 841: provides for GPS monitoring of stalkers
- House Bill 956: adds a new Chapter 53 to Title 23 to provide for custody proceedings where domestic violence is involved
- Senate Bill 500: provides for police escorts for victims of domestic violence at the time the order is served
- Senate Bill 501: extensively revises firearms relinquishment in domestic violence cases
- Senate Bill 502: provides for tolling of protection from abuse orders while the defendant is incarcerated
- House Bill 1099: requires that law enforcement personnel must deliver protection from abuse orders
- House Bill 1100: shortens the time in which a protection from abuse order to 24 hours after issuance and requires a hearing within three days
- House Bill 1337: adds to the type of relief that can be sought under a protection from abuse order to include GPS monitoring of the alleged abuser and submission to a domestic violence treatment evaluation and if deemed eligible, participation in a domestic violence treatment program
- House Bill 1211: waives fees for duplicate state documents for victims of domestic violence
- House Bill 1247: extends protections to victims of domestic violence by authorizing police escorts at high risk times, permitting the court to issue a search and seize order for weapons in certain circumstances and providing for tolling of PFAs while the defendant is incarcerated
- Senate Bill 287: provides for grounds for involuntary termination when a crime of violence against child's parent or other child in household occurs (Kimberlee's Law)

Equitable Distribution

No bills previously introduced

Family Courts/Litigation

- House Bill 663 (Printer's No. 701): part of a family court reform package

Kinship and Foster Care

- House Bill 206: study of drug abuse by parents within resource families

Marriage

- House Bill: 141: Elimination of three-day waiting period for license
- House Bill 622: eliminates the waiting period to marry following application for a marriage license by repealing 23 Pa.C.S. § 1303
- House Bill 1038: amends 23 Pa.C.S. § 1304 to raise the minimum age to apply for a marriage license to 18 years of age in all cases
- House Bill 1296 (Printer's No.1592): amends 23 Pa.C.S. § 1503 to broaden the category of former minor judiciary and mayors eligible to perform marriage ceremonies.

Paternity

- House Bill 243: control substance abuse as grounds for termination of parental rights

Previously Reviewed Legislation — Under Consideration

The following bills have received some form of consideration in the General Assembly since the previous report:

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LEGISLATIVE UPDATE
(continued from page 144)

Adoption

House Bill 59 (Printer's No. 2255) passed the House on March 13, 2017 (185-0). It passed the Senate as amended on July 8, 2017 (49-0). The House concurred, with amendments on July 11, 2017 (102-91) and the Senate concurred in the house amendments, with amendments on July 27, 2017 (35-15). The bill allows parents who adopt a child to appeal to the Pennsylvania Department of Human Services the amount of an adoption subsidy provided by local authorities.

Domestic Violence

House Bill 274 (Printer's No. 1497) was reported from committee as amended, received first consideration and was laid on the table in the House on April 19, 2017. It was laid on the table and then removed June 21, 2017. The bill permits a court entering a protection from abuse order to include an order to not harm a dog or cat belonging to or residing with the plaintiff.

Senate Bill 449 (Printer's No. 439) passed the Senate on July 8, 2017 (49-0). It was referred to the House Judiciary Committee on July 9, 2017. The bill allows magisterial district judges to use a risk assessment tool in determining whether to grant bail in a protection from abuse case.

Marriage

House Bill 1008 (Printer's No. 1803) passed the House on May 23, 2017 (194-0). It was referred to the Senate Judiciary Committee on June 1, 2017. This bill eliminates the waiting period to marry following application for a marriage license by repealing 23 Pa.C.S. § 1303 and amends § 1503 to allow certain former mayors to solemnize marriages.

Equitable Distribution

No bills previously introduced

No movement on previously introduced bills dealing with *Alimony and Support, Custody,*

Divorce, Family Courts/Litigation, or Kinship and Foster Care

Newly Introduced Legislation

Alimony and Support

Senate Bill 629 (Printer's No. 709) was introduced and referred to the Senate Banking and Insurance Committee on April 18, 2017. The bill concerns jurisdiction over transfers made for less than fair market value after a proceeding for support or to enforce a support order has been introduced.

Custody

House Bill 1652 (Printer's No. 2213) was introduced and referred to the House Judiciary Committee on July 8, 2017. The bill provides for custody of pets in divorces.

Domestic Violence

Senate Bill 480 (Printer's No. 469) was introduced and referred to the Senate Judiciary Committee on March 1, 2017. The bill provides for enhance penalties for animal cruelty in domestic violence situations.

House Bill 1540 (Printer's No. 1997) was introduced and referred to the House Judiciary Committee on June 13, 2017. Under this bill, a person who is found in contempt for violating a protection from abuse order may be ordered to undergo drug and alcohol and/or mental health evaluations.

House Bill 1632 (Printer's No. 2178) was introduced and referred to the House Judiciary Committee on June 28, 2017. The bill provides domestic violence victims with the ability to break telephone contracts held jointly with their abuser.

Family Law Section Summer Meeting 2017

Bar Review

Gerald L. Shoemaker Jr.
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Jennifer R. Ryan has joined Blue Bell's **Shemtob Law PC** as an associate attorney.

The Honorable Daniel J. Clifford of the Court of Common Pleas of Montgomery County spoke on a diversity panel "Valuing Difference and Empathy as Future Legal Professionals and Advocates" at Villanova Law School orientation. The incoming law school class consists of approximately 200 1L students.

Doylestown's **Antheil Maslow & MacMinn LLP** welcomes **Jamie M. Jamison**, who joined the family law practice group.

Rochelle "Shelly" Grossman has started her own arbitration/mediation practice, **Family Mediation and Arbitration Center** (FMAC), operating out of King of Prussia. FMAC conducts private mediations and arbitrations throughout Southwestern Pennsylvania. Shelly remains an Equitable Distribution Master in Chester County.

Alyssa R. (Sweeney) Angotti, Lindsay A. Nemit and **Kelsey M. Ward** have joined the Pittsburgh firm of Pollock Begg Komar Glasser & Vertz LLC as associates**.**

Brittany M. Yurchyk has joined the Norristown firm of High Swartz LLP as an associate.

The Honorable Kim D. Eaton of the Court of Common Pleas of Allegheny County was the recipient of the 2017 Amram Award at the Allegheny County Bar Association Annual Bench Bar Conference.

Kelley Menzano Fazzini of Norristown's **Hangley Aronchick Segal Pudlin & Schiller PC,** along with her husband, Mike, welcome the birth of their second child, Ralph Anthony Fazzini, on August 26th. Ralph joins younger brother, AJ, at home.

Susan M. Potts has joined the West Chester office of **Rovito Law LLC.**

The American Academy of Matrimonial Lawyers, Pennsylvania Chapter, announced its new officers as follows:

- **Jeffrey M. Williams**, president
- **Brian C. Vertz**, president elect
- **James H. Richardson,** vice president
- **Colleen M. Neary,** vice president
- **David S. Pollock**, treasurer
- **Julia Swain,** secretary

Getting to Know One of Our Members:

Dawn K. Gull

Dawn K. Gull is the founder of Law Offices of Dawn K. Gull in Pittsburgh.

1. *How did you become interested in family law/why did you choose this area of law?* It's more like family law found me. Right out of law school I worked for a small general practice firm that did a lot of family law and I found it truly rewarding. You get to walk people through what they believe is the worst thing that could ever happen to them, and show them that they can not only survive, but excel.
2. *How long have you been practicing and where?* For 21 years, with offices in Allegheny County.
3. *Why did you choose to live and practice in Pittsburgh?* Family and roots very close by.
4. *What's your favorite thing about Pittsburgh?* The people and the spirit of the city.
5. *What is your favorite sports team(s)?* Steelers and Penguins, of course!
6. *What's your favorite vacation spot?* Topsail Island, N.C.
7. *What's your favorite book? Through a Glass Darkly*, by Karleen Koen.
8. *What's your favorite TV show?* I love dramas, but I'm currently enamored with *United Shades of America* on CNN.
9. *What's your favorite movie?* Toss up between *The Princess Bride* and *The Godfather.*
10. *What's one thing that we don't know about you?* I am a Steelers season ticket holder.
11. *What's your favorite band?* Anything '80s.
12. *What are your pet peeves in terms of practicing family law?* When counsel can't get along.

Dawn K. Gull

The Law Offices of Dawn K. Gull, 10475 Perry Highway, Town Centre Suite 212B, Wexford, PA 15090; (412) 944-2215; dgullesquire@gmail.com

FAMILY LAW SECTION WINTER MEETING JAN. 11-14, 2018, IN NEW ORLEANS

The Family law Section Winter Meeting 2018 is Jan. 11-14 at the Roosevelt New Orleans Waldorf Astoria.

Come experience southern hospitality in New Orleans at the historic Roosevelt New Orleans Waldorf Astoria. The landmark hotel is a short walk to the French Quarter nightlife, street vendors, shopping, people watching and entertainment. New Orleans offers so many things to do that it's too difficult to share in a message. Click here to start planning your free afternoons in New Orleans!

For early guest room and airline reservation purposes, please note that the welcome reception will take place Thursday evening, Jan. 11. Programs will start Friday morning, Jan. 12, and the meeting will conclude with Case Law Updates on Sunday morning, Jan. 14.

Space is limited; book online or call 504-335-3138 to reserve your room.

Our section has a membership initiative to encourage and promote the attendance of family law section members who are (a) new to the practice of family law, (b) from solo or small firms, (c) employed by a government agency, or (d) from counties that have been under-represented at our meetings in the past. To that end, the Joanne Ross Wilder Scholarship program was created to assist family law attorneys who meet one of these criteria in attending our meetings. If you are interested in attending the 2018 Winter meeting and in applying for a scholarship, click here for the application. The deadline to respond is Nov. 17, 2017.

Details and additional information can be found in the meeting brochure once it is available online in mid-November.

We are looking forward to seeing you in the Big Easy!

Family Law Section Summer Meeting 2017

DUQUESNE UNIVERSITY TO ESTABLISH THOMAS R. KLINE JUDICIAL EDUCATION CENTER

Duquesne University President Ken Gormley recently announced the largest individual gift in its law school's history — $7.5 million to establish the "Thomas R. Kline Center for Judicial Education." The gift will enable Duquesne's School of Law to create the first-of-its-kind program in the nation. To be conducted in conjunction with the Administrative Office of Pennsylvania Courts, under the auspices of the Pennsylvania Supreme Court, the program will coordinate with deans and law scholars at Pennsylvania's nine law schools to establish an innovative, high-level curriculum of courses and seminars for the state's more than 600 trial and appellate judges.

"It gives me great pride to help establish the Kline Center for Judicial Education, which for me personally is the intersection of my pride in my alma mater, my commitment to legal education, my respect for the judicial process and the need for the highest standards for lawyers and judges," said Thomas R. Kline, a prominent 1978 Duquesne Law School alumnus, founding partner of the law firm Kline & Specter PC, and one of the state's most successful trial attorneys. "There could be no better place in America for this unique model for judicial education and research to be established than at Duquesne University School of Law, which has a historic commitment to public service and an unparalleled alumni list of distinguished trial and appellate judges who have served the commonwealth and the nation."

In announcing the gift, Gormley said, "The creation of the Thomas R. Kline Center for Judicial Education, in partnership with the Pennsylvania courts, and in collaboration with other law schools, is the first of its kind in the nation. We expect it to become a national model for judicial education in a new era."

Gormley added: "We will draw on expertise not only from legal scholars, but also from experts in science, psychology, health sciences, ethics, and other areas necessary for sophisticated judicial decision-making, utilizing talent from universities across Pennsylvania. We are deeply appreciative to our alumnus Tom Kline, who has been committed throughout his career to the highest possible level of legal education in our commonwealth, and has stepped up to support his alma mater with this history-making gift to create the Center. We are also appreciative that Chief Justice Thomas Saylor, the Supreme Court of Pennsylvania, and the Administrative Office of the Pennsylvania Courts, have collaborated with Duquesne University to create this historic partnership to further advance the system of justice in our commonwealth. It is a truly exciting moment for Duquesne Law School. We are honored to lead this important initiative."

The Kline Center will also work with the deans and legal scholars at all nine law schools in Pennsylvania (including Duquesne's School of Law) to create a statewide network designed to provide an innovative, high-level judicial education to more than 600 Pennsylvania jurists across the state.

"Our goal is to assure that judicial officers in Pennsylvania have the requisite skills and knowledge to fulfill their judicial responsibilities with integrity, adherence to the rule of law, and the highest standards of ethical behavior," said Chief Justice of Pennsylvania Thomas G. Saylor. "The Supreme Court's ongoing continuing judicial education efforts are paramount to achieving this goal. We are grateful to Duquesne University for partnering with us, and indeed, to all the law schools for their anticipated involvement in this most important undertaking."

The Thomas R. Kline Center for Judicial Education will be housed at Duquesne University School of Law. The search for an executive director will begin immediately, with a goal of working with the Judicial Education Department of the Administrative Office of Pennsylvania Courts to begin delivering courses in 2018.

"We are thrilled that Duquesne University School of Law has been given this extraordinary opportunity to facilitate public service of the judicial branch in our commonwealth at the very highest level," said Dean Maureen Lally-Green, who previously served as a judge on the Superior Court of Pennsylvania for eleven years. "The Kline Center will provide an invaluable learning opportunity for our faculty and students as they assist in the great work of the Center. We express our deep thanks to our distinguished alum Tom Kline, and to the Pennsylvania Courts, for proposing this important position of trust in Duquesne's Law School."

THOMAS R. KLINE CENTER FOR JUDICIAL EDUCATION FACT SHEET

- Thomas R. Kline, a 1978 law alum, is donating $7.5 million to support his alma mater through the establishment of the Thomas R. Kline Center for Judicial Education of Duquesne University School of Law. This is the largest individual gift in the history of the law school.
- Pursuant to a December 2016 order of the Supreme Court of Pennsylvania, all trial and appellate court judges and justices in the commonwealth are now required to take, annually, 12 continuing judicial education ("CJE") credits.
- Beginning in January 2018, four of those annual 12 CJE credits must be delivered by the Administrative Office of Pennsylvania Courts (AOPC) to state judges and justices.
- This transformational gift will enable Duquesne University School of Law, in collaboration with the law schools of this commonwealth, to work in partnership with the AOPC (and its Judicial Education Department) to deliver these four CJE credits to more than 600 jurists. This amounts to over 2,400 CJE credit hours annually.
- The Supreme Court and the AOPC have approved this participation with the Kline Center and the law schools of the commonwealth.
- The Kline Center and the law schools will work together with AOPC in its strategic planning, plan implementation and assist in the actual delivery of CJE courses at sites throughout the commonwealth.
- The Thomas R. Kline Center for Judicial Education is the first of its kind in the country. In no other state does an entity partner with the courts and all other law schools in that state in a collaborative fashion to provide education to that state's judiciary free of charge.
- A small number of universities such as George Mason and Duke offer national seminars for judges from across the country, typically for a cost; these programs resemble standard programs for lawyers that deliver continuing legal education for a registration fee.
  The University of North Carolina operates a Judicial College that offers courses for judges in that state, essentially replacing the courts' independent course offerings. Moreover, unlike the new Kline Center for Judicial Education at Duquesne, UNC does not partner with other law schools in the state to provide a network of offerings for its state judges. The Kline Center at Duquesne is therefore unique in the United States in creating such a collaboration that provides courses, free of charge, as a form of public service that is widely available to all judges in the state.
- The Kline Center will provide a forum for academic scholars from a wide range of disciplines to participate with law schools and the AOPC in the planning and teaching of these four CJE credits.
- By using the expertise of scholars in law, science, psychology, health sciences, legal ethics and other areas, the Kline Center will also address emerging areas of law and create a new model for statewide judicial education.
- All of the law schools will have the ability to deliver CJE credits beyond their participation with the Kline Center-AOPC relationship.
- Duquesne Law Dean Maureen Lally-Green, L'74, a former Superior Court of Pennsylvania judge, serves on the state's Continuing Judicial Education Board of Judges. The Supreme Court created the board to guide the judiciary in adopting continuing judicial education requirements by making decisions about accreditation, determining if waivers should be granted, and hearing compliance appeals.
- Duquesne University School of Law has more than 106 years of experience in legal education. In addition, for the past 24 years, Duquesne has offered a comprehensive continuing legal education program for attorneys, with courses in ethics and substantive legal topics.
- Duquesne University School of Law counts 150 jurists, current and former, as distinguished alumni (19 federal judges, 18 state appellate judges, and 113 trial court judges).
- The law schools that will support the judicial education initiative in coordination with the Kline Center for Judicial Education are:
  - Thomas R. Kline School of Law at Drexel University
  - Pennsylvania State University Law
  - Pennsylvania State University Dickinson Law
  - Temple University James E. Beasley School of Law
  - University of Pennsylvania Law School
  - University of Pittsburgh School of Law
  - Villanova University Charles Widger School of Law
  - Widener University Commonwealth Law School
  - And, of course, Duquesne University School of Law

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FACT SHEET

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Thomas R. Kline, L'78
Partner, Kline & Specter, PC

Tom Kline is acknowledged to be one of America's most respected and influential lawyers. He is a founding partner of Kline & Specter, PC, described by *The Philadelphia Inquirer* as "one of the country's leading personal injury law firms." His groundbreaking cases have helped shape the law and have resulted in corporate, institutional and governmental change and justice for his clients.

Kline has consistently been named a top lawyer by leading publications. He has been selected every year as the attorney ranked first among 65,000 active Pennsylvania lawyers by Super Lawyers since its inception in 2004. Lawdragon, listing Kline as one of the top 500 lawyers among 1.3 million active lawyers in America, has described him as "the leading personal injury plaintiffs' lawyer in Pennsylvania." He is the past president of the Inner Circle of Advocates, which *The Washington Post* described as "a select group of 100 of the nation's most celebrated trial lawyers." Kline achieved many landmark jury verdicts in product liability and medical malpractice dating back to the 1980's with seven- and eight-figure jury verdicts in each of four decades. Recent accomplishments include his groundbreaking jury verdicts in the national Risperdal litigation and his leadership as chair of the Plaintiffs Management Committee in achieving the historic Amtrak 188 settlement. Kline's work in the Penn State/Sandusky litigation and the Piazza fraternity hazing case have gained national attention.

A graduate and recipient of the Distinguished Alumnus Award of Albright College, Kline earned his M.A. from Lehigh University and his J.D. from Duquesne University School of Law, where he received the Distinguished Student Award in 1978 and Distinguished Alumnus Award in 2008.

After completing law school, Kline clerked for Pennsylvania Supreme Court Justice Thomas W. Pomeroy. He later served four U.S. senators over two decades in chairing the Federal Judicial Nominating Commission for the U.S. District Court for the Eastern District of Pennsylvania for more than a decade.

The Thomas R. Kline School of Law at Drexel University was named for him in 2014, followed by the Thomas R. Kline Institute for Trial Advocacy. The Thomas R. Kline Center for Judicial Education of Duquesne University School of Law, the first of its kind in the nation, launches during the 2017-2018 academic year.

The Honorable Thomas G. Saylor
Chief Justice, Supreme Court of Pennsylvania

Chief Justice Thomas G. Saylor was installed Jan. 6, 2015. He was elected as a justice to the Pennsylvania Supreme Court for a 10-year term in 1997 and was retained for a second term in 2007. Before election to the Supreme Court he was elected to Pennsylvania Superior Court for a 10-year term in 1993.

Chief Justice Saylor started his career in the general practice of law in 1972 and was appointed first assistant district attorney in Somerset County, Pa., serving from 1973-76. He was named director of the Pennsylvania Bureau of Consumer Protection in the Office of Attorney General in 1982 and was promoted to first deputy attorney general for the Commonwealth of Pennsylvania in 1983, serving until 1987. He returned to private law practice until being elected to the Superior Court.

Chief Justice Saylor is a member of the American Bar Association's Appellate Judges Conference, the Pennsylvania Bar Association and the Cumberland and Dauphin County Bar Associations. He is also a member of the American Law Institute.

He has been an adjunct professor at the Widener University School of Law and has authored numerous articles on various subjects, including constitutional law and the death penalty. He has received honorary Doctor of Laws degrees from the Widener University School of Law and Shippensburg University of Pennsylvania. He recently was a guest speaker at the National Constitution Center town hall meeting where he discussed the Federalist Papers.

Chief Justice Saylor holds a Bachelor of Arts from the University of Virginia in 1969, a Juris Doctor degree from Columbia University School of Law in 1972, and a Masters of Law from the University of Virginia School of Law in 2004.

Kenneth G. Gormley
President and Professor of Law, Duquesne University

Ken Gormley is president and professor of law at Duquesne University in Pittsburgh. He previously served for seven years as dean of Duquesne University School of Law. He joined the faculty in 1994, after teaching at the University of Pittsburgh School of Law and engaging in private practice. Gormley earned his B.A. from the University of Pittsburgh in 1977, summa cum laude, and was elected to Phi Beta Kappa. He received his J.D. from Harvard Law School in 1980, serving as a teaching assistant to Professor Archibald Cox in Constitutional Law.

Gormley's work has earned him a reputation as a highly-respected constitutional scholar, in Pennsylvania and nationally. In 1997, he published *Archibald Cox: Conscience of a Nation* (Perseus Books), the authorized biography of one of the leading law-

FACT SHEET

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yers and public servants of the 20th century. The Cox book was awarded the 1999 Bruce K. Gould Book Award for an outstanding publication relating to the law.

In 2010, Gormley published *The Death of American Virtue: Clinton vs. Starr* (Crown), a New York Times bestseller chronicling the scandals that nearly destroyed the Clinton presidency. The *Death of American Virtue* received a 2011 Silver-Gavel Award (Honorable Mention) from the American Bar Association as well as critical acclaim in publications including the *New York Times Book Review* (Editor's Choice), *Washington Post Book World*, *Wall Street Journal*, *Los Angeles Times, Atlantic* magazine, and dozens of others. Gormley appeared on NBC's *Today Show, The Charlie Rose Show, Hardball with Chris Matthews,* NPR's *Fresh Air*, and hundreds of television and radio shows in the United States and worldwide.

Gormley's newest book, *American Presidents and the Constitution: A Living History*, was published by NYU Press in May, 2016.

Gormley has testified in the U.S. Senate three times. He has also testified in the Pennsylvania Senate on state constitutional matters.

Gormley formerly served as president of the Allegheny County Bar Association, the first academic to hold that position in the organization's 137-year history.

The Honorable Maureen Lally-Green, L'74
Dean, Duquesne University School of Law

The Honorable Maureen Lally-Green was named the first female to serve as dean of Duquesne University's School of Law, effective July 1, 2017. She had been serving as interim dean since July 2016.

During her rich, diverse law career, Lally-Green served as judge of the Superior Court of Pennsylvania for over 11 years. After retiring from the court, she served in various capacities with the Catholic Diocese of Pittsburgh. Her earlier professional life included work as an associate with a private Pittsburgh law firm; counsel to Commodity Futures Trading Commission in Washington, D.C.; counsel to the former Westinghouse Electric Corporation; and consultant to justices of the Supreme Court of Pennsylvania. She served as a professor of law at Duquesne Law from 1983-98, and subsequently as an adjunct law professor.

Lally-Green's honors and recognitions include the Helping Hands Judge Mansmann Award; the Presidents' Award from Saint Francis University and Duquesne University; the Anne X. Alpern Award from the Pennsylvania Bar Association; the St. Thomas More Award from the St. Thomas More Society; and Century Club induction at Duquesne University.

Lally-Green currently serves as: member of the Supreme Court's Continuing Judicial Education Board of Judges; chair of the UPMC Mercy Hospital Board of Directors; chair of the Cardinal Wuerl North Catholic High School Board of Directors; and member of the board of directors of Saint Vincent College and of the board of regents of Saint Vincent Seminary. She earned both a B.S. in secondary education and a J.D. from Duquesne University.

JOY G. MCNALLY NAMED INTERIM DIRECTOR OF THOMAS R. KLINE CENTER FOR JUDICIAL EDUCATION

Attorney Joy G. McNally has been named interim director of the newly established Thomas R. Kline Center for Judicial Education of Duquesne University School of Law.

McNally has had the distinction of serving under several of Pennsylvania's most distinguished jurists. She served as a law clerk to the late Pennsylvania Supreme Court Chief Justice Ralph Jr. Cappy, as well as to former Chief Justice Ronald D. Castille and current Justice Debra M. Todd. Additionally, she clerked for Judge Maureen E. Lally-Green (now Duquesne law school dean) on the Superior Court of Pennsylvania, and (earlier in her career) for the late Judge Carol Los Mansmann on the United States Court of Appeals for the Third Circuit.

In each of these roles, McNally researched and analyzed the issues that came before the court, prepared memoranda of law and other legal documents, assisted in opinion writing, and worked extensively with court personnel and fellow clerks to help jurists produce work product of the highest caliber.

Joy G. McNally

"It is a great honor and my distinct privilege to welcome Joy McNally to serve as the interim director of the Thomas R. Kline Center for Judicial Education," said the Hon. Maureen Lally-Green, dean of

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MCNALLY

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the School of Law. “She brings enormous talent, experience, presence and vision to this position. I have every confidence that Joy is the perfect choice for this position.”

“I am deeply grateful for the opportunity to serve as the interim director of the Thomas R. Kline Center for Judicial Education,” said McNally. “I look forward to the privilege of advancing the Kline Center’s crucial mission of enhancing the fair and impartial delivery of justice in Pennsylvania by providing an outstanding curriculum of continuing education coursework to the commonwealth’s jurists.”

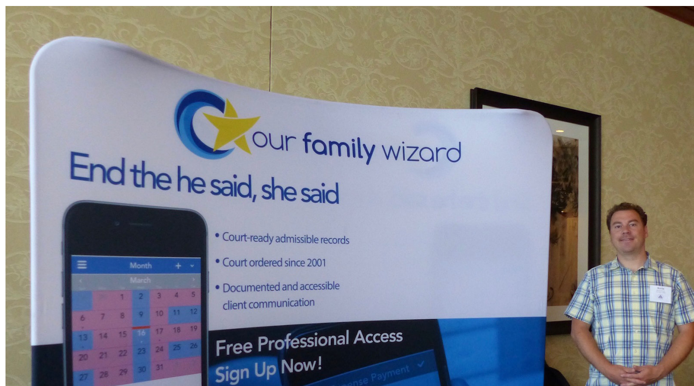
Prior to her clerkships in state and federal court McNally practiced law for 10 years at the firms of Cindrich & Titus, Cohen and Grigsby and Buchanan Ingersoll.

McNally earned a Juris Doctor, magna cum laude, in 1983 from the University of Pittsburgh, where she was a member of the Order of the Coif and was topics editor for the Pitt Law Review. She earned both an M.A. in special education and a B.S. in psychology from the University of Pittsburgh.

Most recently, McNally taught as an adjunct professor in the Duquesne University School of Law, where she also served as a special advisor to then Law Dean Ken Gormley and assisted him in editing his latest book, *The Presidents and the Constitution: A Living History* (2016).

She currently serves as an alternate member of the Edgewood Borough Civil Service Commission.

Family Law Section Summer Meeting 2017



JUDGE LAWRENCE W. KAPLAN AND HIS COURT CASES IN FAMILY DIVISION, COURT OF COMMON PLEAS OF ALLEGHENY COUNTY (1980-1990)

by Joel Fishman Ph.D., M.L.S. fishman@duq.edu

In the last issue of the *Pennsylvania Family Lawyer*, I compiled a list of family law cases decided by Judge R. Stanton Wettick, Jr. for the decade of the 1980s when the Divorce Code was first introduced into the Commonwealth. The local court was a leader in deciding cases that set forth many of the principles that the appellate courts adopted as new law developed. In this article, I present the cases of Judge Lawrence Kaplan who served his entire judicial career in the Allegheny Court of Common Pleas from June 30, 1978 until his retirement on Augst 12, 1998 and then served as a senior judge from August 22, 1998 to December 19, 2008. The Allegheny County Bar Association honored Kaplan with an annual named symposium.

Judge Kaplan's cases listed below are drawn from the *Pittsburgh Legal Journal* and the *Allegheny County Divorce Decisions* Volumes 1-11 (1980-1989) and *Allegheny County Family Law Reporter* Volume 12 (1990). The headnotes and statements are drawn from the digest topics listed in the library's edition, while those solely published in the *Pittsburgh Legal Journal* are drawn from that work. At the end of the article is a complete list of Judge Kaplan's cases published in the *Pittsburgh Legal Journal*.

I. CHRONOLOGICAL LIST

1979

Schmitz v. Schmitz, 129 P.L.J. 176 (1979). Garnishment—Judgment for Support and Maintenance—Surrender Value of Life Insurance Policy—Exemptions from execution. The cash surrender value of a life insurance policy is normally exempt from attachment in satisfaction of a judgment against the insured; however, where the policy gives the insured the right to change beneficiaries as well as withdraw the cash surrender value, that value will not be exempted from property subject to garnishment to satisfy a judgment for support and maintenance.

1980

Broadie v. Hall, 128 P.L.J. 309 (1980). Family law—Illegitimate children—Procedure for establishing paternity. Act of April 28, 1978, No. 46, repealing the paternity section of the Crimes Code (18 Pa.C.S. 4323), now provides that questions of paternity shall be determined in civil actions brought within six months of conception.

**Joel Fishman, B.A., M.A., M.L.S., Ph.D., Associate Director for Lawyer Services, Retired; Duquesne University Center for Legal Information/Allegheny County Law Library; Isabelle Bergstein, B.A., Duquesne University, 2016; Duquesne University School of Law, J.D. Candidate, 2019. To contact Dr. Fishman, email at fishman@duq.edu.*

1981

Ferri v.Ferri, 129 P.L.J. 449, 1 ACDD 122 (1981). Equitable distribution—Partition of entireties owned property. Partition will not be granted prior to final equitable distribution.

Rueckert v. Rueckert, 129 P.L.J. 245, 1 ACDD 55 (1981). Procedure—Alimony pendente lite. 1. A decree can not be issued under §201(c) of the Divorce Code when the defendant has filed a predecree affidavit and the plaintiff has not. 2. The court cannot issue a rule on plaintiff to show cause why a pre-decree affidavit was not filed. 3. When the defendant files a pre-decree affidavit and the plaintiff does not, the court will not grant alimony *pendente lite* under §201(d).

Wurgler v. Wurgler, 1 ACDD 140 (1981). Termination of inactive cases. The minimum standards set out in Pa.R.C.P. 1901(c) must be met before termination under local rule 229(e).

1982

Barto v. Barto, 3 ACDD 24 (1982). Divorce—Procedure—Three year separation— Counseling. Where plaintiff files an affidavit under sec. 201(d) of the Divorce Code alleging a three year separation and an irretrievably broken marriage, a prima facie case for issuance of a decree has been made out, supported by a rebuttable presumption of irretrievability. The burden is thus shifted to a defendant who claims a subsisting marriage despite a three year separation. It is within the court's discretion to deny a request for counseling when in the court's opinion the marriage is irretrievably broken.

Boinski v. Boinski, 130 P.L.J. 404 (1982). Support. 1. The amount of support to which a spouse and child are entitled will depend primarily upon earnings and earning capacity of parties, and a spouse requesting support is entitled to an amount which will make it possible for her to maintain the lifestyle the parties had enjoyed while living together. It is not necessary for spouse seeking support to show that she had expended any funds or incurred any expenses.

Damaso v. Damaso, 130 P.L.J. 242, 2 ACDD 96 (1982). Equitable distribution—Alimony—Alimony pendente lite—Counsel fees—Marital residence.

Franklin v. Franklin, 130 P.L.J. 246, 2 ACDD 9 (1982). Equitable distribution—Alimony. The fact that the wife is totally disabled and unable to engage in gainful employment militates for a more "permanent...rather than a "rehabilitative" award of alimony.

Hickey v. Hickey, 130 P.L.J. 486 (1982). Support. An order requiring defendant to pay child support can be modified so as to reduce the required support not only as the result of changes in the de-

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fendant's financial position but also on the basis of changes in the plaintiff's financial position.

Lame v. Lame, 2 ACDD 158 (1982). Equitable distribution—Alimony—Counsel fees.

Morris v. Morris, 130 P.L.J. 242, 2 ACDD 102 (1982). Alimony.

Ricketts v. Ricketts, 131 P.L.J. 98 (1982). Support—Contempt—Modification of Order. The court has the power to modify an order for support and to cancel outstanding arrearages in a proceeding to hold defendant in contempt for violating the support order, where the modification is justified by a change in circumstances since entry of the original order.

S, Barbara B. v . S, S . Allen, 2 ACDD 116 (1982). Divorce—Adultery as grounds—Three year separation. The court will not entertain a petition for divorce on grounds of adultery when within a short period of time the parties will have lived separate and apart for three years.

Sgro v. Sgro, 2 ACDD 209 (1982). Equitable distribution—Marital property—Three year separation. Property acquired after separation will be considered marital property if the parties engage in sexual intercourse after such acquisition. The act of sexual intercourse tolls the separation period even though the parties did not live together.

Small v. Small, 130 P.L.J. 246, 2 ACDD 15 (1982). Equitable distribution—Alimony.

Sommer v. Sommer, 1 ACDD 215 (1982). Equitable distribution—Alimony—Support—Counsel's fees.

Szott v. Szott, 2 ACDD 40 (1982). Equitable distribution—Marital property.

1983

Ball v. Ball, 132 P.L.J. 123, 5 ACDD 174 (1983). Equitable distribution—Alimony—Counsel fees. Mortgage contribution made during the marriage for a home purchased by one of the parties prior to that marriage are marital property, together with the appreciation attributable thereto.

Belnap v. Belnap, 132 P.L.J. 144, 5 ACDD 147, (1983). Equitable distribution—Alimony—Counsel fees.

Chase v. Chase, 4 ACDD 79 (1983). Equitable distribution—Support—Alimony—Counsel fees.

Cuddy v. Cuddy, 132 P.L.J. 144 (1983). Equitable distribution—Alimony—Counsel fees.

Defrancisco v. Attenucci, 5 ACDD 118 (1983). Equitable distribution—Alimony—Counsel fees.

Ellis v.Ellis, 132 P.L.J. 145, 5 ACDD 72 (1983). Equitable distribution—Alimony—Counsel fees.

Enty v. Enty, 5 ACDD 124 (1983). Alimony—Counsel fees.

Gallagher v. Gallagher, 131 P.L.J. 118, 3 ACDD 132 (1983). Equitable distribution—Alimony—Counsel fees—Pension plan. If a person diverts marital assets for his or her own use, that person should be made to account for it as if it had been retained in its original form.

Grippo v. Grippo, 5 ACDD 59 (1983). Preliminary counsel fees and costs.

Hall v. Hall, 131 P.L.J. 413, 4 ACDD 169 (1983). Alimony—Conflict of laws. Where wife has been awarded the marital residence as "lump sum alimony by the courts of a sister state, husband having chosen the forum, having submitted to its jurisdiction, having pursued its rights to its highest tribunals, cannot now be heard to question the validity of the divorce which is the product of his efforts.

Hansen v. Hansen, 5 ACDD 162 (1983). Divorce—Res judicata—Full faith and credit. Those Pennsylvania cases which limit out-of-state divorce decrees to termination of marital statutes are not applicable when both parties freely submitted to the jurisdiction of the foreign court.

Hulton v. Hulton, 4 ACDD 119 (1983). Divorce—Support. A reduction of a support obligation may be based upon a decrease in income which resulted from a non-volitional change of employment. A change of employment made to avoid transfer or possible termination may be said to be non-volitional.

Kubecka v . Kubecka, 131 P.L.J. 451, 4 ACDD 152 (1983). Equitable distribution—Alimony—Counsel fees.

Oddi v. Oddi, 4 ACDD 208 (1983). Equitable distribution—Alimony—Counsel fees. In regard to valuing the [medical) license and/or diploma of the husband, the court will follow the almost universal position of other state courts and find that these are not marital assets subject to division.

Pearce v. Pearce, 5 ACDD 6 (1983). Equitable distribution—Alimony—Counsel fees—Pension plan-stock option. Husband's pension benefits were valued as of the time of separation according to the cost of acquiring an annuity of equal worth. Husband was credited with the value of the stock for which he has an option to purchase even though such option were not exercised at the time of the separation.

Zubik v. Zubik, 5 ACDD 132 (1983). Counsel fees.

1984

Durham v. Durham, 132 P.L.J. 448, 6 ACDD 300 (1984). Equitable distribution. Property held in an individual spouse's name prior to marriage, becomes marital property thereafter as to that proportion in which both have participated by way of maintenance, mortgage payments, and the like.

Ellis v. Ellis, 6 ACDD 284 (1984). Divorce—Common law marriage.

Graham v. Graham, 7 ACDD 141 (1984). Equitable distribution—Alimony—Counsel fees.

Hulek v. Hulek, 133 P.L.J. 117 (1984). Alimony pendente lite.

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Kappel v. Kappel, 132 P.L.J. 354, 6 ACDD 157 (1984). Equitable distribution—Alimony—Counsel fees—Dissipation of assets.

Lebovitz v. Lebovitz, 133 P.L.J. 117, 7 ACDD 75 (1984). Equitable distribution—Alimony—Counsel fees—Business assets.

Meinzer v. Meinzer, 6 ACDD 103 (1984). Divorce—Consent decree—Petition to strike or open. When petitions to strike off the judgment or open it are asserted in a single petition a differentiation should be made in the petition between grounds asserted for the alternative forms of relief.

Failure of parties to avail themselves of discovery procedure does not constitute the fraud, accident or mistake necessary to open a consent decree.

Motheral v. Motheral, 133 P.L.J. 117, 7 ACDD 103 (1984). Counsel fees—Contempt.

Nemani v. Nemani, 132 P.L.J. 553 (1984). Equitable distribution—Pension plans—Mandatory tax shelter deductions—Alimony—Counsel fees.

Nogan v. Nogan, 7 ACDD 10 (1984). Equitable distribution—Counsel fees—Pension plan. Value of a pension plan will be determined by considering husband' s anticipated pension at the time of his normal retirement and applying a "coverture" fraction, the numerator of which is the years of marriage, the denominator being the total years of employment at age 65. The resulting fraction must then be multiplied by the value of the pension as determined by the tables provided by the Pension Benefit Guaranty Corporation.

Talley v. Zelonka, 6 ACDD 94 (1984). Divorce—Motion to vacate. A motion to vacate a Delaware divorce decree for lack of jurisdiction is subject to the five year limitation of 23 P.S. 102.

Vankirk v. Vankirk, 6 ACDD 222 (1984). Alimony—Consent order. Section 507 of the Divorce Code will not act as a bar to alimony because of cohabitation when such payments are made pursuant to a consent decree.

Wichers v. Wichers, 132 P.L.J. 146, 6 ACDD 66 (1984). Divorce—Alimony—Counsel fees.

1986

Eilart v. Eilart, 668 ACDD 171 (1986). Equitable distribution—Alimony—Counsel fees.

Latcham v. Latcham, 8 ACDD 228 (1986). Equitable distribution—Alimony—Counsel fees.

1987

De Nomme v. De Nomme, 136 P.L.J. 452 (1987). Child support.

Jackson v. Jackson, 9 ACDD 164 (1987). Bifurcation—Equitable distribution—Alimony. Fact wife is the only source of income, veteran's benefits, will cease upon entry of divorce is not sufficient to deny husband a divorce.

Although no alimony was awarded here, veteran's benefits may be considered in awarding alimony *pendente lite.*

Jacobs v. Jacobs, 9 ACDD 180 (1987). Divorce—Equitabledistribution—Alimony— Counsel fees. Wife awarded 60% of marital assets, where wife's potential much more limited than husband's. Wife also awarded alimony for a period of three years and $10,000 towards her counsel fees.

Kupfer v. Kupfer, 9 ACDD 78 (1987). Equitable distribution—Alimony—Counsel fees. Husband was required to share in the payment of wife's counsel fees where husband was the primary wage earner and there was no pool of assets from which wife could receive any benefit.

1988

Birmingham v. Birmingham, 137 P.L.J. 101, 10 ACDD 342 (1988). Counsel fees. The court need not hold a hearing and/or jury trial to determine if a party is entitled to relief under 42 Pa.C.S.A. 2503.

Dellovade v. Dellovade, 10 ACDD 230 (1988). Venue—Preliminary objections. Husband's preliminary objections based on venue were granted and wife's complaint in divorce was dismissed where husband had filed a divorce action in Washington County, the parties had lived most of their married lives in Washington County, the majority of assets were in Washington County, husband lived and continued employment in Washington County, all necessary witnesses in the matter resided in Washington County, and a master had been appointed in the Washington County action.

DePaulis v. DePaulis, 10 ACDD 308 (1988). Counsel fees. The husband was held responsible for attorney's fees imposed upon him due to the acts of his counsel.

Gerhard v. Gerhard, 136 P.L.J. 451 (1988). Divorce—Bifurcation.

McCune v. McCune, 10 ACDD 50 (1988). Equitable distribution—Alimony—Counsel fees. This case discusses valuation of pension , treatment of husband's bonus, credit in contributions of non-marital property to the marital estate, and credit in payment of marital debt, in equitable distribution.

Peace v. Peace, 10 ACDD 298 (1988). Educational support. Father was to pay for educationa l support out of his present earnings rather than the parties savings account which had been used prior to the divorce action to educate the parties other children. Once the divorce action was filed, the savings account changed character becoming an item to be considered in the equitable distribution.

1989

Ghaznavi v. Ghaznavi, 11 ACDD 73 (1989). Alimony *pendente lite*—Child support. Wife granted a temporarily lower earning capacity where she was attempting to minimize her legal fees by performing her own legal research. Additionally, the Court agreed that the husband should not be permitted to delay payment of arrearages, for to allow him to do so would defeat the very purpose of alimony *pendente lite.*

Krakovsky v. Krakovsky, 11 ACDD 336 (1989). Equitable distri-

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bution—Alimony—Alimony *pendente lite*—Counsel fees. Husband's claim for fair rental value during the wife's sole occupancy of the marital residence was denied where it was unclear as to which party had made the mortgage payments, husband presented no expert testimony on the issue, and husband's testimony was not credible since he had not seen the residence since separatio n . With regard to alimony arrearages,the husband was unable to prove laches under *Jackman v. Pelusi*, 379 Pa. Super. 361, 550 A.2d 199 (1988).

Perkins v. Perkins, 11 ACDD 242 (1989). Counsel fees. Pursuant to the parties' agreement, the husband was required to pay those counsel fees necessary to enforce the agreement even though he was not found in contempt.

Rodriguez v. Rodriguez, 11 ACDD 258 (1989). Child support—Earning capacity. After considering the father's skills and recent history of combining employment and part-time schooling, the Court determined that the father was not meeting his earning capacity. Also relevant was the impact of the father's new spouse's income on his financial resources.

Wright v. Wright, 11 ACDD 95 (1989). Alimony *pendente lite*—Child support. Where husband's income was subject to seasonal fluctuations, it was reasonable to consider the previous year's income.

1990

Blake v. Blake, 138 P.L.J. 190, 12 ACFLR 60 (1990). Equitable distribution—Alimony—Child support— Counsel fees. Reviewing the factors listed in 401(d), the Court determined that Wife was entitled to receive a greater percentage of marital property. Husband was assessed an earning capacity where he chose to retire when his position was elminated rather than remain with his long-time employer at another position. Lastly, Wife was awarded counsel fees due to Husband's obdurate and vexatious behavior, and the need to put the parties "on par."

Mankey v. Mankey, 138 P.L.J. 103, 12 ACFLR 9 (1990). Educational support—Additional expenses. The Court held that educational expenses are not limited to the child's room, board and tuition. Other needs such as incidentals, clothing, and expenses while at home, may also be considered.

II. ALPHABETICAL LIST

Ball v. Ball, 132 P.L.J. 123, 5 ACDD 174 (1983). Equitable distribution—Alimony—Counsel fees. Mortgage contribution made during the marriage for a home purchased by one of the parties prior to that marriage are marital property, together with the appreciation attributable thereto.

Barto v. Barto, 3 ACDD 24 (1982). Divorce—Procedure—Three year separation— Counseling. Where plaintiff files an affidavit under sec. 201(d) of the Divorce Code alleging a three year separation and an irretrievably broken marriage, a prima facie case for issuance of a decree has been made out, supported by a rebuttable presumption of irretrievability. The burden is thus shifted to a defendant who claims a subsisting marriage despite a three year separation. It is within the court's discretion to deny a request for counseling when in the court's opinion the marriage is irretrievably broken.

Belnap v. Belnap, 132 P.L.J. 144, 5 ACDD 147, (1983). Equitable distribution—Alimony—Counsel fees.

Birmingham v. Birmingham, 137 P.L.J. 101, 10 ACDD 342 (1988). Counsel fees. The court need not hold a hearing and/or jury trial to determine if a party is entitled to relief under 42 Pa.C.S.A. 2503.

Blake v. Blake, 138 P.L.J. 190, 12 ACFLR 60 (1990). Equitable distribution—Alimony—Child support— Counsel fees. Reviewing the factors listed in 401(d), the Court determined that Wife was entitled to receive a greater percentage of marital property. Husband was assessed an earning capacity where he chose to retire when his position was elminated rather than remain with his long-time employer at another position. Lastly, Wife was awarded counsel fees due to Husband's obdurate and vexatious behavior, and the need to put the parties "on par."

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Broadie v. Hall, 128 P.L.J. 309 (1980). Family law—Illegitimate children—Procedure for establishing paternity. Act of April 28, 1978, No. 46, repealing the paternity section of the Crimes Code (18 Pa.C.S. 4323), now provides that questions of paternity shall be determined in civil actions brought within six months of conception.

Chase v. Chase, 4 ACDD 79 (1983). Equitable distribution—Support—Alimony—Counsel fees.

Cuddy v. Cuddy, 132 P.L.J. 144 (1983). Equitable distribution—Alimony—Counsel fees.

Damaso v. Damaso, 130 P.L.J. 242, 2 ACDD 96 (1982). Equitable distribution—Alimony—Alimony pendente lite—Counsel fees—Marital residence.

De Nomme v. De Nomme, 136 P.L.J. 452 (1987). Child support.

Defrancisco v. Attenucci, 5 ACDD 118 (1983). Equitable distribution—Alimony—Counsel fees.

Dellovade v. Dellovade, 10 ACDD 230 (1988). Venue—Preliminary objections. Husband's preliminary objections based on venue were granted and wife's complaint in divorce was dismissed where husband had filed a divorce action in Washington County, the parties had lived most of their married lives in Washington County, the majority of assets were in Washington County, husband lived and continued employment in Washington County, all necessary witnesses in the matter resided in Washington County, and a master had been appointed in the Washington County action.

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DePaulis v. DePaulis, 10 ACDD 308 (1988). Counsel fees. The husband was held responsible for attorney's fees imposed upon him due to the acts of his counsel.

Durham v. Durham, 132 P.L.J. 448, 6 ACDD 300 (1984). Equitable distribution. Property held in an individual spouse's name prior to marriage, becomes marital property thereafter as to that proportion in which both have participated by way of maintenance, mortgage payments, and the like.

Eilart v. Eilart, 668 ACDD 171 (1986). Equitable distribution—Alimony—Counsel fees.

Ellis v.Ellis, 132 P.L.J. 145, 5 ACDD 72 (1983). Equitable distribution—Alimony—Counsel fees.

Ellis v. Ellis, 6 ACDD 284 (1984). Divorce—Common law marriage.

Enty v. Enty, 5 ACDD 124 (1983). Alimony—Counsel fees.

Ferri v.Ferri, 129 P.L.J. 449, 1 ACDD 122 (1981). Equitable distribution—Partition of entireties owned property. Partition will not be granted prior to final equitable distribution.

Franklin v. Franklin, 130 P.L.J. 246, 2 ACDD 9 (1982). Equitable distribution—Alimony. The fact that the wife is totally disabled and unable to engage in gainful employment militates for a more "permanent...rather than a "rehabilitative" award of alimony.

Gallagher v. Gallagher, 131 P.L.J. 118, 3 ACDD 132 (1983). Equitable distribution—Alimony—Counsel fees—Pension plan. If a person diverts marital assets for his or her own use, that person should be made to account for it as if it had been retained in its original form.

Gerhard v. Gerhard, 136 P.L.J. 451 (1988). Divorce—Bifurcation.

Ghaznavi v. Ghaznavi, 11 ACDD 73 (1989). Alimony *pendente lite*—Child support. Wife granted a temporarily lower earning capacity where she was attempting to minimize her legal fees by performing her own legal research. Additionally, the Court agreed that the husband should not be permitted to delay payment of arrearages, for to allow him to do so would defeat the very purpose of alimony *pendente lite.*

Graham v. Graham, 7 ACDD 141 (1984). Equitable distribution—Alimony—Counsel fees.

Grippo v. Grippo, 5 ACDD 59 (1983). Preliminary counsel fees and costs.

Hall v. Hall, 131 P.L.J. 413, 4 ACDD 169 (1983). Alimony—Conflict of laws. Where wife has been awarded the marital residence as "lump sum alimony by the courts of a sister state, husband having chosen the forum, having submitted to its jurisdiction, having pursued its rights to its highest tribunals, cannot now be heard to question the validity of the divorce which is the product of his efforts.

Hansen v. Hansen, 5 ACDD 162 (1983). Divorce—Res judicata—Full faith and credit. Those Pennsylvania cases which limit out-of-state divorce decrees to termination of marital statutes are not applicable when both parties freely submitted to the jurisdiction of the foreign court.

Hickey v. Hickey, 130 P.L.J. 486 (1982). Support. An order requiring defendant to pay child support can be modified so as to reduce the required support not only as the result of changes in the defendant's financial position but also on the basis of changes in the plaintiff's financial position.

Hulek v. Hulek, 133 P.L.J. 117 (1984). Alimony pendente lite.

Hulton v. Hulton, 4 ACDD 119 (1983). Divorce—Support. A reduction of a support obligation may be based upon a decrease in income which resulted from a non-volitional change of employment. A change of employment made to avoid transfer or possible termination may be said to be non-volitional.

Jackson v. Jackson, 9 ACDD 164 (1987). Bifurcation—Equitable distribution—Alimony. Fact wife is the only source of income, veteran's benefits, will cease upon entry of divorce is not sufficient to deny husband a divorce.

Although no alimony was awarded here, veteran's benefits may be considered in awarding alimony *pendente lite.*

Jacobs v. Jacobs, 9 ACDD 180 (1987). Divorce—Equitable distribution—Alimony— Counsel fees. Wife awarded 60% of marital assets, where wife's potential much more limited than husband's. Wife also awarded alimony for a period of three years and $10,000 towards her counsel fees.

Kappel v. Kappel, 132 P.L.J. 354, 6 ACDD 157 (1984). Equitable distribution—Alimony—Counsel fees—Dissipation of assets.

Krakovsky v. Krakovsky, 11 ACDD 336 (1989). Equitable distribution—Alimony—Alimony *pendente lite*—Counsel fees. Husband's claim for fair rental value during the wife's sole occupancy of the marital residence was denied where it was unclear as to which party had made the mortgage payments, husband presented no expert testimony on the issue, and husband's testimony was not credible since he had not seen the residence since separatio n . With regard to alimony arrearages,the husband was unable to prove laches under Jackman v. Pelusi, 379 Pa. Super. 361, 550 A.2d 199 (1988).

Kubecka v . Kubecka, 131 P.L.J. 451, 4 ACDD 152 (1983). Equitable distribution—Alimony—Counsel fees.

Kupfer v . Kupfer, 9 ACDD 78 (1987). Equitable distribution—Alimony—Counsel fees. Husband was required to share in the payment of wife's counsel fees where husband was the primary wage earner and there was no pool of assets from which wife could receive any benefit.

Lame v. Lame, 2 ACDD 158 (1982). Equitable distribution—Alimony—Counsel fees.

Latcham v. Latcham, 8 ACDD 228 (1986). Equitable distribution—Alimony—Counsel fees.

Lebovitz v. Lebovitz, 133 P.L.J. 117, 7 ACDD 75 (1984). Equitable distribution—Alimony—Counsel fees—Business assets.

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Mankey v. Mankey, 138 P.L.J. 103, 12 ACFLR 9 (1990). Educational support—Additional expenses. The Court held that educational expenses are not limited to the child's room, board and tuition. Other needs such as incidentals, clothing, and expenses while at home, may also be considered.

McCune v. McCune, 10 ACDD 50 (1988). Equitable distribution—Alimony—Counsel fees. This case discusses valuation of pension, treatment of husband's bonus, credit in contributions of non-marital property to the marital estate, and credit in payment of marital debt, in equitable distribution.

Meinzer v. Meinzer, 6 ACDD 103 (1984). Divorce—Consent decree—Petition to strike or open. When petitions to strike off the judgment or open it are asserted in a single petition a differentiation should be made in the petition between grounds asserted for the alternative forms of relief.

Failure of parties to avail themselves of discovery procedure does not constitute the fraud, accident or mistake necessary to open a consent decree.

Morris v. Morris, 130 P.L.J. 242, 2 ACDD 102 (1982). Alimony.

Motheral v. Motheral, 133 P.L.J. 117, 7 ACDD 103 (1984). Counsel fees—Contempt.

Nemani v. Nemani, 132 P.L.J. 553 (1984). Equitable distribution—Pension plans—Mandatory tax shelter deductions—Alimony—Counsel fees.

Nogan v. Nogan, 7 ACDD 10 (1984). Equitable distribution—Counsel fees—Pension plan. Value of a pension plan will be determined by considering husband' s anticipated pension at the time of his norma l retirement and applying a "coverture" fraction, the numerator of which is the years of marriage, the denominator being the total years of employment at age 65. The resulting fraction must then be multiplied by the value of the pension as determined by the tables provided by the Pension Benefit Guaranty Corporation.

Oddi v. Oddi, 4 ACDD 208 (1983). Equitable distribution—Alimony—Counsel fees. In regard to valuing the [medical) license and/or diploma of the husband, the court will follow the almost universal position of other state courts and find that these are not marital assets subject to division.

Peace v. Peace, 10 ACDD 298 (1988). Educational support. Father was to pay for educationa l support out of his present earnings rather than the parties savings account which had been used prior to the divorce action to educate the parties other children. Once the divorce action was filed, the savings account changed character becoming an item to be considered in the equitable distribution.

Pearce v. Pearce, 5 ACDD 6 (1983). Equitable distribution—Alimony—Counsel fees—Pension plan-stock option. Husband's pension benefits were valued as of the time of separation according to the cost of acquiring an annuity of equal worth. Husband was credited with the value of the stock for which he has an option to purchase even though such option were not exercised at the time of the separation.

Perkins v. Perkins, 11 ACDD 242 (1989). Counsel fees. Pursuant to the parties' agreement, the husband was required to pay those counsel fees necessary to enforce the agreement even though he was not found in contempt.

Rodriguez v. Rodriguez, 11 ACDD 258 (1989). Child support—Earning capacity. After considering the father's skills and recent history of combining employment and part-time schooling, the Court determined that the father was not meeting his earning capacity. Also relevant was the impact of the father's new spouse's income on his financial resources.

Ricketts v. Ricketts, 131 P.L.J. 98 (1982). Support—Contempt—Modification of Order. The court has the power to modify an order for support and to cancel outstanding arrearages in a proceeding to hold defendant in contempt for violating the support order, where the modification is justified by a change in circumstances since entry of the original order.

Rueckert v. Rueckert, 129 P.L.J. 245, 1 ACDD 55 (1981). Procedure—Alimony pendente lite. 1. A decree can not be issued under §201(c) of the Divorce Code when the defendant has filed a pre-decree affidavit and the plaintiff has not. 2. The court cannot issue a rule on plaintiff to show cause why a pre-decree affidavit was not filed. 3. When the defendant files a pre-decree affidavit and the plaintiff does not, the court will not grant alimony *pendente lite* under §201(d) .

S, Barbara B. v. S, S. Allen, 2 ACDD 116 (1982). Divorce—Adultery as grounds—Three year separation. The court will not entertain a petition for divorce on grounds of adultery when within a short period of time the parties will have lived separate and apart for three years.

Schmitz v. Schmitz, 129 P.L.J. 176 (1979). Garnishment—Judgment for Support and Maintenance—Surrender Value of Life Insurance Policy—Exemptions from execution. The cash surrender value of a life insurance policy is normally exempt from attachment in satisfaction of a judgment against the insured; however, where the policy gives the insured the right to change beneficiaries as well as withdraw the cash surrender value, that value will not be exempted from property subject to garnishment to satisfy a judgment for support and maintenance.

Sgro v. Sgro, 2 ACDD 209 (1982). Equitable distribution—Marital property—Three year separation. Property acquired after separation will be considered marital property if the parties engage in sexual intercourse after such acquisition. The act of sexual intercourse tolls the separation period even though the parties did not live together.

Small v. Small, 130 P.L.J. 246, 2 ACDD 15 (1982). Equitable distribution—Alimony.

Sommer v. Sommer, 1 ACDD 215 (1982). Equitable distribution—Alimony—Support—Counsel's fees.

Szott v. Szott, 2 ACDD 40 (1982). Equitable distribution—Marital property.

Talley v. Zelonka, 6 ACDD 94 (1984). Divorce—Motion to va-

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cate. A motion to vacate a Delaware divorce decree for lack of jurisdiction is subject to the five year limitation of 23 P.S. 102.

Vankirk v. Vankirk, 6 ACDD 222 (1984). Alimony—Consent order. Section 507 of the Divorce Code will not act as a bar to alimony because of cohabitation when such payments are made pursuant to a consent decree.

Wichers v. Wichers, 132 P.L.J. 146, 6 ACDD 66 (1984). Divorce—Alimony—Counsel fees.

Wright v. Wright, 11 ACDD 95 (1989). Alimony *pendente lite*—Child support. Where husband's income was subject to seasonal fluctuations, it was reasonable to consider the previous year's income.

Wurgler v. Wurgler, 1 ACDD 140 (1981). Termination of inactive cases. The minimum standards set out in Pa.R.C.P. 1901(c) must be met before termination under local rule 229(e).

Zubik v. Zubik, 5 ACDD 132 (1983). Counsel fees.

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Counsel fees. *Birmingham v. Birmingham*, 137 P.L.J. 101, 10 ACDD 342 (1988).

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Divorce—Equitable distribution—Alimony— Counsel fees. *Jacobs v. Jacobs*, 9 ACDD 180 (1987).

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Equitable distribution—Alimony—Counsel fees—Pension plan. *Gallagher v. Gallagher*, 131 P.L.J. 118, 3 ACDD 132 (1983).

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Equitable distribution—Alimony—Support— Counsel's fees. *Sommer v. Sommer*, 1 ACDD 215 (1982).

Equitable distribution—Counsel fees—Pension plan. *Nogan v. Nogan*, 7 ACDD 10 (1984).

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MAKING DIVORCE LESS TAXING: A UNIQUE OPPORTUNITY FOR INCOME, ESTATE, AND GIFT TAX PLANNING

Justin T. Miller*

Author's Synopsis: Divorce often is an emotionally traumatic experience, and dealing with tax considerations in divorce only adds to the psychological burden. However, addressing the unique tax issues that arise in divorce should be an integral part of the marital dissolution process. The problems that can result from poor tax planning may not surface until months or even years after a divorce, and attempts to fix those problems—if even possible—may be extremely difficult, time-consuming, and expensive. To help plan for taxes during a divorce and avoid various traps for the unwary, this Article addresses ten common issues that should be considered during the marital dissolution process, especially when working with high net worth spouses who typically have more complicated income, estate, gift, and generation skipping transfer tax planning needs.

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I. INTRODUCTION

The emotions experienced by a client going through a divorce or marital dissolution[1] often include grief, sadness, depression, anger, rejection, despair, shock, fear, bitterness, denial, and guilt. Given the emotional and financial toll of divorce, the last thing a client needs is a tax problem—with the Internal Revenue Service (Service) or state tax authorities—on top of a divorce. Unfortunately, the problems caused by poor tax planning may not become apparent until months or even years after a divorce, and those tax problems may be difficult and expensive to fix. If advisors address the tax issues up front, while a client is negotiating the terms of a divorce or marital dissolution, the client could end up with more money in the long run—and the ability to sleep better at night. To help make divorce a less *taxing*[2] experience, this Article will discuss the following ten issues that typically should be considered when dissolving a marriage, especially when one or both spouses has a high net worth with more complicated planning needs: (1) tax filing status; (2) dependency exemptions; (3) sale of principal residence exclusion; (4) mortgage interest deductions; (5) deductions related to divorce; (6) allocation of tax carryovers; (7) payments after divorce—such as child support, alimony, and life insurance premiums; (8) qualified retirement plans and individual retirement accounts (IRAs); (9) property transfers and division of appreciated property; and (10) support trusts.

II. TAX FILING STATUS

Two major tax issues all divorcing spouses need to consider are when to time the divorce and how to file for tax purposes. The federal income tax filing status options for married taxpayers are (1) married filing jointly,[3] which typically is the most tax efficient filing status, or (2) married filing separately, which may be more desirable in certain limited circumstances, such as limiting potential joint liability.[4] The federal income tax filing status options for unmarried taxpayers are (1) single, (2) head of household, or (3) qualifying widow(er).[5]

[1] For purposes of this Article, the terms divorce and marital dissolution are assumed to be synonymous, which is not always the case under the laws of certain states.

[2] Pun intended—less physically and mentally demanding as well as less money owed to the federal and state governments.

[3] *See* I.R.C. § 7703(a)(1). Any references to the "Code" or "I.R.C." refer to the Internal Revenue Code, Title 26, United States Code; any reference to the Regulations refers to the Regulations promulgated thereunder. All statutory citations in this Article refer to the current statute unless otherwise indicated.

[4] *See id.*

[5] For purposes of this outline, both spouses are assumed to be living.

A. Timing of Divorce

Tax filing status is set by the spouses' marital status on the last day of the tax year[6]—typically December 31.[7] In general, spouses are treated for tax purposes as married for the entire year, even if they are separated, when they have not obtained a final decree of divorce or separate maintenance by the last day of the tax year.[8] If spouses are considered legally divorced[9] or "considered unmarried" under a legally binding separation agreement[10] on the last day of the tax year, each spouse must file as single or head of household.[11]

Example 1. Amy and Bob are in the process of dissolving their marriage.[12] Amy is a stay-at-home mom, and Bob is the beneficiary of a trust fund that distributes approximately $450,000 of income to him each year. The highest tax bracket for a married couple filing jointly in 2017 is $470,700, and the highest tax bracket for a single person in 2017 is $418,400.[13] If Bob's taxable income is $450,000 per year, he would be in the highest tax bracket for a single person, but not if he was married filing jointly. In that case, being married could be a tax benefit, so Bob may want to push the actual date of their divorce into next year.

Example 2. Charlotte and Dave are both attorneys and they each make $250,000 per year. Charlotte and Dave would not be in the highest tax bracket as single people, but they would be in the highest tax bracket if married. Accordingly, to avoid a marriage tax penalty, they may want to speed up the divorce process and finalize it this year.

B. Married Filing Jointly

While married filing jointly may provide a better tax result for both spouses versus married filing separately,[14] a major risk to consider is that each spouse may be held responsible, jointly and individually, for the tax and any interest or penalty due on their joint tax return.[15] This means that one spouse may be held liable for all the tax due, even if all of the income was earned by the other spouse.[16] Each spouse is jointly and individually responsible for any tax, interest, and penalties due on a joint return for a tax year ending before the divorce, even if the divorce decree states that the other spouse will be responsible for any amounts due on previously filed joint returns.[17]

Example 1. Assume Ella has filed for divorce from Frank, but the divorce process could take several years. Frank is an international arms dealer with a team of attorneys and accountants who have helped him create a labyrinth of entities and trusts with accounts at different financial institutions throughout the world. Ella is a practicing medical doctor who has inherited a significant sum from her grandparents, which would be her separate property. Ella, who has been busy with her medical practice, has not been involved with the family's finances or tax

[6] *See* I.R.C. § 7703(a)(1).

[7] *See* I.R.C. § 441(g).

[8] *See* I.R.C. § 7703(a). Noted that an interlocutory decree is not a final decree.

[9] Divorced or legally separated under a decree of divorce or a decree of separation. *See* I.R.C. § 152(e)(1)(A)(i).

[10] I.R.C. § 152(e)(1)(A)(ii).

[11] *See id.*

[12] Unless otherwise provided, the names, characters, businesses, places, and events discussed in the hypothetical examples in this paper are fictitious. Any resemblance to actual persons, living or dead, or actual events is purely coincidental.

[13] *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 707, 709.

[14] *See infra* Part II.C.

[15] *See* I.R.C. § 6013(d)(3).

[16] *See id.*

[17] *See id.*

preparation. Frank could be subject to substantial taxes, penalties, and interest due to the failure to pay taxes or report many of his international holdings—for example, noncompliance with the Report of Foreign Bank (FBAR) and Financial Accounts and Foreign Account Tax Compliance Act[18] (FATCA) rules. If Ella were to file as married filing jointly with Frank, she may be held liable by the Service for the entire amount of such taxes, penalties, and interest. While she may be entitled to relief,[19] the process to obtain such relief could be expensive and time-consuming, and there is no guarantee that she will be granted relief. Accordingly, Ella may be much better off by filing as married filing separately.

In some cases, a spouse may be relieved of the tax, interest, and penalties on a joint return.[20] A spouse may request relief from the Service regardless of the size of the liability.[21] Generally, three types of relief are available, and each kind of relief has different requirements.[22] A spouse must file IRS Form 8857, *Request for Innocent Spouse Relief*,[23] to request relief under any of the following categories: (1) innocent spouse relief; (2) separation of liability relief; or (3) equitable relief.

Under the "innocent spouse" rule, a spouse may not be responsible for the former spouse's failure to pay taxes that were due while they were married and filing joint returns.[24] The requesting spouse must file the request for relief within two years of the first collection action.[25] In determining whether the spouse qualifies for relief, the Service will consider the innocent spouse's level of financial sophistication and the specific circumstances of the tax error.[26] To be considered an innocent spouse, that spouse must be able to prove:

1. The spouse filed a joint return and there was an understatement or misrepresentation of information that directly relates to the former spouse's items;
2. The spouse did not know at the time, and had no reason to know, of the former spouse's misrepresentations on the joint tax return; and
3. Taking into consideration all the facts and circumstances, it would be unfair to hold the spouse accountable.[27]

Separation of liability relief applies to joint filers who are divorced, widowed, legally separated, or who have not lived together for the twelve months ending on the date election of this relief is filed.[28] The requesting spouse must file within two years of first collection action,[29] and the Service has the burden of proof that the requesting spouse had knowledge of understatement or underpayment.[30]

[18] I.R.C. §§ 1471-74, 6038D.
[19] *See infra* Part II.B.
[20] *See* I.R.C. § 6015.
[21] *See id.*
[22] *See id.*
[23] *See* I.R.S. FORM 8857, REQUEST FOR INNOCENT SPOUSE RELIEF, https://www.irs.gov/pub/irs-pdf/f8857.pdf.
[24] *See* I.R.C. § 6015(b).
[25] *See id.*
[26] *See id.*
[27] *See id.*
[28] *See* I.R.C. § 6015(c).
[29] *See* I.R.C. § 6015(c)(3)(B).
[30] *See* I.R.C. § 6015(c)(e)(C); Culver v. Comm'r, 116 T.C. 189, 196–98 (2001).

Equitable relief applies if the requesting spouse does not qualify for innocent spouse or separation of liability relief, if (1) the requesting spouse had no knowledge of the understatement or underpayment; and (2) it would be inequitable to hold the requesting spouse liable.[31] Married persons who live in community property states, but who did not file joint returns, also may qualify for relief from liability arising from community property law.[32]

C. Married Filing Separately

If spouses file separate returns as married filing separately, each should report only their own income, exemptions, deductions, and credits on their individual return.[33] Each spouse is responsible for only their own taxes due on their own return—that is, no joint liability as with married filing jointly.[34] Each spouse can file a separate return even if only one of the spouses had income.[35] If spouses file separate returns and one spouse itemizes deductions, the other spouse cannot use the standard deduction and also should itemize deductions.[36]

Most often, filing jointly will provide the spouses with an increased refund or reduced tax bill.[37] When filing separately, the tax rate may be higher and the spouses typically will not be able to claim the earned income credit, the child and dependent care credit, and the adoption credit.[38] Furthermore, if the spouses live in a community property state—such as Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin—they also may have to contend with community property allocations and adjustments, which results in added complexity and requires additional tax preparation assistance.[39]

D. Single

Filing as single is the standard filing status for unmarried people who do not qualify to file as head of household.[40] If a spouse was not married on the last day of the tax year and that spouse does not qualify to use any other filing status, then the spouse must file a tax return as single.[41]

E. Head of Household

If a spouse is unmarried and qualified to file as head of household, that spouse will receive better tax benefits using head of household filing status than using single filing status.[42] A spouse also may be "considered unmarried" for head of household status if the spouses have lived apart for at least the last six months of the tax year and that spouse supports a qualifying relative.[43]

A spouse may file as head of household if:

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[31] *See* I.R.C. § 6015(f).
[32] *See* Treas. Reg. § 1.66-4.
[33] *See* I.R.S. Pub. 501 (2016).
[34] *See id.*
[35] *See id.*
[36] *See id.*
[37] *See id.*
[38] *See id.*
[39] *See id.*
[40] *See id.*
[41] *See id.*
[42] *See id.*
[43] I.R.C. § 152(e)(1)(A)(iii). Note that a spouse is considered to live in a home even if that spouse is temporarily absent due to special circumstances. *See* Treas. Reg. § 1.2-2(c)(1).

1. The spouse is unmarried on the last day of the year[44] or "considered unmarried"—that is, there is a legally binding separation agreement, or the spouses have not lived together during the past six months of the tax year;[45]
2. The spouse's home was the main home for a "qualifying per-son," as defined below, for more than half the year;[46]
3. The spouse paid more than half the cost of maintaining the home for at least half the year[47]—these costs include rent, mortgage interest, real estate taxes, insurance repairs, utilities, and food eaten in the home, but do not include clothes, education, medical, vacations, life insurance, or transportation;[48] and
4. The spouse can claim the dependency exemptions for the qualifying persons[49]—even if the spouse does not actually claim the exemptions.[50]

For purposes of the above listed requirements, a "qualifying person" is a "qualifying child" or "qualifying relative."[51] In general, a qualifying child[52] is defined as:

1. A child (including legally adopted), stepchild, foster child, sib-ling, half-sibling, step-sibling, or a descendant of any of them—for example, a grandchild, niece or nephew;[53]
2. Who has the same residence as the taxpayer for more than half the year;
3. Who has not provided over half of their own support for the year;[54]
4. Who is single or, if married, the spouse is qualified to claim them as a dependent—even if not actually claiming them;[55] and
5. Who is under the age of nineteen, unless the child is a student[56] under the age of twenty-four as of the close of the calendar year—note, there are exceptions for disabled individuals.[57]

Whereas, a qualifying relative[58]—often, a child that is too old to fit the definition of qualifying child—generally is defined as:

1. A mother or father, if the spouse is qualified to claim them as a dependent—even if not actually claiming them;[59] or

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[44] *See* I.R.C. § 2(b)(1).
[45] Treas. Reg. § 1.2-2(b)(5).
[46] I.R.C. § 2(b)(1)(A)-(B).
[47] *See* I.R.C. § 2(b)(1).
[48] *See* I.R.S. Pub. 501 (2016).
[49] *See infra* Part III.
[50] *See* I.R.C. § 2(b)(1).
[51] I.R.C. § 152(a).
[52] I.R.C. § 152(c).
[53] *See id.*
[54] *See id.*
[55] *See id.*
[56] Defined under I.R.C. § 152(f)(2).
[57] *See* I.R.C. § 152(c).
[58] *See* I.R.C. § 152(d).
[59] *See id.*

2. A relative related by blood, legal adoption, or marriage other than a parent—such as a child, sibling, grandparent, nephew, aunt, step-parent, or in-law—that lived with the spouse for more than half the year, and that the spouse is able to claim as a dependent—even if not actually claiming them.[60]

F. Name Changes

It should be noted that a spouse who plans to reclaim a name that he or she had before marriage, such as a maiden name, should not use that name on a tax return until the name change has been filed with the Social Security Administration (SSA) using Form SS-5, *Application for a Social Security Card*.[61] The name on a tax return must match SSA records, and a mismatch can significantly delay refunds and cause other unnecessary complications with the Service.[62]

III. DEPENDENCY EXEMPTIONS

In addition to a personal exemption, taxpayers are permitted to claim one exemption for each person claimed as a dependent—that is, the "dependency exemption."[63] Only one taxpayer may claim a dependency exemption for a child for a tax year.[64] The dependency exemption for a child may not be split between two or more taxpayers.[65] The dependency exemption, similar to a tax deduction, reduces taxable income resulting in the payment of less income tax.[66] The exemption amount is adjusted each year for inflation; the exemption amount is $4,050 in 2017.[67] For the dependency exemption, the dependent generally must meet the following requirements:

1. Be a qualifying child or qualifying relative;[68]
2. Not be able to be claimed as a dependent on someone else's tax return;[69]
3. Be a U.S. citizen, resident alien, or U.S. national;[70]
4. Be single, or, if married, may not have filed a joint return with his or her spouse for the tax year;[71]
5. As of the end of the calendar year, (1) be younger than nineteen, or a student who is younger than twenty-four, at the end of the year—note that there is no age limit on claiming the child as a dependent if the child meets the "qualifying relative test"—or (2) have gross income for the tax year less than the exemption amount for that year;[72] and

[60] *See id.*
[61] *See* I.R.S. Pub. 17 (2016).
[62] *See id.*
[63] I.R.C. § 151(c).
[64] *See* I.R.C. § 152.
[65] *See* I.R.C. § 151(d)(2).
[66] *See* I.R.C. § 151(a).
[67] *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 707, 713.
[68] *See* I.R.C. § 152.
[69] *See id.*
[70] *See id.*
[71] *See id.*
[72] *See id.*

6. Receive more than half the support from one or both spouses—support generally includes food, shelter, clothing, medical care, dental care, and education.[73]

The Service presumes that the custodial parent is entitled to the exemption for children.[74] Generally, the custodial parent is considered to be the parent who has physical custody of the child for most of the year.[75] Custody typically is determined by the number of nights spent with each parent, although there is an exception for parents who work at night.[76] If the child spends an equal amount of time with each parent, then the parent with highest adjusted gross income is considered the custodial parent.[77] Even if the custody decree grants physical custody to one parent, the tax court has held that "this parent is not entitled to a dependency exemption when the children did not live with this parent for most of the year."[78]

A custodial spouse may give the dependency exemption to the non-custodial spouse—treating the child as the qualifying child or qualifying relative of the noncustodial parent—if the custodial spouse makes too much or too little to benefit from the exemption.[79] There are certain instances where it may make more sense for the noncustodial parent to claim the dependency exemption.

Example 1. Grace and Henry are getting a divorce and have two minor children. Grace, who will be the custodial parent, makes $500,000 per year as a senior executive of a successful technology company. Henry is a school teacher who makes $60,000 per year and will be receiving $75,000 per year of alimony. Pursuant to the American Taxpayer Relief Act of 2012,[80] Grace will not be able to take advantage of the two dependency exemptions for tax purposes due to the phase out of personal exemptions, which fully phases out in 2017 at $384,000 if filing as single and $410,150 if filing as head of household.[81] Rather than waste the dependency exemptions, Grace could give the dependency exemptions to Henry, the noncustodial parent.

Example 2. Isabelle and John are getting a divorce and have two minor children. Isabelle, who will be the custodial parent, makes $40,000 per year as a nurse and will receive $25,000 per year in alimony. John, the noncustodial parent, is a dentist who makes $225,000 per year. Because Isabelle is in a much lower tax bracket than John—25% versus 33%—John would receive a greater tax benefit if he were allowed to take advantage of the dependency exemptions. Because John does not make enough to be subject to the phase out of personal exemptions—which begins at $261,500 for those filing as single in 2017[82]—Isabelle and John could agree as part of their settlement negotiations that the dependency exemptions should be given to John, even though he is the noncustodial parent.

In order to "trade" the dependency exemption, both of the following conditions must be met: (1) the custodial parent signs IRS Form 8332, *Release/Revocation of Release of Claim to*

[73] *See* I.R.C. § 152(e)(1)(A).
[74] *See* I.R.C. § 152(c)(4)(B).
[75] *See* I.R.C. § 152(e)(4).
[76] *See* Treas. Reg. § 1.152-4(d)(1) -(5).
[77] *See* I.R.C. § 152(c)(4)(B)(ii).
[78] Maher v. Comm'r, 85 T.C.M. 2003-85 (CCH) 1053, 1056 (2003).
[79] *See* I.R.C. § 152(e).
[80] American Taxpayer Relief Act of 2012, Pub. L. No. 112–240, H.R. 8, 126 Stat. 2313 (Jan. 2, 2013).
[81] *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 707, 713.
[82] *See id.*

Exemption for Child by Custodial Parent,[83] or a substantially similar statement; and (2) the noncustodial parent attaches the Form 8332 or the statement to his or her return.[84]

Spouses also may be able to structure the use of dependency exemptions as part of a creative settlement solution. For instance, each spouse could alternate who claims the child from year to year in order to share the tax benefit—for example, one spouse gets the dependency exemption in even years and the other spouse gets the dependency exemption in odd years.[85] If there is more than one child, spouses can split the dependency of the children between them, which is allowed even if both children spend the same amount of time with each parent.[86]

A state divorce court often orders in its divorce decree or separation agreement that the custodial parent must give the dependency exemption to the noncustodial parent.[87] However, such a state court order generally has no effect on the Service or the tax court because federal law deter-mines who may claim a dependency exemption—meaning, the Service and the tax court likely will not pay any attention to such an order.[88] Consequently, if the spouses agree that it would be more efficient for tax purposes to have the noncustodial parent claim a dependency exemption, then a signed IRS Form 8332 should be required as part of the final divorce agreement.[89]

The only purpose of the IRS Form 8332 or similar statement is to release the custodial parent's claim to the child's exemption.[90] Moreover, the IRS Form 8332 or similar statement must release the custodial parent's claim to the child without imposing any conditions—for example, the release must not depend on the noncustodial parent paying support.[91]

If the noncustodial parent fails to make the required child support payments, then the custodial parent can revoke the IRS Form 8332 release.[92] The custodial parent can use Part III of IRS Form 8332 for this purpose and must attach a copy of the revocation to his or her return for each tax year he or she claims the child as a dependent as a result of such revocation.[93] The custodial parent also must give—or make a reasonable effort to give—written notice of the revocation to the noncustodial parent.[94]

If the custodial parent releases a claim to the dependency exemption for a child for a specific year, the custodial parent may not claim the child tax credit for that child.[95] However, certain tax benefits for a qualifying child may not be "traded" to the other parent—meaning the benefits are available to only the custodial parent—such as: (1) head of household filing status; (2) dependent care credit; (3) exclusion from income for dependent care benefits; (4) Hope scholarship credit; (5) lifetime learning credit; and (6) earned income credit.[96]

[83] I.R.S. FORM 8332, https://www.irs.gov/pub/irs-pdf/8332.pdf.

[84] *See* Treas. Reg. § 1.152-4.

[85] *See* I.R.S. Pub. 504 (2016).

[86] *See id.*

[87] *See, e.g.*, Hughes v. Hughes, 518 N.E.2d 1213 (Ohio 1988).

[88] *See*, *e.g.*, Rivas v. Comm'r, T.C.M. 2016-158 (2016); He v. Comm'r, T.C. Summ. 2016-4 (2016); Cappel v. Comm'r, 112 T.C.M. (CCH) 216 (Ohio 1988); I.R.S. C.C.A. 201602009 (Jan. 8, 2016).

[89] *See* I.R.S. Pub. 504 (2016).

[90] *See id.*

[91] *See id.*

[92] *See id.*

[93] *See id.*

[94] *See id.*

[95] *See id.*

[96] *Id.*

IV. SALE OF PRINCIPAL RESIDENCE EXCLUSION

In general, spouses may exclude from taxable income a substantial amount of capital gains on the sale of their principal residence if they have owned and used the home as a principal residence for two of the last five years, and they have not taken advantage of the principal residence exclusion within the last two years.[97] The exclusion amount from capital gains is $250,000 if single or $500,000 if married.[98] In order to take advantage of the $500,000 exclusion amount, the following must apply:

1. The spouses must still be married at year end;
2. The spouses must file a joint income tax return for year of sale;
3. Either spouse must meet the "ownership" test; and
4. Both spouses must use the house as a principal residence.[99]

For purposes of the ownership test, a spouse's period of ownership is attributable—imputed—to the other spouse.[100] For instance, if the spouse who owns the home transfers it to the other spouse pursuant to the divorce, the transferring spouse's period of ownership is attributed to the other spouse's ownership; thus, the transferring spouse's holding period becomes part of the other spouse's ownership period.[101]

Example 1. Kathy and Larry are getting a divorce this year. Kathy purchased a home five years ago, and both Kathy and Larry have occupied the home as their principal residence for the past two years. Pursuant to the divorce decree, Kathy will be transferring ownership of the home to Larry. If Larry sells the home next year, he still will be entitled to the $250,000 exclusion (filing as single) because Kathy's ownership period is treated as his ownership period. Thus, Larry satisfies both the use and ownership requirements.[102]

Note also that a spouse owning a home is treated for tax purposes as using the home as a principal residence during any period the other spouse is granted use of the home under a divorce or separation agreement—the other spouse's use of the home is attributed to the spouse who left the home.[103] Therefore, if a spouse moved out of the house before the divorce was final but then ended up getting the house in the proceedings anyway, that spouse still may claim the house as a primary residence.[104]

Example 2. Melissa and Nick are getting a divorce. They have used their home as a principal residence for one year. The spouses both agreed that Melissa will be granted sole use of the home for one more year, and that Nick—who owns the home—will move out of the house into a nearby apartment. When the home is sold a year later, Melissa's use of the home is attributed to Nick.[105] Accordingly, Nick still will be able to claim the full $250,000 exclusion (filing as

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[97] *See* I.R.C. § 121.
[98] *See* I.R.C. § 121(b).
[99] I.R.C. § 121(b)(2); *see also* Treas. Reg. § 1.121-2(a)(3)(i).
[100] *See* I.R.C. § 121(b)(2).
[101] *See* I.R.C. § 121(d)(3)(A); *see also* Treas. Reg. § 1.121-4(b)(1).
[102] *See id.*
[103] *See* I.R.C. § 121(d)(3)(B); *see also* Treas. Reg. § 1.121-4(b)(2).
[104] *See* I.R.C. § 121(d)(3)(B).
[105] *See id*.

single) based on Melissa's use of the home, even though he only used the home as a principal residence for one year.[106]

To qualify for the home sale exclusion, a spouse does not need to reside in the house at the time he or she sells it.[107] The two years of ownership and use may occur anytime during the five years prior to the date of the sale.[108] For instance, a spouse can move out of the house for up to three years and still qualify for the exclusion, or a spouse may rent out the home for up to three years prior to the sale and still qualify for the exclusion.[109] It is important to track such time periods in order to take advantage of the exclusion.

Example 3. Olivia and Peter purchased a home four years ago for $500,000, and it is now worth $1,000,000. They used the home as their principal residence for two years, but they have been living in separate apartments and renting the house out for the past two years. If Olivia and Peter sell the house this year, while they are married filing jointly, they could exclude the entire $500,000 of capital gains from the sale. If, on the other hand, Peter transfers his half of the residence to Olivia and she sells it next year after the divorce when she is filing as single, then Olivia only would be able to exclude $250,000 of the capital gains (filing as single) and would be subject to taxation on $250,000 of capital gains—potentially subject to federal income tax at a rate as high as 23.8%, including the net investment income tax,[110] as well as state income tax at rates as high as 13.3%.[111] Accordingly, it may be prudent for Olivia and Peter to sell the home prior to finalizing the divorce in order to benefit from the entire $500,000 capital gain exclusion.

A partial exclusion of gain may be available for a spouse who does not meet the ownership and use requirements or who has already used the section 121 exclusion within the prior two years[112] if the sale results from (1) a change in place of employment; (2) health reasons; or (3) un-foreseen circumstances. Fortunately for divorcing spouses, an unforeseen circumstance includes divorce or legal separation under a decree of divorce or separate maintenance.[113] The formula for determining the partial exclusion is the following: days of ownership and use, or, if less, days between dates of sale of previous and current home; divided by 730 days; times $250,000 or $500,000—whichever exclusion is applicable.[114]

Example 4. Rebecca and Steve purchased a home as their principal residence one year ago for $250,000. They are now in the process of getting divorced and are selling the home for $750,000. If they had owned and used the home as principal residence for two years, they would have been entitled to a $500,000 capital gain exclusion.[115] Even though they only owned and used the home for half of the required period, they still are allowed to claim half the benefit of the exclusion due to the unforeseen circumstance of divorce—that is, 365 days divided by 730 days times $500,000 (filing as married filing jointly). Accordingly, Rebecca and Steve would be able to exclude $250,000 of the capital gains—half of the $500,000 married filing jointly amount—and would be subject to taxation on the remaining $250,000 of capital gains.

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[106] *See id.*

[107] *See* Treas. Reg. § 1.121-1(c).

[108] *See id.*

[109] *See id.*

[110] *See* I.R.C. § 1411(a)(1).

[111] *See* Ca. Franchise Tax Bd., Ca. Tax Rates and Exemptions (2015), https://ftb.ca.gov/forms/2015-california-tax-rates-and-exemptions.shtml.

[112] *See* I.R.C. § 121(c)(2)(B); Treas. Reg. § 1.121-3(b).

[113] *See* I.R.C. § 121(c)(2)(B); *see also* Treas. Reg. § 1.121-3(e)(2).

[114] *See* Treas. Reg. § 1.121-3(g)(1).

[115] *See* I.R.C. § 121(b)(2)(A).

If a spouse qualifies for the exclusion, that spouse may do anything with the proceeds from the sale; the spouse is not required to reinvest or rollover the money into another house—whereas prior law was different.[116] If a spouse buys another home, that spouse can qualify for the principal residence exclusion again if the subsequent sale occurs at least two years later.[117]

V. MORTGAGE DEDUCTIONS

In general, single individuals and married spouses have a $1,100,000 deductible interest limitation on acquisition and home equity indebted-ness, which includes $1,000,000 on acquisition indebtedness and $100,000 on home equity indebtedness.[118] For the home mortgage interest deduction, the debt must be secured by a qualified home, which means a main home or a second home.[119] A "home" includes a house, condominium, cooperative, mobile home, house trailer, boat, or similar property that has sleeping, cooking, and toilet facilities.[120] The home must be used by the taxpayer as a residence—meaning the taxpayer uses it for fourteen days within the year or for 10% of the time it is rented, whichever is greater.[121] The taxpayer is deemed to have used the unit to the extent that the taxpayer or "any member of the family of the taxpayer" uses it, which likely does not include a former spouse.[122] A mortgage secured by a qualified home may be treated as home acquisition debt, even if a taxpayer does not actually use the proceeds to buy, build, or substantially improve the home.[123] This applies in the following situations:

1. The taxpayer purchases the home within ninety days before or after the date of the mortgage;
2. The taxpayer builds or improves the home and takes out the mortgage before the work is completed—the home acquisition debt is limited to the amount of the expenses incurred within twenty-four months before the date of the mortgage; or
3. The taxpayer builds or improves the home and takes out the mortgage within ninety days after the work is completed.[124]

Traditionally, the Service has applied the $1,100,000 indebtedness limitation[125] on a per-residence basis as opposed to a per-taxpayer basis—meaning that unmarried owners were required to allocate the $1,100,000 limitation amounts amongst themselves.[126] However, in August 2015, the United States Court of Appeals for the Ninth Circuit in *Voss v. Commissioner of Internal Revenue*[127]—in reversing a tax court decision—ruled that each unmarried taxpayer was allowed to individually apply the $1,100,000 limitation.[128] Moreover, in August 2016, the

[116] *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 312, 111 Stat. 788, 836-41.
[117] *See* I.R.C. § 121(b)(3).
[118] *See* I.R.C. § 163(h)(3).
[119] *See* I.R.C. § 163(h)(4)(A).
[120] Treas. Reg. § 1.163-10T(p)(3)(ii).
[121] *See* I.R.C. § 280A(d)(1).
[122] I.R.C. § 280A(d)(2).
[123] *See* I.R.S. Pub. 936 (2016).
[124] *See id.*
[125] *See* I.R.C. § 163(h)(3).
[126] *See id.*
[127] 796 F.3d 1051 (9th Cir. 2015), *rev'g* Sophy v. Comm'r, 138 T.C. 204 (2012).
[128] *See id.* at 1068.

Service acquiesced to the decision in *Voss*.[129] Accordingly, to the extent former spouses are sharing ownership and use of a main home or second home—which typically is not recommended for emotional and psycho-logical reasons—each former spouse should be entitled to a $1,100,000 deductible interest limitation. For unmarried couples, the recent ruling also provides individuals who would prefer to stay unmarried with a good financial excuse not to get married—in addition to the marriage tax penalty, discussed above.

VI. Deductions Related to Divorce

In general, fees and expenses related to a divorce are considered non-deductible personal expenses.[130] However, certain divorce-related fees that are attributable to the collection of income or tax advice may be deductible, including, expenses that are:

> "(1) for the production or collection of income;
>
> (2) for the management, conservation, or maintenance of property held for the production of income; or
>
> (3) in connection with the determination, collection, or refund of any tax."[131]

As an example of the foregoing, fees and costs for attorneys, accountants, appraisers, actuaries, and vocational counselors related to obtaining alimony may be deductible.[132] This would include (1) the determination and collection of alimony; (2) the recovery of alimony arrearages—that is, delinquent support; and (3) a claim for an increase in alimony payments.[133] An example of deductible fees and costs for tax advice rendered incident to a divorce would include: (1) structuring a settlement or property division to produce desired tax effects; (2) creating a support trust as an alternative to alimony; (3) estate planning to mitigate estate and gift tax consequences of support or property division; and (4) preparing, submitting, and enforcing a qualified domestic relations order.[134] On the other hand, fees and costs that may not be deductible would include anything related to (1) the payment—as opposed to collection—of alimony;[135] (2) a business, but originating with a divorce action—even if paid through a business and useful for protecting a family business;[136] and (3) property transfers—other than tax advice related to a property division.[137]

Ultimately, the taxpayer has the burden of proving the amount of deductible expenses.[138] To assist the taxpayer, family law attorneys should maintain careful records and separately itemize billings related to tax advice or to income production or collection, which could help clients save thousands of dollars, potentially.[139] Because determining deductibility is dependent on an

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[129] A.O.D. 2016-2, 2016-31 I.R.B. 193.

[130] *See* United States v. Gilmore, 372 U.S. 39, 42 (1963).

[131] I.R.C. § 212.

[132] *See* I.R.C. § 71.

[133] *See* I.R.C. §§ 71,212 and 71,215 (providing that a spouse's payment of the other spouse's legal fees may be deductible by the payor (as alimony), includible in income by the payee (as alimony), and also deductible by the payee (related to collection of alimony)).

[134] *See* Carpenter v. United States, 338 F.2d 366 (Ct. Cl. 1964); *see also* Rev. Rul. 72-545, 1972-2 C.B. 179.

[135] *See* I.R.C. § 71; *see also* United States v. Davis, 370 U.S. 65 (1962).

[136] *See* United States v. Gilmore, 372 U.S. 39 (1963); Dolese v. United States, 605 F.2d 1146 (10th Cir. 1979); Melat v. Comm'r, 65 T.C.M. (CCH) 247 1993.

[137] *See* I.R.C. §§ 1041, 2056, 2516, and 2523.

[138] *See* INDOPCO, Inc. v. Comm'r, 503 U.S. 79, 84 (1992).

[139] *See* Rev. Rul. 72-545, 1972-2 C.B. 179.

individual's particular facts and circumstances, family law practitioners should advise taxpayers to consult with their tax advisors for specific tax advice.

Even if certain divorce-related fees are deductible, those deductions still might be subject to other limitations. For instance, the deductions will be itemized deductions subject to the two percent floor for miscellaneous itemized deductions—which means the deductions will be lost if the individual uses the standard deduction.[140] The deductions also could be lost if the individual is subject to the alternative minimum tax.[141]

VII. ALLOCATION OF TAX CARRYOVERS

Tax carryovers—such as capital loss carryovers, charitable contribution carryovers, net operating loss carryovers, and passive loss carryovers—are property rights that have inherent value and must be considered in a divorce proceeding. Tax carryovers sometimes are overlooked or ignored by family law attorneys and courts. In addition, there is different tax treatment for tax carryovers related to separate property versus marital assets.

Charitable contribution carryovers should be divided post-marriage in accordance with the ratio of amounts that would have carried forward if separate returns were filed in the year of contribution.[142] The Service has ruled that the allocation of excess charitable contribution between spouses cannot be made by agreement between the parties but must be in accordance with the method set forth in the Treasury Regulations.[143]

Capital loss carryovers should be divided post-marriage in accordance with the individual net losses that gave rise to carryover.[144] In other words, the capital loss carryover typically is allocated to the spouse who actually suffered the capital loss.[145] In certain states, capital loss carryovers are treated as marital assets subject to equitable division.[146] For example, the appellate division of the New York Supreme Court in *Finkelstein v. Finkelstein*[147] held that a capital loss carryover was a marital asset subject to equitable distribution.[148] The court in *Finkelstein* determined that a capital loss carryover constituted marital property based on the reasoning that marital property should be broadly construed and consist of "things of value arising out of the marital relationship."[149] Similarly, the Missouri Court of Appeals in *Mills v. Mills*[150] sustained the trial court's finding that a long-term capital loss carryover was marital property.[151] In *Mills*, the trial court made an equal allocation of the loss carryforwards even though the losses were generated by the husband's capital losses.[152] The ruling in *Mills* appears to contradict Treasury Regulation section 1.1212-1(c), which provides that if spouses file a joint

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[140] *See* I.R.C. § 67(a)-(b).

[141] *See, e.g.*, I.R.C. § 56(b)(1)(A) (disallowing miscellaneous itemized deductions in computing an individual's alternative minimum tax).

[142] *See* Treas. Reg. § 1.AG170A-10(d)(4)(i)(b); *see*, *e.g.*, Dombrowski v. Dombrowski, 559 A.2d 828 (N.H. 1989).

[143] *See* Rev. Rul. 76-267, 1976-2 C.B. 71.

[144] *See* Treas. Reg. § 1.1212-1(c)(1)(iii).

[145] *See id.*

[146] *See* Finkelstein v. Finkelstein, 701 N.Y.S.2d. 52 (2000).

[147] *See id.*

[148] *See id.* at 54.

[149] *Id.*; *see also* Cerretani v. Cerretani, 634 N.Y.S.2d 228, 231–32 (1995) (examining N.Y. Domestic Relations Law § 236 (B) and finding that a capital loss carryforward was not the type of property that was contemplated by the statute and that tax consequences were a factor in equitable distribution, but only relating to the consequences of such distribution).

[150] 663 S.W.2d 369 (Mo. Ct. App. 1983).

[151] *See id.*

[152] *See id.* at 372.

return for a year in which a net capital loss arises and separate returns are filed for the following year, the carryover is allocated to each spouse on the basis of their individual net capital losses for the preceding year.[153] However, the court in *Mills* stated:

> Husband further asserts that the court's order awarding wife one-half of the loss carry forward violates Treasury Reg. § 1.1212-1(c). It is well settled that a state court cannot override federal income tax regulations. *Calia v. Calia*, 624 S.W.2d 870, 873 (Mo. App. 1981). We have examined the regulation and do not find that the trial court's order violates the regulation in any manner.[154]

Passive loss carryovers may be treated similar to capital loss carry-overs. The Missouri Court of Appeals in *Silverstein v. Silverstein*[155] held that a passive loss carryforward generated during the marriage was a marital asset and that the trial court should have divided it.[156] The court cited *Mills* to support its decision.[157]

To calculate the appropriate amounts for carryovers, spouses may need to go back and prepare married filing separately returns in the year when the tax loss was generated—solely for calculation purposes—and then prorate the loss between the spouses accordingly going forward.

VIII. PAYMENTS AFTER DIVORCE

A. Child Support

As a general rule, child support payments are not tax deductible for the parent paying the support and not taxable income for the parent receiving the support.[158] In other words, if a spouse pays child support, that spouse cannot deduct it on a tax return.[159] If a spouse receives child support, the amount that spouse receives is not taxable.[160] While alimony, discussed below, is considered a taxable event,[161] child support is always tax-neutral, meaning it does not affect the spouses' taxes in any way.[162]

B. Alimony

Alimony refers to spousal support payments—sometimes called spousal maintenance payments—that meet the requirements for "alimony or separate maintenance payment" under section 71.[163] Unlike child support payments, alimony payments are tax deductible for the spouse making the payments,[164] and the payments are taxable for the spouse receiving the payments.[165]

In order to qualify as alimony, the support payments must meet all of the following strict requirements:

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[153] *See* Treas. Reg. § 1.1212-1(c)(iii).
[154] *Mills*, 663 S.W.2d at 372.
[155] Silverstein v. Silverstein, 943 S.W.2d 300 (Mo. Ct. App. 1997).
[156] *See id.*
[157] *See id.* at 302.
[158] *See* I.R.C. § 71(c)(1); Treas. Reg. § 1.71-1T.
[159] *See* Treas. Reg. § 1.71-1T(c).
[160] *See* I.R.C. § 71; Temp. Treas. Reg. § 1.71-1T(c).
[161] *See* I.R.C. § 71(a).
[162] *See* Temp Treas. Reg. § 1.71-1T(c).
[163] *See* I.R.C. § 71(b)(1).
[164] *See* I.R.C. § 71(a).
[165] *See* I.R.C. § 215(a).

1. The payments must be required under a divorce or separate maintenance decree or written separation agreement.[166] Accordingly, spouses facing extended divorce proceedings due to financial issues, custody disputes, or state laws that require extended periods of separation may have trouble qualifying for the deduction.[167]
2. The payments must be paid in cash, which includes checks and bank deposits.[168] Payment in the form of other items—such as stocks, bonds, or physical objects—are not considered alimony.[169]
3. There must be no liability for payment after the death of the recipient.[170] A taxpayer may not deduct a payment as alimony if the obligation does not terminate after the death of the recipient.[171] An agreement or applicable state law must show that the obligation would terminate on death.[172]
4. The spouses may not live in same household.[173] If the spouses continue to share a residence after the divorce, any support payments made during that time cannot be deducted.[174]
5. The divorce or separate maintenance decree may not designate the payment as anything other than alimony—for example, child support.[175]

If a spouse makes payments under a divorce decree, separate maintenance decree, or written separation agreement, that spouse may be able to deduct the payments as alimony, provided the payments qualify as alimony for federal tax purposes.[176] If the decree or agreement does not require the payments, then the payments do not qualify as alimony.[177] In most cases, alimony will lower the tax bill of the spouse making the payments. Alimony is an above-the-line deduction, which means the paying spouse does not need to itemize in order to benefit from the tax advantage.[178]

If a spouse receives alimony from a former spouse, the alimony is taxable in the year received.[179] Alimony is not subject to tax withholding, so the receiving spouse may need to increase the payment of taxes during the year to avoid potential penalties.[180] The alimony recipient can accomplish this by either making estimated tax payments or increasing the amount

[166] *See* I.R.C. § 71(b)(1)(A).

[167] *See* Larievy v. Comm'r, 104 T.C.M. (CCH) 241 (2012).

[168] *See* I.R.C. § 71(b)(1).

[169] *See* Temp. Treas. Reg. § 1.71-1T(b), Q&A (5).

[170] *See* I.R.C. § 71(b)(1)(D). Note that life insurance may be an acceptable method to ensure that the payee spouse's successors will receive some, if not all, of the value of the payments had the payee survived. The House Ways and Means Committee Report on the Tax Reform Act of 1984 states that life insurance proceeds payable on the death of the payee spouse are not considered a substitute payment. H.R. REP. NO. 98-432, pt. 2, at 1391-1462 (1984).

[171] *See* Temp. Treas. Reg. § 1.71-1T(b), Q&A (10).

[172] *See* Hampers v. Comm'r, 109 T.C.M. (CCH) 1138 (2015); Crabtree v. Comm'r, 110 T.C.M. (CCH) 219 (2015); Mukherjee v. Comm'r, 87 T.C.M. (CCH) 1224 (2004).

[173] *See* I.R.C. § 71(b)(1)(C).

[174] *See* Temp. Treas. Reg. § 1.71-1T(c), Q&A (15)(a).

[175] *See* I.R.C. § 71(b)(1)(B); *see also* Temp Treas. Reg. § 1.71-1T(c), Q&A (15)(a).

[176] *See* I.R.C. § 215(a).

[177] *See* I.R.S. Pub. 504, at 15 (2016).

[178] *See id.* at 13–14.

[179] *See* I.R.C. § 71(a); Treas. Reg. § 1.71-1(b)(5).

[180] *See* I.R.S. Pub. 504, at 23.

of tax withheld from his or her wages—that is, file a new Form W-4, *Employee's Withholding Allowance Certificate*, with his or her employer.[181]

The tax treatment of alimony payments makes it tempting for some divorcing spouses to want to disguise property settlements and child support as alimony. Consequently, the Service has strict rules about what may be treated as alimony for tax purposes.[182] Excessively high or front-loaded payments in the first three post-separation calendar years—starting with the first calendar year that an alimony payment has been made—are subject to recapture or being taxed to the payor in the third post-separation year.[183] In other words, if there is a significantly large payment within a short period of time after the divorce, the Service may consider the payment to be a property settlement (which is not deductible) as opposed to alimony (which is deductible).[184] Exceptions to the recapture rules include (1) payments that cease due to death of either party or remarriage of payee spouse; (2) payments that are pursuant to a temporary order for support; or (3) payments that fluctuate outside of the payor's control because the payments are based on a percentage or fixed portion of the payor's income or compensation.[185]

In addition, payments do not qualify as alimony if reductions in such payments are tied to certain childhood events.[186] The "Anti-Lester Rules"[187] under section 71(c)(2) were implemented so that these types of payments would be treated like child support payments, which are not deductible by the payor spouse and not taxable to the payee spouse.[188]

Example 1. Ursula and Victor are getting a divorce, and they have one minor child, Charlotte. Ursula is in a very low tax bracket and Victor is in the highest bracket for tax purposes. Ursula and Victor have agreed that he needs to help support Charlotte until she finishes high school. However, Victor would like to structure the support payments so that he could deduct them as alimony at his high rates, and Ursula would include the payments as income at her lower rates. So, Victor proposes that his monthly payments to Ursula be called "spousal support" and that the requirement to make the payments end six months after Charlotte's 18th birthday. Under the "Anti-Lester Rules" in section 71, the payments likely will be treated as disguised child support, which do not qualify as alimony.

C. Life Insurance

Life insurance commonly is used in a divorce context to ensure payment of alimony or child support.[189] Life insurance also may be necessary to provide liquidity at death—for example, estate taxes may be due, but the estate may consist mainly of illiquid real estate investments.[190]

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[181] *See id.*

[182] *See* I.R.C. § 71(b).

[183] *See* I.R.C. § 71(f).

[184] *See id.*

[185] *See* I.R.C. § 71(f)(5).

[186] *See* I.R.C. § 71(c)(2).

[187] *See id.* Prior to the enactment of section 71(c)(2), as part of the Tax Reform Act of 1984, spousal support payments could be treated as alimony, as opposed to child support, even if reductions in the payments were tied to certain childhood events. *See* Comm'r v. Lester, 366 U.S. 299 (1961).

[188] *See* Temp. Treas. Reg. § 1.71-1T(c), Q&A (15)–(16).

[189] *See* Jani Maurer, *Use and Disposition of Life Insurance in Dissolution of Marriage*, 16 BARRY L. REV. 57, 58 (2011).

[190] *See id.* at 88.

In general, the proceeds of a life insurance policy received at the death of the insured are excluded from gross income for income tax purposes, assuming no transfer for value;[191] however, there could be estate tax consequences if the insured retains any incidents of ownership in the policy.[192] Moreover, unless the insured states otherwise in his will, the executor will be entitled to recover from the insurance beneficiary the estate tax attributable to the insurance proceeds—in which case, the divorce agreement should clearly state whether any estate taxes on the policy proceeds are to be paid from the insured spouse's assets or from the insurance policy proceeds.[193]

To avoid inclusion for estate tax purposes, the insured may be able to transfer ownership to his or her spouse without income or estate tax consequences.[194] However, even with a spousal transfer, there is a "three-year rule" in which the amount of life insurance proceeds may be included in the insured's estate if the insured dies within three years of transfer.[195] Accordingly, if practical, it may be more efficient for the insured's spouse to purchase a new policy.

If the former spouse of the insured is both the owner and the beneficiary of the policy, the policy should not be included in the insured spouse's estate, and the payment of premiums by the insured spouse may be deductible as alimony.[196] However, the premium payments would not be deductible if the insured spouse retains policy ownership, even if the policy names the former spouse as beneficiary.[197]

Example 1. Wilma and Zeke are getting a divorce, and have agreed that Wilma will be entitled to $100,000 per year of alimony for the next ten years. To protect such support payments in the event of Zeke's un-timely death, a $1,000,000 life insurance policy could be purchased with Zeke as the insured and Wilma as the beneficiary. If Zeke is the owner of the life insurance policy and the size of his estate at death exceeds the lifetime exclusion amount of $5,490,000 (in 2017),[198] then the insurance proceeds could be subject to a 40% estate tax, which would be $400,000 in estate taxes on a $1,000,000 life insurance death benefit. To avoid that result, Wilma could be both the owner and the beneficiary of the policy, and Zeke's payments of life insurance premiums could be treated as alimony—taxable to Wilma and deductible by Zeke.

Another alternative planning strategy for divorcing spouses would be using an Irrevocable Life Insurance Trust (ILIT).[199] While premium payments would not be deductible as alimony, a properly structured ILIT may have additional gift, estate, and generation skipping transfer (GST) tax benefits.

Example 2. Allison and Ben are getting a divorce. Allison has no children and Ben has three adult children from a previous marriage. Allison and Ben have agreed that a $3,000,000 life insurance policy should be purchased to ensure that Allison continues to receive $150,000 of

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[191] *See* I.R.C. § 101(a).

[192] *See* I.R.C. § 2042(2).

[193] *See* I.R.C. § 2206.

[194] *See* I.R.C. §§ 1041, 2516; *see infra* Part X.

[195] I.R.C. § 2035.

[196] *See* Rev. Rul. 70-218, 1970-1 CB 19.

[197] *See id.*

[198] *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 538, 714. The American Taxpayer Relief Act of 2012, which became effective on January 1, 2013, established a maximum estate, gift, and GST tax rate of 40%, but also provided a significant exemption amount—that is, an amount not subject to estate, gift, or GST tax. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, H.R. 8, 126 Stat. 2313 (Jan. 2, 2013). The exemption amount increases each year, indexed for inflation—for example, $5,490,000 in 2017. *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 538, 714.

[199] *See, e.g.*, Donald O. Jansen, *Giving Birth to, Caring for, and Feeding the Irrevocable Life Insurance Trust*, 41 REAL PROP. PROB. & TR. J 571 (2006).

support payments every year for the next twenty years, even if Ben were to die. Allison and Ben do not want the life insurance proceeds to be subject to estate taxes upon Ben's death. In addition, Ben does not want Allison to receive anything more than the required support payments on his death and would rather have his three children receive any excess death benefits from the insurance policy. In this case, Ben could create an ILIT to own the insurance policy, and the ILIT would pay Allison support payments for the remaining term after Ben's death, with the remainder payable to Ben's children. Ben could fund the life insurance premium payments without gift tax consequences by using his annual gift tax exclusion amount of $14,000 per individual beneficiary (in 2017),[200] and the death benefit would not be included in his estate for estate tax purposes because the ILIT—not Ben—would be the owner of the policy.[201] The ILIT approach could save up to $1,200,000 in estate taxes—that is, 40% of $3,000,000.

IX. RETIREMENT ACCOUNTS

A. Qualified Retirement Plans and Qualified Domestic Relations Orders

A qualified retirement plan typically is set up by employers as an employee benefit.[202] These plans are subject to federal tax and labor laws—that is, both the Code and the Employee Retirement Income Security Act of 1974 (ERISA)[203]—and are overseen by the Service, the Pension Benefit Guaranty Corporation, and the Department of Labor. The transfer of all or part of a qualified retirement plan in a divorce or marital dissolution requires a Qualified Domestic Relations Order (QDRO), which is a judgment, decree, or court order pursuant to a state domestic relations law.[204] A state authority, generally a court, must issue a judgment, order, or decree, or otherwise formally approve a property settlement agreement, before it can qualify as a QDRO under ERISA.[205] A QDRO provides for an alternative payee or payees to whom plan assets can be transferred—such as a former spouse or children—without penalties or taxes.[206]

The qualified retirement plan administrator must assure that the QDRO is properly drafted because failure to comply with format, content, and procedural requirements may cause immediate tax consequences or jeopardize the qualified status for the entire plan.[207] Accordingly, the plan administrator should be included in drafting and reviewing the QDRO.

If structured appropriately, there are no tax consequences if the transfer from a qualified retirement plans is subject to a QDRO and is an "eligible rollover distribution."[208] The alternate payee—that is, the non-employee spouse—generally is subject to ordinary income tax on distributions or withdrawals.[209] If the qualified retirement plan consists partially, or entirely, of after-tax contributions, the original basis is allocated pro rata between the original employee spouse and the alternate payee spouse.[210] One of the most important benefits for the alternate

[200] *See* I.R.C. § 2503(b)-(c); *see also* Crummey v. Comm'r, 397 F.2d 82, 86–88 (9th Cir. 1968).
[201] *See* I.R.C. § 2042.
[202] *See* I.R.C. § 401(a).
[203] *See* 29 U.S.C. § 1056.
[204] *See* I.R.C. § 414(p)(1)(A).
[205] *See* 29 U.S.C. § 1056(d)(3)(B)(i).
[206] *See* I.R.C. § 401(a)(13)(B).
[207] *See id.*
[208] I.R.C. § 402.
[209] *See* I.R.C. § 402(e)(1)(A).
[210] *See* I.R.C. § 72(m)(10).

payee spouse—if under the age of fifty-nine and one-half—is that the 10% penalty for early distribution is waived.[211]

There are a number of advantages to rolling the former spouse's qualified retirement plan to an IRA. This typically is the optimal choice, as it generally provides: (1) distance from the former spouse; (2) greater control over funds and investment choices; (3) more options for beneficiary designations; (4) the potential to deduct fees; and (5) no mandatory withholding.[212] Note that a rollover of a distribution to the alternate payee spouse's IRA does have a 20% withholding requirement, although a direct trustee-to-trustee transfer from the qualified retirement plan to the IRA will avoid the 20% withholding requirement.[213]

However, there also may be advantages to keeping the funds in a former spouse's qualified retirement plan, including: (1) access to funds, if under fifty-nine and one-half years old, without a 10% penalty; (2) additional creditor protection; (3) loans or hardship distributions; and (4) possible life insurance retention. To the extent a spouse is interested in moving the funds to an IRA but wants to retain some flexibility to withdraw money while that spouse is under fifty-nine and one-half years old without a 10% penalty, the spouse could transfer some of the funds to an IRA and keep the remaining amount in the qualified retirement plan—because withdrawals from the qualified retirement plan pursuant to the QDRO are not subject to the 10% penalty.[214] Moreover, there is no time limit on when the amount received under a QDRO must be rolled over to an IRA.[215]

Example 1. Carrie and Dan are getting a divorce. Dan has a significant qualified retirement plan with $2,000,000 in assets and has agreed to transfer $1,000,000 of the plan to Carrie pursuant to a QDRO. Carrie would prefer not to keep any of the assets in the qualified retirement plan managed by her ex-husband's employer and would like to transfer the assets to an IRA. However, Carrie is fifty years old and is afraid she might need access to some of the funds before she is fifty-nine and one-half years old. Accordingly, Carrie could leave some of the assets in the qualified retirement plan—perhaps $250,000 that she might need before the age of fifty-nine and one-half—and could transfer the remaining assets to an IRA. Once she is fifty-nine and one-half years old, she could then transfer the remaining assets to her IRA without fear of a 10% penalty for withdrawing any funds.[216]

It should be noted that a QDRO also may be used as collateral and is exempt from the anti-alienation and anti-assignment provisions of ERISA.[217] A divorce judgment could assign a security interest in a participant spouse's QDRO to the alternate payee spouse to secure equitable distribution, alimony, child support, education funding obligations and, potentially, attorney fees—depending on state law.[218]

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[211] *See* I.R.C. § 72(t)(2)(C).

[212] *See* I.R.C. § 3405.

[213] *See* I.R.C. § 3405(c).

[214] *See* I.R.C. § 72(t)(2)(c).

[215] *See* I.R.C. § 72.

[216] *See* I.R.C. § 72.

[217] *See* I.R.C. § 414.

[218] *See* Priv. Ltr. Rul. 9234014 (May 21, 1992); *see also* Silverman v. Spiro, 784 N.E.2d 1, 9 (Mass. 2003) (granting husband's request for attorney's fees associated with back child support); Renner v. Blatte, 650 N.Y.S.2d 943, 946 (1996) (approving use of QDRO as security for future support obligations); Hayden v. Hayden, 662 So. 2d 713, 717 (Fla. Dist. Ct. App. 1995) (permitting QDRO to secure alimony and child support arrearages).

B. IRAs

IRAs are governed by the Code[219] and are not subject to ERISA; in other words, QDROs are not appropriate. A spouse may transfer an IRA tax-free only during a divorce situation;[220] a spouse may not transfer an IRA tax-free to another spouse during marriage outside of the divorce context.[221] The transfer is not taxable if it is (1) pursuant to a decree of divorce or separate maintenance or a "written instrument incident to such a decree;"[222] and (2) transferred directly (trustee-to-trustee transfer) to the donee spouse's IRA.[223] Unfortunately, "written instrument incident to such a decree" is not defined in the Code or Treasury Regulations. Accordingly, the following should be considered when dealing with a written instrument: (1) a written agreement requiring that the transfer should be referred to, incorporated into, or approved by the court entering the decree of divorce or legal separation to confirm it is the intention of parties that the transfer of the IRA be tax-free under section 408(d)(6);[224] and (2) a spouse should not transfer the IRA—that is, he or she should wait—until the final decree. The reason for waiting is that the divorce may never be finalized; for example, one of the parties could die prior to the divorce decree, or the spouses could reconcile, in which case the transfer would be a taxable event.

The donee spouse is treated as the owner after transfer,[225] so the IRA will be treated as the donee spouse's IRA for all purposes. This means that (1) the regular income tax treatment for IRAs applies—in which case, the donee spouse is taxed on distributions;[226] (2) the donee spouse can name his or her own beneficiary(ies); (3) the 10% penalty applies if the donee spouse receives distributions under fifty-nine and one-half years old;[227] (4) minimum required distributions occur at age seventy and one-half;[228] (5) the donee spouse is not bound by the former spouse's election to receive "substantially equal periodic payments;"[229] and (6) the donee spouse can contribute more funds annually if he or she has sufficient earned income—note that alimony is treated as "earned income."[230]

When transferring an IRA, the owner should not do a "rollover" or "distribution," but rather, the owner should do a trustee-to-trustee "transfer."[231] If an IRA owner withdraws an amount from an IRA and endorses the check to the former spouse who is entitled to the IRA under the divorce agreement, it will not qualify as a "transfer" and the IRA owner will be subject to tax on the withdrawal plus an additional 10% penalty.[232]

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[219] *See* I.R.C. § 408(d)(6).

[220] I.R.C. § 408(d)(6) supersedes I.R.C. § 1041.

[221] *See* Priv. Ltr. Rul. 9422060 (June 3, 1994) and 8820086 (Feb. 25, 1988).

[222] I.R.C. § 71(b)(2)(A).

[223] *See supra* note 221 and accompanying text.

[224] *See* Priv. Ltr. Rul. 9344027 (Nov. 3, 1993) (concluding that a husband's transfer of his wife's community share of IRA pursuant to a "private" written separation agreement was not incident to either a divorce or legal separation); Tech. Adv. Mem. 199935055 (providing that a withdrawal from husband's community IRA endorsed to wife was not "under" a written instrument). In both cases, the husband was subject to tax on the IRA distribution.

[225] *See* I.R.C. § 408(d)(6).

[226] *See* I.R.C. § 408(d)(1).

[227] *See* I.R.C. § 72(t)(1).

[228] *See* I.R.C. § 4974.

[229] I.R.C. § 72(t)(4).

[230] I.R.C. § 219(f)(1).

[231] *See* I.R.S. Pub. 590-A, at 28 (2016).

[232] *See* Jones v. Comm'r, 80 T.C. 259 (2000); Bunney v. Comm'r, 114 T.C. 259 (2000); Czepiel v. Comm'r, 78 TCM (CCH) 378 (1999); Harris v. Comm'r, 62 T.C.M. (CCH) 406 (1991).

There is an exception under the IRA rules to avoid the 10% penalty for withdrawals under the age of fifty-nine and one-half if the owner elects to receive "substantially equal periodic payments" (SEPP).[233] However, if the SEPP status is ever modified, there is a retroactive 10% penalty plus interest imposed on the IRA owner.[234] The good news in a divorce situation is that the Service has issued a number of private letter rulings allowing an IRA in SEPP status to be divided pursuant to a divorce without being treated as a SEPP modification subject to a 10% penalty plus interest.[235] Because private letter rulings only may be relied upon by the taxpayer requesting the ruling, it is generally recommended that individuals seek a private letter ruling if dividing an IRA that is in SEPP status.

C. Beneficiary Designations

The beneficiary designations for qualified retirement plans and IRAs always should be reviewed and updated, if necessary, following a divorce.

As a general rule with qualified retirement plans, the beneficiary designation on file usually controls who receives the funds.[236] ERISA, which governs qualified retirement plans, is a federal statute that pre-empts state laws.[237] In addition, ERISA trumps contractual law, even if a spouse waives a right in a settlement agreement—although the spouse may be sued under a separate state contract claim.[238]

The beneficiary designation on file for an IRA typically will control who receives the funds.[239] However, many states do have laws that over-ride the IRA beneficiary designation of a former spouse post-divorce.[240] At the same time, it is possible that the IRA owner could move to another state that does not override designation post-divorce, in which case the former spouse could receive the IRA funds as a result.

Accordingly, advisors should be certain to help their clients review and update their beneficiary designations for qualified retirement plans and IRAs after a divorce. In addition, advisors also should help clients make the necessary changes to all of their estate planning documents, such as: (1) executor/personal representative; (2) trustee; (3) trust beneficiary(ies); (4) attorney-in-fact; (5) health care agent; and (6) insurance policy beneficiary.

X. PROPERTY TRANSFERS AND DIVISION OF PROPERTY

Transfers of property from one spouse to another spouse during marriage, or incident to a divorce, generally are non-recognition events for income and gift tax purposes.[241] If provisions in a premarital agreement require a transfer—for example, the need to give a spouse certain assets in a divorce—it is recommended that the premarital agreement require that the provision also be

[233] I.R.C. § 72(t)(4).

[234] *See id.*

[235] *See* Priv. Ltr. Rul. 201030038 (Jul. 30, 2010); 200717026 (Apr. 27, 2007); 200225040 (Mar. 25, 2002); 200202076 (Jan. 11, 2002); 200202075 (Jan. 11, 2002); 200202074 (Jan. 11, 2002); 2002-14-034 (Apr. 5, 2002); 200116056 (Apr. 23, 2001); 200052039 (Jan. 2, 2001); 200050046 (Dec. 18, 2000); 200027060 (Jul. 10, 2000); and 9739044 (Sept. 26, 1997).

[236] *See* 29 U.S.C. § 2510.3-2.

[237] *See* Kennedy v. DuPont, 555 U.S. 285 (2009); Egelhoff v. Egelhoff, 532 U.S. 141 (2001). Note that the ERISA exception for spousal protection may override beneficiary designations. *See Egelhoff*, 532 U.S. at 151–52.

[238] *See Kennedy*, 555 U.S. at 299–300.

[239] *See* I.R.S. Pub. 590-A, at 8 (2016).

[240] *See*, *e.g.*, CAL. PROB. CODE § 5040(a) ("[A] nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage . . . fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse. . . ."); *see also* East v. PaineWebber, Inc., 748 A.2d 1082 (Md. Ct. Spec. App. 2000).

[241] *See* I.R.C. §§ 1041, 2056, 2516, 2523.

included in a divorce decree to maintain tax-free treatment of the transfer for both income tax and gift tax purposes. While the tax treatment of non-U.S. persons is beyond the scope of this Article, it should be noted that there may be additional income and gift tax issues if either of the spouses is a non-U.S. person.[242]

A. Income Tax Consequences

Transfers of property between spouses or "incident to divorce" generally are income tax free—that is, a non-recognition event—under section 1041.[243] A transfer is considered "incident to divorce" if (1) the transfer occurs within one year after the marriage ceases; or (2) it is "related" to the cessation of marriage, which generally means that the divorce or separation instrument requires the transfer and the transfer happens within six years after the marriage ceases.[244] In other words, the Service increases scrutiny for income tax purposes if the transfer occurs more than one year after the marriage ceases.[245] If the transfer occurs more than six years after the marriage ceases, then there is a rebuttable presumption, which may be rebutted with sufficient documentation, that the transfer is unrelated the marriage ceasing and is thus outside of section 1041.[246] The presumption may be rebutted "only by showing that the transfer was made to effect the division of property owned by the former spouses" at the time their marriage ceased.[247] Accordingly, even if a transfer occurs more than six years after a marriage ceases, a transfer may still be tax-free if there is a good reason for the delay, such as "legal or business impediments" or "disputes concerning the value of proper-ty."[248] In addition, a transfer of property may be made to third parties on behalf of a spouse or former spouse without income tax consequences if (1) the transfer is required by divorce or separation agreement; (2) the transfer is pursuant to a specific written request of the spouse or former spouse; or (3) the transferor receives a written consent or ratification of the transfer from the other spouse or former spouse.[249]

In limited circumstances, divorcing spouses may want to avoid a tax-free transfer and have a true sale. In such a case, it is especially important to carefully arrange such a transaction with

[242] For purposes of this Article, both spouses are assumed to be U.S. citizens. An analysis of the tax consequences for noncitizen spouses is beyond the scope of this Article. For example, the non-recognition provisions of section 1041 for income tax purposes do not apply to transfers to a spouse who is a nonresident alien or to a trust for that spouse's benefit. *See* I.R.C. § 1041(d). However, section 1041 does apply to transfers from a nonresident spouse to a spouse who is a U.S. person. Furthermore, there is no unlimited marital deduction for gift tax purposes for non-U.S. citizen spouses, in which case qualified domestic trusts (QDOTs) may be beneficial.

[243] Note that, among other things, section 1041 of the Code is not applicable with respect to negative basis property under section 1041(e) of the Code—in other words, to the extent that the sum of the liabilities assumed plus the amount of liabilities to which the property is subject exceeds the adjusted basis of the transferred property—or with respect to the transfer of an installment obligation under section 453B(g) of the Code.

[244] *See* I.R.C. § 1041(c); *see also* Treas. Reg. § 1.1041-1T(b) (providing that a transfer is related to the cessation of the marriage when the transfer is required under the divorce or separation instrument and the transfer takes place within six years from the date of the divorce).

[245] *See id.*

[246] *See* Treas. Regs. § 1.1041-1T, Q&A (7); *see* Priv. Ltr. Rul. 9306015 (Nov. 11, 1992).

[247] Treas. Regs. § 1.1041-1T, Q&A (7).

[248] Temp. Treas. Reg. § 1.1041-1T(b), Q&A (7); *see* Young v. Comm'r, 113 T.C. 152 (1999), *aff'd* 240 F.3d 369 (4th Cir. 2001) (delay permitted); Priv. Ltr. Rul. 200221021 (delay permitted due to compelling business reasons); Priv. Ltr. Rul. 9644053 (Nov. 1, 1996) (delay permitted); Priv. Ltr. Rul. 9306015 (Feb. 12, 1993) (an eight year delay in a property division was not made to effect a property division); Priv. Ltr. Rul. 9235026 (Aug. 28, 1992) (delay due to dispute over purchase price and transfer was made shortly after resolution of the dispute).

[249] *See* Temp. Treas. Reg. § 1.1041-1T(c), Q&A (9).

competent tax advisors. Unfortunately, there is no opt-out provision similar to the alimony rules under section 71.[250]

Example 1. Emily and Fred are divorcing and own a vacation home in Hawaii, each having a 50% interest in the home. They purchased the Hawaii home three years ago for $500,000 (they each have a $250,000 basis), and the home is now worth $1,000,000. Emily would like to purchase Fred's 50% interest in the home for $500,000. If this transaction is structured as a tax-free transfer pursuant to a divorce or separation agreement, as opposed to a true sale, Emily's basis would remain $500,000—that is, she would carryover Fred's $250,000 basis and keep her $250,000 basis. If she later sells the property for $1,000,000, she would have a gain of $500,000.

Example 2. Alternatively, Emily and Fred could structure the transaction as a valid sale rather than a tax-free transfer incident to divorce or pursuant to a divorce or separation agreement. Presumably, they would need to wait more than a year after the divorce to avoid the non-recognition treatment under section 1041.[251] If properly structured as a sale transaction, then (1) Fred would have a $250,000 gain upon selling his interest to Emily; and (2) Emily would have a stepped-up $750,000 basis in the property—her original $250,000 basis plus a new $500,000 basis from the purchase. If Emily later sells the property for $1,000,000, she would have a $250,000 gain instead of a $500,000 gain, as in the previous example.

It should be noted that cohabitating couples do not qualify under section 1041—assuming it is not a lawful marriage under common law—because the tax-free transfer rule only applies to married couples or previously married couples.[252] Accordingly, division of property for cohabitating couples is taxable as a sale for fair market value, even if there is no exchange of money; the transferor would have taxable income without receiving funds to pay the tax. In limited circumstances, when dividing property due to the end of cohabitation, it may be beneficial for the individuals to get married and then divorced for non-recognition treatment under section 1041.[253]

B. Gift Tax Consequences

Transfers between married spouses generally are free of gift taxes under the unlimited marital deduction.[254] In a divorce context, there generally are seven ways in which a property settlement may be accomplished without the transfer being deemed to constitute a taxable gift to the spouse, former spouse, or child—assuming both spouses are U.S. citizens:

1. The transfer of property is accomplished prior to the legal termination of the marriage, and the transfer meets the requirements of the unlimited gift tax marital deduction under section 2523;[255]
2. The transfer of property satisfies the requirements of section 2516, which provides a special exception from gift tax if the transfer is made pursuant to a written marital settlement agreement and the divorce occurs within a three-year period beginning one

[250] *See* I.R.C. § 71(b)(1)(B).

[251] *See* I.R.C. § 1041.

[252] *See* Treas. Reg. § 301.7701-18.

[253] *See* I.R.C. § 1041.

[254] *See* I.R.C. §§ 2056, 2523. Note, for non-U.S. citizens, there may be gift tax issues. *See* I.R.C. § 2523(i). The annual gift tax exclusion for gifts to non-U.S. citizen spouses is $149,000 (for 2017), adjusted periodically for inflation. *See* I.R.C. §§ 2503, 2523(i)(2). For transfers in trust to a spouse who is not a U.S. citizen, a qualified domestic trust (QDOT) may provide a more tax-efficient result. *See* Treas. Reg. § 20.2056A-2.

[255] *See* I.R.C. § 2523.

year before the execution of the agreement and ending two years after the execution of the agreement.[256] The transfer can happen any time for gift tax purposes, so long as the agreement is entered within the applicable three-year period.[257] Specifically, the requirements under section 2516 include:

(a) A *written* agreement—it is not necessary for the agreement to be approved by the divorce court or incorporated or referred to in the divorce decree;[258]

(b) The transfer must be for the *reasonable*[259] support of minor[260] children or in settlement of a spouse's marital or property rights;[261]

(c) There must be a final decree of divorce;[262]

(d) Payments of cash or property must be required and designated by the agreement;[263] and

(e) The divorce must occur within a three year period, beginning one year before the execution of the agreement. In other words, there must be an agreement within two years before the divorce or one year after the divorce.[264]

3. The transfer of property is pursuant to a court order;[265]
4. The transfer of property is made in exchange for the relinquishment or waiver of obligations of support—for example, alimony or the support of minor children.[266] Note that transfers in exchange for the relinquishment of other marital rights, such as "dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the spouse's property or estate," do not constitute adequate consideration in money or money's worth for gift tax purposes;[267]
5. The transfer qualifies for the annual gift tax exclusion—$14,000 in 2017;[268]
6. The transfer is covered by the lifetime exclusion amount from gift and estate taxes—$5,490,000 per individual in 2017;[269] and

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[256] *See* I.R.C. § 2516(1)-(2).

[257] *See id.*

[258] *See* Treas. Reg. § 25.2516-1(a).

[259] *See* I.R.C. § 2516(2).

[260] The I.R.C. and Treasury Regulations fail to define the "age of majority" for purposes of section 2516. It may be eighteen or twenty-one. *See* Rev. Rul. 79-363, 1979-2 C.B. 345 (providing that a transfer of remainder interest in trust to an adult child was not made for full an adequate consideration under section 2516, except to extent that the donee spouse specifically released support rights); *see also* Rev. Rul. 68-379, 1968-2 C.B. 414 (providing that a payor may be deemed to receive adequate consideration if spouse releases future support rights).

[261] *See* Treas. Reg. § 25.2516-1(a).

[262] *See id.*; Treas. Reg. § 25.6019-3(b).

[263] *See* I.R.C. § 2516.

[264] *See id*.

[265] *See* Harris v. Comm'r, 340 U.S. 106 (1950); *see also* Rev. Rul. 79-118, 1979-1 C.B. 315; Rev. Rul. 60-160, 1960-1 C.B. 374.

[266] *See* Rev. Rul. 77-314, 1977-2 C.B. 349; Rev. Rul. 71-67, 1971-1 C.B. 271; Rev. Rul. 68-379, 1968-2 C.B. 414; *see also* Rosenthal v. Comm'r, 205 F.2d 505 (2d Cir. 1953); Keller Estate v. Comm'r, 44 T.C. 851 (1965).

[267] Treas. Reg. § 25.2512-8; *see also* Rev. Rul. 68-379, 1968-2 C.B. 414 (concluding that transfers in satisfaction of a legal obligation of support are different than transfers in settlement of a transferee spouse's inheritance rights).

[268] *See* I.R.C. § 2503(b).

7. The transfer qualifies as a direct payment for medical or educational expenses.[270]

Note that a transfer made before the marriage—even if pursuant to an antenuptial agreement—is subject to gift tax at the time of the transfer, and the gift tax marital deduction is not available because the donee is not yet married to the donor.[271] However, if an antenuptial agreement becomes enforceable only upon the marriage of the two parties and the transfer occurs after the marriage pursuant to the agreement, then the transfer is eligible for the gift tax marital deduction—assuming the requirements for the gift tax marital deduction, discussed above, are satisfied.[272] In other words, gift tax typically can be avoided with an antenuptial agreement if the agreement is conditioned upon—and all transfers occur after—the marriage of the parties to the agreement.

It also should be noted that, without careful planning, section 2702 could cause a draconian gift tax result—that is, a taxable gift equal to the full value of the transferred property—to the extent anyone other than the spouses will receive a current or remainder interest in a transfer to a trust for the support of a spouse.[273] Fortunately, such a negative result may be minimized, or even avoided, with prudent planning, such as providing the beneficiary spouse with: (1) a qualifying income interest in an *inter vivos* QTIP trust that qualifies under section 2056;[274] (2) a qualified annuity or income interest pursuant to section 2516;[275] or (3) a power of appointment over the remainder of the trust limited to the spouses' issue.[276]

XI. SUPPORT TRUSTS IN LIEU OF ALIMONY[277]

A. Overview

In a typical divorce, it is very common for one spouse (the Moneyed Spouse) to end up paying the other spouse (the Non-Moneyed Spouse) spousal support in the form of alimony[278] over a given term. However, alimony may not always be the best solution for both parties. In

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[269] *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 538, 714.

[270] *See* I.R.C. § 2503(e).

[271] In general, an agreement to transfer property is subject to gift tax if the promise is enforceable under state law. *See* Rev. Rul. 79-384, 1979-2 C.B. 344.

[272] *See supra* notes 254–66 and accompanying text.

[273] *See* I.R.C. § 2702(a)(2)(A). Treasury Regulation section 25.2702-1(c)(7) pro-vides an exception to section 2702 of the Code "if the transfer of an interest to a spouse is deemed to be for full and adequate consideration by reason of section 2516 . . . and the remaining interests in the trust are retained by the other spouse." It also is possible that a transfer could be treated as a recognition event, as opposed to a gift. For instance, if the primary purpose of the transfer to the trust is to discharge a spouse's obligation to support children or is made to provide a reasonable allowance for the support of the spouses' minor issue under section 2516, the transfer may be treated as a recognition event instead of a gift. Neither section 1041 nor the Treasury Regulations thereunder distinguish between trusts with a spouse as the sole beneficiary and trusts that have additional beneficiaries, nor do they specify the type or amount of interest that the spouse is required to have in order for section 1041 to apply.

[274] *See* I.R.C. § 2056.

[275] *See* I.R.C. § 2516; Treas. Reg. § 25.2702-3. Section 2702 does not apply if the spouse retains a "qualified interest." I.R.C. §§ 2702(a) and (b); Treas. Reg. § 25.2702-3(b)(1)(i).

[276] *See* Priv. Ltr. Rul. 201116006 (Apr. 22, 2011).

[277] For more a more detailed discussion, see Justin T. Miller, *Support Trusts in Lieu of Alimony: A Creative Settlement Solution*, 30 AM. J. OF FAM. L., no. 2 (2016); Justin T. Miller, Taxation of Grantor Trusts After Divorce: A Need to Define to 'Income,' Tax Notes, Tax Analysts (Sept. 14, 2015); Alan S. Acker, 852-3d Tax Mgmt. Portfolio (BNA), *Income Taxation of Trusts and Estates* (2007); CARLYN S. MCCAFFREY & MELISSA G. SALTEN, STRUCTURING THE TAX CONSEQUENCES OF MARRIAGE AND DIVORCE, THE LITTLE, BROWN TAX PRACTICE SERIES (1995).

[278] *See* I.R.C. § 718. Alimony refers to spousal support payments that meet the requirements for "alimony or separate maintenance payment." *Id.*

certain situations, a better settlement solution for both parties may be the creation of an irrevocable trust by the Moneyed Spouse for the benefit of the Non-Moneyed Spouse in lieu of alimony (a Support Trust). For instance, a Support Trust may be preferable to alimony in the following situations:

1. The spouses may have a hostile relationship and want to minimize their need for any future interaction, which otherwise would be necessary with the payment of alimony;
2. The Moneyed Spouse may have limited liquidity and want to prevent the sale or transfer of a closely held business, which otherwise might be necessary to fund alimony payments;
3. The Non-Moneyed Spouse may want to ensure that support payments continue even in the case of the Moneyed Spouse's financial insolvency or bankruptcy, especially if the Moneyed Spouse has a profession—such as a professional athlete[279]—with a high risk of financial insolvency or bankruptcy, which could prevent payment of future alimony;
4. The Non-Moneyed Spouse may want to ensure continued support payments in the event of the Moneyed Spouse's death—which may not be practical or possible with life insurance due to the health condition of the Moneyed Spouse or the cost of premiums;
5. Ongoing professional asset management may be necessary to protect a financially unsophisticated Non-Moneyed Spouse, who might otherwise make poor investment decisions;
6. A spouse may want to protect assets for children and future descendants from creditors; or
7. A spouse may want to take advantage of potential estate, gift, and GST tax savings.

Support Trusts also may be used as a practical pre- or post-marital planning tool for a Moneyed Spouse to provide support payments to a Non-Moneyed Spouse for a specified term, although the Support Trust should not be funded until after marriage in order to avoid potential income and gift tax issues on transfer.[280] For example, a Support Trust could be set up by the Moneyed Spouse during marriage to benefit the Non-Moneyed spouse for a term of years with a reversion to the Moneyed Spouse, or it could be set up as an *inter vivos*—that is, lifetime—qualified terminable interest property (QTIP) trust[281] that provides income at least annually to the Non-Moneyed spouse—that is, a "qualifying income interest"—with the remainder to the Moneyed Spouse's children after death, either outright or in trust.

With a Support Trust, the Moneyed Spouse first transfers income producing assets, such as cash, securities, or business interests, into an irrevocable trust. Unless the Support Trust is being structured—for estate planning purposes—to provide a future benefit to beneficiaries other than the two spouses,[282] (1) no gain or loss will be recognized for income tax purposes under section

[279] According to research provided by the National Basketball Players Assn. (2011) and National Football League Players Assn. (2011), 60% of NBA players and 78% of NFL players are broke within two to five years into retirement. *See* Pablo Torre, *How (and Why) Athletes Go Broke*, Sports Illustrated Mar. 23, 2009, www.si.com/vault/2009/03/23/105789480/how-and-why-athletes-go-broke.

[280] *See supra* Part X.

[281] *See* I.R.C. § 2056(b)(7).

[282] *See infra* Part XI.G.

1041 for the transfer during marriage or incident to a divorce,[283] and (2) the transfer could be structured to be free of gift taxes pursuant to the unlimited marital deduction provided by sections 2056 and 2523[284] or pursuant to a written marital settlement agreement under section 2516.[285]

By utilizing a Support Trust, the spouses no longer would need to interact with each other because the Support Trust could be managed by an independent, neutral trustee outside of the control of both spouses. The income generated by the Support Trust's assets as well as trust principal—for example, a specified dollar amount or percentage of trust assets—could be distributed to the Non-Moneyed Spouse for a specified length of time, such as a term of years or the life of the Non-Moneyed Spouse. At the end of the trust term, the Support Trust's assets could either revert back to the Moneyed Spouse or be distributed outright, or in trust, to the spouses' children or future descendants.

B. Grantor Trust Rules

The tax rules under sections 671-679 (the Grantor Trust Rules)[286] typically apply to Support Trusts because the Moneyed Spouse usually retains certain interests in, or powers over, the trust.[287] Moreover, for estate planning purposes, a tax efficient strategy may be to have the Moneyed Spouse intentionally retain certain rights that will cause the Support Trust to be treated as a grantor trust for income tax purposes under the Grantor Trust Rules, but not cause the trust to be included in either spouse's estate for estate tax purposes—commonly referred to as an "intentionally defective grantor trust" (IDGT).[288] In other words, the IDGT can continue to grow, free of taxes, outside of the Moneyed Spouse's estate for the benefit of children and future descendants. Moreover, because the Moneyed Spouse is paying the taxes directly, those payments are not treated as a gift for gift tax purposes and will further reduce the value of the Moneyed Spouse's estate for estate tax purposes.[289]

Under the usual Grantor Trust Rules, the Moneyed Spouse would be subject to tax on the trust's taxable income, regardless of whether the Support Trust distributed any income to the Non-Moneyed Spouse.[290] In other words, the Moneyed Spouse would be treated as the owner of

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[283] *See* I.R.C. § 1041 (the transfer of assets to the Support Trust would not be a taxable event).

[284] *See* I.R.C. §§ 2056, 2523. *See*, *e.g.*, I.R.S. Priv. Ltr. Rul. 201707007 (Feb. 17, 2017) and 201707008 (Feb. 17, 2017). For example, an *inter vivos* qualified terminable interest property trust that provides fiduciary accounting income at least annually to the Non-Moneyed Spouse with the remainder to the spouses' children after death (either outright or in trust). *See* I.R.C. § 2056.

[285] *See* I.R.C. § 2056 (providing that the divorce occurs within a two year period beginning one year before the execution of the agreement and ending one year after the execution of the agreement).

[286] *See* I.R.C. §§ 671-79.

[287] *See* I.R.C. § 672(e) (treating the Moneyed Spouse as holding any interest or power held by the Non-Moneyed Spouse during marriage). There are no provisions in the Code—subject to limited exceptions provided by sections 71 and 682—that terminate such treatment if the marriage is dissolved. *See* I.R.C. § 672(e). The Support Trust would be a grantor trust if the Moneyed Spouse has the right to decide how the spouses' children will share in the trust property upon the death or remarriage of the Non-Moneyed Spouse. *See* I.R.C. § 674(a). The Moneyed Spouse would be treated as the owner of any portion of a trust, under the Grantor Trust Rules, in which he or she has a reversionary interest upon the occurrence of a specific event—for example, the death or remarriage of the Non-Moneyed Spouse—if the value of such reversionary interest is more than five percent of the initial value of such portion of the trust. *See* I.R.C. § 673(a). The Moneyed Spouse would be treated as the owner of any portion of the trust if the income from that portion may be distributed to, or accumulated for future distribution to, the Moneyed Spouse without the consent of an "adverse party," as defined in section 672(a). I.R.C. § 677(a).

[288] I.R.C. § 675; *see also* Rev. Rul. 2011-28, 2011-49 I.R.B. 830; 2008-22, 2008-16 I.R.B. 796; 2004-64, 2004-29 I.R.B. 6; 85-13, 1985-1 C.B. 184; Priv. Ltr. Rul. 200606006 (Feb. 10, 2006) and 200603040 (Jan. 20, 2006).

[289] *See supra* note 288.

[290] *See* I.R.C. § 671.

the trust's assets for income tax purposes.[291] It is very unlikely that a Moneyed Spouse would want to be subject to taxes on trust income to the extent that income is distributed to his or her former spouse after a divorce. Fortunately, section 682 provides a special exception to the usual Grantor Trust Rules, requiring the Non-Moneyed Spouse—not the Moneyed Spouse—to include the income he or she is entitled to receive from the Support Trust in his or her gross income.[292] Under section 682, the Moneyed Spouse does not get an income tax deduction, as with alimony, and is not taxed on any of the trust's income that is payable to the former spouse.[293] Instead, the Non-Moneyed Spouse is taxed on that income, as if he or she received it directly, rather than the trust.[294]

Example 1. Natalie, the Non-Moneyed spouse, and Martin, the Moneyed Spouse, are getting a divorce. As part of their settlement negotiations, they discuss whether it would be better for Martin to pay Natalie $100,000 per year as alimony or to contribute $2,000,000 out of his separate property investment portfolio to a Support Trust that would pay Natalie $100,000 per year, which also could be structured as a unitrust that pays Natalie 5% of the trust's assets per year. The $2,000,000 portfolio is invested in highly rated corporate bonds, which generate a five percent return annually, or $100,000 per year. If the spouses agree to alimony, (1) Martin first would be required to include the $100,000 of taxable bond interest in income, (2) Martin then would receive an offsetting deduction for the payment of alimony, and (3) Natalie would be required to include the $100,000 of alimony as income. On the other hand, if Natalie and Martin were to utilize a Support Trust, (1) Martin would *not* be subject to tax on the $100,000 of income and, therefore, would not need an offsetting deduction, and (2) Natalie would be subject to tax directly on the $100,000 of bond interest that she receives from the trust.

Example 2. Assume in the foregoing example that the Support Trust's $2,000,000 portfolio instead generated only $50,000 in qualified dividends. In that case, Natalie still would be entitled to a $100,000 distribution. She would be subject to tax on $50,000 in qualified dividends, and the additional $50,000 that Natalie receives from the Support Trust would be treated as a tax-free distribution of principal[295] under section 102.[296] While alimony payments are treated as ordinary income under section 71, Support Trust payments under section 682 retain the same character for tax purposes as the income earned by the Support Trust—in this case, qualified dividend income, which could be subject to federal income tax at the highest rate of 23.8%, as opposed to ordinary income, which is subject to tax at the highest rate of 43.4%.[297]

[291] *See id.*

[292] *See* I.R.C. § 682. Section 682(a) supersedes the usual Grantor Trust Rules. *See* Treas. Reg. § 1.671-1(b) ("Sections 671 through 677 do not apply if the income of a trust is taxable to a grantor's spouse under section 71 or 682 (relating respectively to alimony and separate maintenance payments, and the income of an estate or trust in the case of divorce, etc.)"); *see also* Treas. Reg. § 1.677(a)-1 ("However, section 677 does not apply when the income of a trust is taxable to a grantor's spouse under section 71 (relating to alimony and separate maintenance payments) or section 682 (relating to income of an estate or trust in case of divorce, etc.")).

[293] *See* I.R.C. § 682.

[294] *See id.*

[295] Also commonly referred to as corpus.

[296] *See* I.R.C. § 102.

[297] *See* I.R.C. §§ 1(e), 1411. Effective on January 1, 2013, the American Taxpayer Relief Act of 2012 increased the top tax rate from 35% to 39.6% for ordinary income (which includes wages and interest from corporate bonds) and the top tax rate from 15% to 20% for long-term capital gains and qualified dividends. See I.R.C. § 1. Also effective on January 1, 2013, the Patient Protection and Affordable Care Act of 2010, as amended, imposed a new additional 3.8% surtax on net investment income, which includes many different types of passive investment income, including interest, dividends, annuities, royalties, rents, passive-activity income, and capital gains. *See* I.R.C. § 1411.

Section 682(a) provides that if the spouses are divorced from each other or are separated under a decree of separate maintenance or under a written separation agreement, the Non-Moneyed Spouse is required to include in gross income:

> [t]he amount of the income of any trust which such wife is entitled to receive and which, except for this section, would be includible in the gross income of her husband, and such amount shall not, despite any other provision of this subtitle, be includible in the gross income of such husband.[298]

If one were to read solely section 682—which originally was enacted as part of the Revenue Act of 1942[299]—it would appear to be a very paternalistic rule that only refers to the situation where a husband, the Moneyed Spouse, sets up a trust for his wife, the Non-Moneyed Spouse. However, section 7701(a)(17) provides that section 682 also applies to a trust created by a wife for her husband and to trust relationships between former wives and husbands—or vice versa.[300] Sections 682 and 7701(a)(17) refer to only relationships between husbands and wives, or former husbands and former wives, and do not address the specific tax treatment for same-sex spouses.[301] However, the Service issued a response to the United States Supreme Court ruling in *United States v. Windsor*,[302] concluding that, "[f]or federal tax purposes, the terms 'spouse,' 'husband and wife,' 'husband,' and 'wife' include an individual married to a person of the same sex if the individuals are lawfully married under state law."[303]

C. Front-Loaded Payments, Anti-Lester Rules, and Child Support

Unlike with alimony,[304] a Support Trust can be used to front-load payments to the Non-Moneyed Spouse with decreasing amounts over time. Under the alimony rules,[305] excessively high or front-loaded payments in the first three post-separation years are subject to recapture or being taxed to the payor in the third post-separation year.[306] However, a Support Trust *is* permitted to make extra payments to the Non-Moneyed Spouse in the first three post-separation years because trusts are subject to taxation under the Grantor Trust Rules, not section 71.[307]

The Anti-Lester Rules[308] prohibit spousal support payments from being treated as alimony if reductions in such payments are tied to certain childhood events.[309] This rule was implemented so that these types of payments would be treated like child support payments, which are not deductible by the payor and not taxable to the payee.[310] However, unlike with alimony, a Support

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[298] I.R.C. § 682(a).

[299] *See* ch. 619, 56 Stat. 798, 817-18. The predecessor to section 682 was section 171 of the Internal Revenue Code of 1939, as amended, which was adopted pursuant to section 120 of the Revenue Act of 1942. *See id.* Section 171 of the Internal Revenue Code of 1939, as amended, became section 682 as part of the Internal Revenue Code of 1954. *See* ch. 736, 68A Stat. 1, 234 (codified as amended at I.R.C. § 682).

[300] *See* I.R.C. § 7701(a)(17).

[301] *See id.*

[302] 133 S. Ct. 2675 (2013) (holding Section 3 of the Defense of Marriage Act unconstitutional because it violated principles of equal protection by treating relation-ships that had equal status under state law differently under federal law).

[303] Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

[304] *See supra* Part VIII.B.

[305] *See supra* Part VIII.B.

[306] *See* I.R.C. § 71(f).

[307] *See* I.R.C. §§ 671-79.

[308] *See supra* Part VIII.B.

[309] *See* I.R.C. § 71(c)(2).

[310] *See* Temp. Treas. Reg. § 1.71-1T(c), Q&A (15)–(16).

Trust *can* provide a reduction in payments to the Non-Moneyed Spouse based on certain childhood events.

Example 1. Mark and Nina have agreed that Mark's spousal support payments to Nina should end after their child graduates from high school or reaches the age of nineteen, whichever comes first. Because this would not qualify as alimony under section 71(c)(2), Mark (who is in the highest tax bracket) would not receive a deduction and Nina (who is in a much lower tax bracket) would not include the payments in income. If Mark is in the highest tax bracket, he could be subject to a federal tax rate as high as 43.4% on ordinary income and 23.8% on long-term capital gains and qualified dividends;[311] however, Nina could be in a much lower tax bracket, potentially even subject to a zero percent rate on long-term capital gains and qualified dividends.[312] As an alternative to spousal support that is treated as child support under section 71(c)(2), Mark could contribute assets to a Support Trust that would provide Nina with support until the earlier of their child graduating high school or turning nineteen years old. Mark would not be subject to tax on the income from the Spousal Trust and Nina would be subject to tax on the income, which would be a much more efficient result for tax purposes due to Nina's lower tax bracket. Such a result is possible with Spousal Trusts because such trusts are subject to taxation under subchapter J of the Code[313] and are not subject to the Anti-Lester Rules of section 71(c)(2).

While section 682 does provide special tax treatment for amounts that are payable to support a former spouse, the section 682 exception to the Grantor Trust Rules would not apply to any part of trust income that the terms of the divorce decree, written separation agreement, or trust agreement fix as payable for the support of the Moneyed Spouse's minor children.[314] To the extent any amounts from a Support Trust are paid to support the Moneyed Spouse's minor children, the Moneyed Spouse would be subject to tax on the portion of the Support Trust's income that is used for such support.[315] This is similar to the limitation on alimony, in that child support payments do not qualify as alimony under section 71, and child support payments are not deductible by the paying spouse and not taxable to the child.[316]

D. Section 682 Capital Gains Issue

A major problem with section 682 is that the Code and the Treasury Regulations thereunder fail to define the term "income" for purposes of section 682. "Income" could mean "fiduciary accounting income" (FAI) under section 643(b), which is determined under the trust instrument and local law and typically would not include capital gains.[317] On the other hand, "income" could mean "income determined for tax purposes" under section 1.671-2(b) of the Treasury Regulations, which would include capital gains.[318]

In other words, if a Support Trust has any capital gains, it is not clear whether the Moneyed Spouse or the Non-Moneyed Spouse would be subject to tax on the capital gains, regardless of any amounts distributed to the Non-Moneyed Spouse. In 2015, this issue was brought to the

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[311] *See* I.R.C. §§ 1, 1411.

[312] *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 707.

[313] *See* I.R.C. §§ 641-92.

[314] *See* I.R.C. § 682(a). If trust income is less than the amount required to be paid for child support, trust income is to be allocated first to the child support portion of the amount paid to the Non-Moneyed Spouse. *See id*.

[315] *See* I.R.C. § 682(a); Treas. Reg. § 1.682(a)-1; *see also* I.R.C. §§ 674(b)(1), 677(b).

[316] *See id*.

[317] I.R.C. § 643(b).

[318] Treas. Reg. § 1.671-2(b).

attention of the Service's Office of Chief Counsel, Department of Treasury, United States Congress Joint Committee on Taxation, and Senate Finance Committee, which led to the Department of Treasury adding the issue to its 2016-2017 Priority Guidance Plan.[319] Until the government provides the necessary guidance to taxpayers, a practical solution could be to include provisions in the trust agreement to address a potentially negative conclusion by the Service. For instance, the spouses could agree that the Non-Moneyed Spouse will be liable for the tax on capital gains to the extent his or her distributions are above distributable net income as determined under section 643. Moreover, the agreement could require the Non-Moneyed Spouse to reimburse the Moneyed Spouse to the extent the Moneyed Spouse is subject to tax on such capital gain income. In order to prevent such reimbursement from being treated as income under section 71, the trust agreement also could contain a provision stating that the reimbursement payments should not be included in the Moneyed Spouse's gross income and should not be deductible by the Non-Moneyed Spouse.

E. Non-Grantor Trust Rules

To the extent a Moneyed Spouse were to create a non-grantor trust for the benefit of a Non-Moneyed Spouse that does not fall under Grantor Trust Rules, section 682 would not apply and the tax consequences to the Moneyed Spouse, Non-Moneyed Spouse, and Support Trust—both during and after marriage—would be governed by the standard trust taxation rules under subchapter J of the Code, primarily sections 651-652 for "simple trusts" and sections 661-662 for "complex trusts." While the foregoing sections do not use the terms "simple trusts" or "complex trusts," such terms may be found in the Treasury Regulations thereunder.[320]

F. Alimony Trust Rules

To the extent a divorce or separation instrument requires the establishment of a trust to make payments for life to the Non-Moneyed Spouse, there is an argument to be made that section 71(a) may apply instead of section 682, which would require all payments from the trust to be included in the Non-Moneyed Spouse's gross income and treated as ordinary income, regardless of whether such payments are from the net income of the Support Trust.[321] If that were the case, then the Moneyed Spouse—who would be treated as the owner of the trust under the Grantor Trust Rules—may be able to deduct the payment under section 215 because the Moneyed Spouse would be treated as having made the payment.[322] To prevent the possibility of such a result, a practical solution would be to include a provision in the spouses' divorce or separation agreement stating that the distributions from the Support Trust to the Non-Moneyed Spouse are not included in his or her income under section 71(a).[323]

[319] *See* Miller, *supra* note 277, at 96; Department of the Treasury 2016-2017 Priority Guidance Plan at 13 (Aug. 15, 2016).

[320] *See, e.g.*, Treas. Reg. § 1.651(a)-1.

[321] Before the Deficit Reduction Act of 1984, a prior version of section 71 applied to trusts that were created in contemplation of a divorce or separation instead of section 682. Under the former section, all payments to the Non-Moneyed Spouse were taxable whether or not they would be taxable to the beneficiary under the rules applicable to standard trusts and their beneficiaries. As a result, distributions of principal as well as distributions of tax exempt income from a trust would be included in the Non-Moneyed Spouse's gross income and excluded from the Moneyed Spouse's income. *See* Treas. Reg. §§ 1.71-1(c)(2), 1.682(a)-1(a)(2); Rev. Rul. 65-283, 1965-2 C.B. 25. *Contra* Ellis v. United States, 416 F.2d 894 (6th Cir. 1969); Stewart v. Commissioner, 9 T.C. 195 (1947). The current version of section 71 contains no similar provision.

[322] *See* Treas. Reg. § 1.671-2(c).

[323] *See* I.R.C. § 71(b)(1)(B); *see also* McCaffrey & Salten, *supra* note 277, at 96.

G. Estate Planning with Support Trusts

Support Trusts also could be a good strategy to address certain estate planning objectives to provide for children and future descendants. For instance, the Non-Moneyed Spouse may be concerned that the Moneyed Spouse will not leave sufficient funds for the couple's children. Life insurance is one possible solution to this issue; however, it may not be possible to obtain life insurance on the Moneyed Spouse—for example, there may be a health condition or the cost of life insurance could be prohibitively expensive. A Support Trust could alleviate this concern by having the Moneyed Spouse irrevocably transfer assets to the trust that would not revert back to the Moneyed Spouse. At the end of the term of providing support to the Non-Moneyed Spouse, which could be the Non-Moneyed Spouse's lifetime, the assets would be distributed outright, or in trust, to the spouses' children or future descendants.

Moreover, a Support Trust that eventually will benefit future generations could provide substantial gift, estate, and GST tax savings. This likely would be a concern only for high net worth clients with more than $5,490,000—the exclusion amount in 2017—which is the maximum amount each spouse can give away, either during life or at death, without being subject to any gift, estate, or GST taxes.[324] To the extent a Moneyed Spouse has more than the exemption amount—or may have more than the exemption amount at death due to appreciation of assets—the Support Trust could be structured to utilize the Non-Moneyed Spouse's exemption amount for estate tax purposes. This would allow the Moneyed Spouse and Non-Moneyed Spouse to effectively combine their exclusion amounts—which would be $10,980,000 in 2017[325]—to leave twice as much to future generations free of gift, estate, and GST taxes.

Example 1. Michelle and Nathan are getting a divorce and have three minor children. Michelle has a substantial net worth of $30,000,000—all her separate property. As a creative settlement solution, Michelle and Nathan could set up a Support Trust that would provide support payments to Nathan and help both parents achieve their estate planning goals for their children and future generations. Michelle's financial advisors have run a "Monte Carlo simulation"[326] that shows she could gift $5,490,000 out of her investment portfolio, maintain her standard of living, and still have a 99% probability of retaining a substantial amount of assets for the remainder of her life. Accordingly, Michelle could set up a Support Trust without the need for the assets to revert back to her—at the same time, she likely does not want her future ex-husband to get those assets either. Instead, Michelle may want the remaining assets after the end of the trust term—which could be upon Nathan's death—to go outright, or in trust, to the children. A Support Trust with $5,490,000 could support Nathan for the remainder of his life—for example, a four percent annual income distribution would equal approximately $218,000. As a more tax efficient estate plan, the Support Trust could be structured as a completed gift for gift tax purposes,[327] using up a portion of a spouse's lifetime exclusion amount—that is, $5,490,000

[324] *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 538, 714.

[325] *See id.*

[326] A "Monte Carlo simulation" is a computational algorithm that is used to approximate the probability of certain outcomes by running multiple trial iterations using random variables. *See* EPA, Office of the Scientific Advisor, *Guiding Principles to Monte Carlo Analysis*, http://www.epa.gov/risk/guiding-principles-monte-carlo-analysis (last visited Jan. 16, 2017).

[327] *See, e.g.*, Treas. Reg. § 25.2511-2(b), which provides that a gift is complete as to any property, or part thereof or interest therein, of which the donor has so parted with "dominion and control" as to leave the donor with no power to change its disposition, whether for the donor's own benefit or for the benefit of another. The section also provides an example where no portion of the transfer is a completed gift when the donor transfers property to another in trust and the donor retains a testamentary power to appoint the remainder among the donor's descendants.

in 2017.[328] As a result, any assets remaining in the trust at the end of the specified term could be transferred outright, or in trust, to the spouses' children free of future gift and estate taxes.

Utilizing a Support Trust as part of a tax-efficient estate plan could minimize the value of the current gift for gift tax purposes under section 2702 and could eliminate a 40% estate tax on the future appreciation of the assets in the trust—which is commonly referred to as an "estate freeze."[329] Such a plan could result in a substantially larger transfer of assets to the spouses' descendants and still provide support to the Non-Moneyed Spouse for his or her lifetime.

XII. CONCLUSION

Given the complexity of the tax rules, especially in connection with a divorce, it is very important for all of a client's advisors—including attorneys, accountants, business valuation professionals, investment managers, and other advisors—to work collaboratively so that the client's tax and estate plan is implemented correctly and in the most efficient manner. Mistakes and poor planning could lead to severe, unintended tax consequences—including additional taxes, penalties, and interest—among a multitude of other issues. If planning is done correctly, a client potentially could save thousands—or even millions—of dollars over a lifetime in income, estate, gift, and GST taxes.

[328] *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 538, 714.

[329] *See* I.R.C. §§ 2033, 2036(a), 2036(b), 2038, 2039, 2042; *see also* Rev. Rul. 2011-28, 2008-22, 2004-64, 85-13; Priv. Ltr. Rul. 2006-06-006 (Feb. 10, 2006), 2006-03-040 (Jan. 20, 2006).

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