



Family Law News

A newsletter published by the Section Council of the Section of Family & Juvenile Law

Maryland State Bar Association, Inc.

October 2008

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EDITOR: WALTER A. HERBERT, JR.

CHAIR'S MESSAGE- OCTOBER 2008

Welcome to the new Section year!

My first order of business is to thank Marc Noren again for his fine leadership, not just in the 2007-2008 year but for all of the many years he has served on the Section Council. As I am learning (!), the Chair fields many questions and has many responsibilities to ensure that the Section members stay informed and up to date. Marc handled those responsibilities efficiently and with nary a complaint. I hope to do half as well.

This year, I hope Section Council will focus on several initiatives.

The legislative session will see the presentation of the first major revision to the child support guidelines since its enactment in **1989**. While the basic principles underlying the Income Shares Model have not changed, the table of support has been updated, the application of the guidelines has been expanded, and some of the more complicated parts of the statutory framework have been simplified. The proposed statute should be available for dissemination later this fall, and we will insure that Section members have the opportunity to study and comment.

The legislature will also be presented with a revised custody statute. Those of you who attended the Family and Juvenile Law Program at the Maryland State Bar Convention in Ocean City in June will have a copy of HB1147. Over the summer a committee headed by Delegate Kathleen Dumais has been working on revising provisions in response to comments made at the Ocean City program, as well as those made by members of the judiciary and the legislature. The bill is being redrafted, and when complete, we will seek your feedback once again.

Further, I think it is crucial that the Section devote more of its time to the issues in Juvenile law. The children who require the services of the juvenile court system are in need of a voice, in the legislature and in court. As a Section, we have resources and knowledge that we can employ to assist the most vulnerable litigants. More specifics will be forthcoming as the year progresses.

Finally, for now, the Administrative Office of the Courts is revisiting the question of web publication of court records in family matters. While this effort is in its early stages, it is already overdue. Retired Judge Wilner heads the subcommittee of the AOC judicial Conference which is considering the issues. Again, we will report as more information becomes available.

In closing, to quote Marc Noren: "The Family & Juvenile Law Section is one of the most active, important and necessary sections of the Maryland State Bar Association. I urge those who are not members to join this section; those who are members to get involved with the section's activities; and those who are involved to do even more. We really do make a difference, and we must continue to do so."

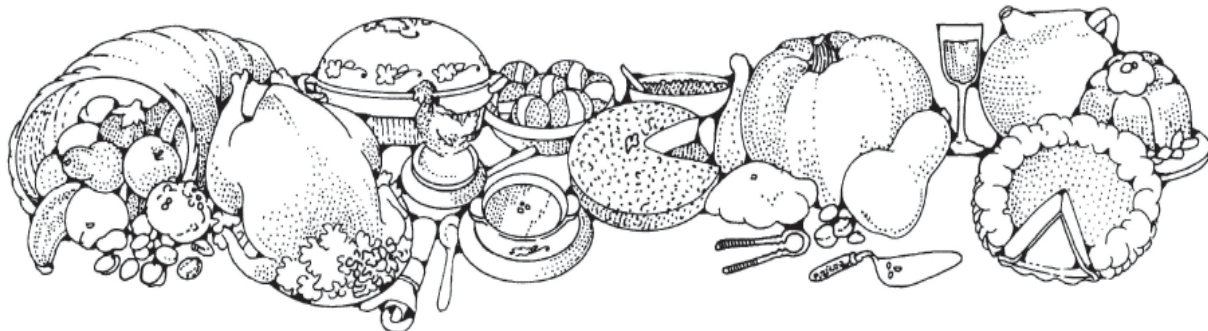


Cynthia Callahan
Chair 2008-2009
Rockville, Maryland

DISCLAIMER

Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Maryland State Bar Association, its officers, Board of Governors, the Editorial Board or the Family & Juvenile Law Section Council.

The FJLSC makes every effort to check the accuracy of the articles submitted, but does not warrant accuracy.



Message from the Editor

We welcome several first time writers in this issue. As our Chair Cindy Callahan points out in her initial Chairs Message, it looks like we will have a revision to our child support statute and our colleague Meg McKinney weighs in with a look at above the guidelines child support litigation.

Kristine Howanski just joined the Section Council in June and she already provides us with her first article on attorney trust account record-keeping: don't yawn, the Rules changed when you weren't looking.

Speaking of the Section Council, our very own Deb Webb and Erin Gable provide us with Case Notes, as does Master Kramer from Howard County.

As always, contact me with your thoughts and comments, and don't miss our archived issues on the Section Council web page.

E-mail me at Herbertlaw@att.net, and visit us on-line at:
http://www.msba.org/sec_comm/sections/family/

301.952.0707
Next issue: January 2009



Avoiding Alimony Recapture

By: Jeffery Capron and William C. Foote

Introduction

Alimony represents a transfer of income between taxpayers (i.e., spouses or former spouses), as opposed to a transfer of property. To guard against property settlements being disguised as alimony, the Internal Revenue Code (“IRC”)¹ contains a three-year rule pertaining to the excess front-loading of alimony. Retrospective in nature, the rule applies only to alimony paid during the first three “post-separation years,” where the first post-separation year is the calendar year in which the payor spouse first makes payments to the payee spouse under an applicable divorce or separation instrument.²

Amounts determined to be “excess alimony payments” must be included in gross income of the payor spouse in the third post-separation year,³ wherein lies the IRS’s retribution for the sin of alimony front-loading. With careful planning, however, family law attorneys can help their clients avoid this unintended tax consequence.

Most, if not all family law attorneys are familiar with the alimony recapture rules. This article is intended as a refresher on the subject.

Alimony in General

For federal income tax purposes, alimony is generally included in the gross income of the payee spouse and deducted from the gross income of the payor spouse. Before we dig into the calculation of excess alimony payments, let’s first review the criteria that must be met in order for alimony to be taxable/tax-deductible.

First of all, to be treated as alimony, the payments must be pursuant to a valid divorce or separation agreement.⁴ In addition, the following requirements apply.

- Payments must be cash
- Payments must not be designated in the divorce or separation instrument as non-alimony
- Spouses must not be members of the same household at the time of payment
- Payments must cease upon death of the payee spouse
- Spouses must not file a joint return with each other
- Payments must not be related to or contingent on events involving children (i.e., payments are not in substance child support disguised as alimony)

In certain situations, payments to third parties can be treated as alimony. For instance, Spouse A can pay Spouse B’s mortgage and deduct such amounts as alimony paid, so long as the residence is titled to Spouse B. In this situation, Spouse B can deduct the related mortgage interest.⁵

How to Calculate Alimony Recapture

Due to the formulaic nature of the IRC rules, the amount of alimony to be recaptured, if any, can only be determined after the third post-separation year. The mathematics work in reverse order. That is, excess alimony payments in the second post-separation year are calculated first, and excess alimony payments in the first post-separation year are calculated second.

Excess alimony payments in the second post-separation year are equal to the amount by which alimony payments in the third post-separation year fall short of alimony payments in the second post-separation year, but only to the extent that such shortfall is greater than \$15,000. For excess alimony payments in the first post-separation year, the math gets a little more complicated. Excess first year payments are equal to the amount by which the average of third year payments and unrecaptured second year payments falls short of first year payments, but again only to the extent that such shortfall is greater than \$15,000. Excess second year payments are then added to excess first year payments to arrive at the amount recaptured in the third year.

A Practical Example

Assume Spouse A and Spouse B are negotiating a divorce settlement, one component of which is payment of alimony by Spouse A to Spouse B for a period of 10 years. Further assume that the terms of the settlement will be finalized in December 2007 such that alimony payments begin in January 2008.

Spouse A initially proposes alimony in the amount of \$5,000 per month for 120 months (Scenario 1). Spouse B wants more money up front, and proposes the following payment schedule (Scenario 2):

- Year 1: \$10,000 per month
- Year 2: \$7,500 per month
- Years 3-7: \$5,000 per month
- Years 8-10: \$2,500 per month

Spouse A objects to this payment schedule in general, but also points out that if the payments are structured in this manner it will result in alimony recapture of \$52,500. Spouse A counters with the following payment schedule (Scenario 3):

- Year 1: \$6,875 per month
- Year 2: \$6,250 per month
- Years 3-5: \$5,000 per month
- Years 6-10: \$4,375 per month

Spouse B accepts this proposal. Each of these scenarios and the related alimony recapture calculations are summarized in the table below.

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Avoiding Alimony Recapture...

(Continued from page 4)

Note that if recapture occurs, it must be reported on both parties' income tax returns in the third post-separation year (in our example this would be 2010). As a result, in that year the amount otherwise taxable to or deductible by each spouse will be offset to the extent of the recapture. So in Scenario 2 above, on Spouse A's 2010 Form 1040, \$52,500 would be reported as alimony "received" and \$60,000 would be deducted as alimony paid. Conversely, on Spouse B's 2010 Form 1040, \$52,500 would be deducted as alimony "paid" and \$60,000 would be reported as alimony received.

How to Avoid Excess Front-Loading

The alimony recapture rules, like much of the IRC, are arcane. With that said, the focus should be placed on *avoiding* alimony recapture rather than *understanding* it.

As a general rule, parties can steer clear of the recapture rules if they can ensure that (i) alimony payments in the second post-separation year do not exceed alimony payments in the third post-separation year by more than \$15,000 and that (ii) alimony payments in the first post-separation year do not exceed alimony payments in the second post-separation year by more than \$7,500. Also, the later in the year alimony payments commence the less likely it is that the recapture provisions will apply (and if they do apply, the impact will not be as significant).⁶ For instance, if the payments under Scenario 2 above commenced in April instead of January, the amount of recapture would be \$15,000 instead of \$52,500.

Note that the recapture calculations are based on actual payment dates, so failure to make payments as scheduled can subject parties to recapture, notwithstanding efforts to address front-loading at the time the agreement was executed. It should also be noted that the following types of alimony need not be considered for the purpose of the recapture calculations:⁷

- Payments pursuant to temporary support orders
- Payments that fluctuate and are not in the control of the payor spouse – that is, payments based on a fixed percentage of the payor spouse's income (if over at least three years)
- Payments that decrease due to the death or remarriage of the payee spouse before the end of the third post-separation year

Conclusion

Remember, the recapture rules address *front-loading* of alimony, so if alimony payments are not reduced or terminated during the first three post-separation years, there is no issue. Family law attorneys should be familiar with the alimony front-loading rules so they can help their clients avoid unexpected tax consequences. In most cases, alimony is structured to be taxable for the payee spouse and tax deductible for the payor spouse

because it will result in a lower tax bill for the two parties. If the parties become subject to the alimony recapture rules, then some of that intended tax advantage will be lost.

Jeffery P. Capron and William C. Foote are officers at Aronson & Company, where they specialize in business valuation and litigation support services. Aronson & Company has been recognized by leading publications as one of the "top 50 accounting firms in the nation" and has been named one of the Washington, D.C., metro area's "Best Places to Work" by the Washington Business Journal.

¹ IRC Sec. 71(f).

² IRC Sec. 71(f)(6).

³ The payee spouse receives a corresponding tax deduction in the third post-separation year.

⁴ As described in *IRS Publication 504 – Divorced or Separated Individuals*, valid agreements include (i) decrees of divorce or separate maintenance, (ii) written separation agreements, and (iii) temporary/interlocutory decrees and pendente lite orders.

⁵ Temp. Reg. 1.71-1T(b), Q&A 6.

⁶ This is the case because for the purposes IRC Sec. 71(f) "post-separation years" are calendar years.

⁷ IRC Sec. 71(f)(5).

	Scenario 1	Scenario 2	Scenario 3
ALIMONY PAYMENT SCHEDULE			
Year 1 payments	\$ 60,000	\$ 120,000	\$ 82,500
Year 2 payments	60,000	90,000	75,000
Year 3 payments	60,000	60,000	60,000
Subtotal	180,000	270,000	217,500
Year 4 payments	60,000	60,000	60,000
Year 5 payments	60,000	60,000	60,000
Year 6 payments	60,000	60,000	52,500
Year 7 payments	60,000	60,000	52,500
Year 8 payments	60,000	30,000	52,500
Year 9 payments	60,000	30,000	52,500
Year 10 payments	60,000	30,000	52,500
Total	\$ 600,000	\$ 600,000	\$ 600,000
RECAPTURE CALCULATION			
Year 2 payments	\$ 60,000	\$ 90,000	\$ 75,000
Less: year 3 payments	(60,000)	(60,000)	(60,000)
Less: floor	(15,000)	(15,000)	(15,000)
Excess year 2 payments	-	15,000	-
Year 1 payments	60,000	120,000	82,500
Less: average of year 3 payments and unrecaptured year 2 payments	(60,000)	(67,500)	(67,500)
Less: floor	(15,000)	(15,000)	(15,000)
Excess year 1 payments	-	37,500	-
Total excess alimony	\$ -	\$ 52,500	\$ -

MARK YOUR CALENDARS:



MICPEL:

MICPEL and the MSBA Family & Juvenile Law Section Council present their annual

MARITAL PROPERTY WORKSHOP

Tuesday, **November 18, 2008**
Ecker Business Training Center
6751 Columbia Drive
Columbia, Maryland

Topics include:

Identifying Marital Property	Extant Property
Valuation Issues	Stock Options
Appropriate Monetary Awards	Burden of Proof

The Faculty is outstanding, including 4 former Chairs of the Section Council!

Contact MICPEL at 410.659.6730 or info@micpel.edu

PRINCE GEORGE'S COUNTY BAR ASSOCIATION FAMILY LAW COMMITTEE

Our section meets on the **third Wednesday of each month** at 4:45 p.m. in the Circuit Court Law Library. Each meeting includes a Guest Speaker . . . all are welcome. Upcoming topics include:

Wednesday, **October 15, 2008**

Topic: Nuts and Bolts: Child Support (including income sources, deviations from the Guidelines, voluntary impoverishment, the tax exemption, etc.)
Speaker: TBA

Wednesday, **November 19, 2008**

Topic: Master's Rants
Speaker: Master Paul Bauer Eason

Wednesday, **December 17, 2008**

Topic: Discovery and Continuance Policies
Speakers: Judge Julia B. Weatherly and Judge Cathy H. Serrette

For Information Contact:

PGCBA, Family Law Committee

Co-Chair:

Lindsay Erdmann, Esq.
301.952.0100

Co-Chair:

Elveta M. Martin, Esq.
301.322.2711

ANNE ARUNDEL BAR ASSOCIATION FAMILY LAW COMMITTEE

CLE: Alimony

October 21, 2008

5:30 – 7:30 p.m.

Alimony from A to Z - but who knows which letter your Judge will choose?

Leslie Billman and Paul Reinstein will discuss the status of alimony in Maryland today (and will attempt to herd cats during the break). Topics will include pendente lite alimony, rehabilitative alimony, indefinite alimony, use of experts, alimony guidelines, best practices, best evidence and contempt. These experienced practitioners and seasoned speakers will bring you up to speed on recent developments in the case law, provide tips on pleadings, drafting of agreements and other practical pointers, and will review the recent development of the alimony guidelines computer software.

Panelists:

Paul Reinstein graduated from the Catholic University of America's Columbus School of Law in 1980. Paul started practicing in Maryland soon after his graduation. Paul is also a member of the Maryland State Bar Association and Prince George's County Bar Associations. Paul is currently a partner at the firm Sasscer, Clagett & Bucher in Upper Marlboro focusing his practice on family law.

Leslie Billman is a frequent lecturer on family law topics for lawyers and judges through Maryland Institute of Continuing Professional Education for Lawyers, The American Academy of Family Law, The Judicial Institute of Maryland and through bar association presentations. She has presented testimony on family law issues to Maryland House of Delegates and to Maryland Senate. Authored articles pertaining to family law issues published in the Maryland State Bar Association Journal, Anne Arundel and Prince George's County Bar Associations newsletters, and in Family Law News. She is the Past Chair, Family Law Committee, Prince George's County Bar Association, Former Chair, Family Law Section

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Mark Your Calendars...

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Council of Maryland State Bar Association; Member Anne Arundel County Family Law Committee; Settlement Facilitator, Family Law Division Anne Arundel County. She has been named in Best Lawyers of America and Super Lawyers. She is a Fellow and current secretary of the Maryland Chapter of American Academy of Matrimonial Lawyers.

Registration Form

All seminars are \$35 for AABA members, \$45 at the door
\$45 for non-members and \$50 at the door

Seating is limited, be sure to register in advance.

Make check payable to AABA. Complete and return this form and payment to:

AABA
P.O. Box 161
Annapolis, MD 21404

November 18, 2008

5:00 – 6:00 p.m.

AABA Family Law Committee Meeting in the Attorney's lounge of the Anne Arundel County Courthouse - Church Road, Annapolis

No fee

Toal, Griffith and Ayers accounting firm deductibility presentation.

Erin Darner Gable, Esquire
Coordinator of Legal Resources
Family Administration
580 Taylor Avenue, Suite A2
Annapolis, Maryland 21401
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*Unless otherwise noted, all meetings will be held on the third Tuesday of each month at 5:00 p.m. in the Attorney's Lounge at the Circuit Court. Email reminders for each meeting will be sent out monthly. To be added to the email list, please send your email address to jmerrill@dalnekoff-mason.com. A minimum of one meeting this year will be held in Glen Burnie and advance notice will be sent out prior to the meeting.

All bar members are welcome at the committee meetings. The meetings are well attended by the Bench and provide an excellent opportunity for discourse between the Bar and the Judges and Masters.

HOWARD COUNTY BAR ASSOCIATION FAMILY LAW COMMITTEE

October 3, 2008: Insider Tips for Family Law Attorneys in Howard County, with speakers Masters William Tucker and Mary Kramer

November 7, 2008: The Kaufman Alimony Guidelines with speaker Tracy Brown of the Women's Law Center

December 5, 2008: Domestic Violence and High Conflict Divorce cases with speaker Judge Louis A. Becker

Meetings are held on the first Friday of the month in the jury assembly room of the Howard County Circuit Court. Lunch is available with prior RSVP. RSVPs should be sent to HC-FLC@agclaw.com.

Master Mary Kramer
Circuit Court Howard County
410-313-4857
mary.kramer@courts.state.md.us



Attorney Trust Account Record Keeping for Family Law Practitioners

By: Kristine Howanski, Esquire

Many of us may recall Judge Harrell and Glenn Grossman riding circuit over the course of the last year in an attempt to educate lawyers generally on the new record keeping requirements for client funds. The genesis of the rule was to address the Court of Appeals' concern with deficiencies in record keeping that caused or contributed to lawyers mishandling trust funds. Attorneys, often without bad intent, found themselves ensnared in difficulties largely due to a failure to maintain good records. The new rules, which have now been in effect for almost a year, mark an attempt to spare lawyers from getting dragged over the coals simply for being poor record-keepers. The rules are intended to assist lawyers in properly handling client and third party funds and maintaining accurate records of their use of those funds.

As family law attorneys, we represent individuals and quite often have occasion to handle clients' and third parties' property and funds. We hold monies in escrow for our fees. We sometimes hold property in the course of dividing, selling assets or making duplicate copies of tangible assets such as photographs. Likewise, we may hold funds such as proceeds from a sale of real estate. The pertinent changes to the standards are codified in Rule 1.15 (a) of the Maryland Lawyers' Rules of Professional Conduct and Maryland Rules 16-606.1 and 16-609.

Rule 1.15 (a) requires lawyers to hold the property of clients and third persons in connection with a representation separate from the lawyer's own property. This applies both to property the attorney may hold or funds. It provides:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained pursuant to Title 16, Chapter 600 of the Maryland Rules. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and of other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

With respect to tangible property, family law attorneys are well-advised to try to avoid being the holder of the asset in the first place. If it cannot be avoided, we should hold the property as infrequently and for as short duration as possible and, in all instances, keep a record of receipt, the name of the person from whom it was received, and when and to whom it is ultimately distributed.

Funds of clients or third parties must be maintained in a separate account that is identified as a trust account. This includes money received on a client's behalf that is to be delivered to a client or third party and retainer money to be applied against future fees incurred for legal services.

The records we need to maintain for five years under Rule 1.15 consist of the monthly bank statements, cancelled checks, duplicate deposit slips, and reconciliations of the trust accounts, cash receipt and disbursement journals, electronic transfer memos, if any, and client matter records.¹ These records may be kept electronically, but the records must be printable, bearing in mind that one of the reasons to maintain these records is to be able to produce them upon reasonable request of Bar Counsel. Quickbooks, Timeslips and other such electronic record-keeping software tend to be printable and thus comply.

Rule 16-609 prohibits attorneys from borrowing or pledging any funds which are required to be deposited in attorney trust accounts, receiving any remuneration for depositing any funds in trust accounts, or using the funds for any unauthorized purpose. It would seem obvious that we are not to borrow or use as collateral funds from one client to cover the expenses of another or any other expenses for that matter. Likewise, we all appear to be aware that we cannot earn interest or otherwise receive remuneration for depositing the funds in an account.² The requirement that the account be identified as a trust account would seem to preclude a bank erroneously giving attorneys interest on such an account. The bank cannot, however, intuit if attorneys place client or third party funds in an interest-bearing account that is not identified as an escrow or IOLTA account. Inherent honesty is going to remain our responsibility.

In keeping with the prohibitions against taking any liberties with clients' or third parties' funds under Rule 16-609, attorneys also cannot make cash withdrawals even if it the cash is intended to be on the client's behalf such as paying for copies or open court costs. Similarly, attorneys cannot cash checks made out to "cash" from trust accounts. In the case of costs, for instance, an attorney either should know the precise amount and issue a check made payable to the Clerk's Office for that amount, or use her own cash or a check from her operating account, with the hope of eventual reimbursement.

If we are not to use clients' funds for our own use or that of other clients, it would seem to follow that we cannot have a

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Attorney Trust Account...

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negative balance in these accounts. By definition, if an overdraft occurs on the account as a whole or a negative balance occurs for a given client, we are most certainly using another's funds to finance the expense of a particular client or third party. This cannot be done, even for a moment. That is, we are not permitted a "float".

How does prudent safe-keeping look on a day to day and monthly basis? First, take common sense precautions. Ethical attorneys who have run afoul of these rules tend to lack sufficient oversight, so, much as we might trust our right-hand office manager, only attorneys should be authorized to disburse client or third party funds. Attorneys should never pre-sign blank checks or use a signature stamp for checks. Keep your clients informed of all transactions and do not disburse escrow funds without specific authorization confirmed in writing. Consider having different colored checks for each account to reduce the risk of confusing them. When a case is complete, make sure the client balance is \$0.

Daily activity should consist of making timely deposits and properly completing deposit slips with dates, breakdowns for clients and/or third parties by name and amount and having the slip clearly identify that this a trust account. Disbursements likewise should be recorded timely and supporting documents retained. Deposits and payments should be recorded on client ledgers and client files updated as these events occur. Client ledgers can be maintained through software such as Timeslips and Quickbooks as well as manually. As with everything involving the law practice, it is a good idea to have multiple systems and thus have back up. The entries, however, should be the same without regard to method. That is, there should be dates for deposits and disbursements, the payor or payee should be identified and a line memorializing the purpose for which the event occurred with deposits or credits in one column and checks or debits in another column with a running balance as set forth below in Chart A.

At the end of each month, reconcile the bank statements as well as the client ledgers. The bank statement reconciliation will confirm the accuracy of the account's running balance as it adjusts and accounts for deposits made minus checks cleared and/or written (e.g., \$10,000 balance + \$5,000 in deposits - \$6,500.00 in cleared checks - \$2,000.00 in outstanding checks = \$6,500.00). The client ledger trial balance will identify each client, the date of the last activity in the account and the remaining balance as a result of that activity as set forth below in Chart B.

Each month, the difference between the total of the deposits in trust less outstanding checks should equal the total client ledger trial balance. The monthly reconciliation should thus make it difficult either for an attorney to fail to see a misuse of funds by another or to go for long without correcting a mistaken deposit, payment or transfer from or to an incorrect account.

While tangentially related, some discussion regarding the use of credit cards to pay fees in family law cases may be in order. There is interest in evaluating whether or not other arrangements can constitute good faith compliance, but the present state of the law appears to be as follows.

Attorneys may accept credit cards for payment of fees, even if the spouse's credit is pledged, unless the lawyer reasonably believes that the client will be filing a petition in bankruptcy and the debt would thus be discharged in a bankruptcy proceeding. (MSBA Committee on Ethics, Ethics Docket 91-5) Credit card payments may also be used for retainers for fees not yet earned, but these need to be deposited into a trust account. (MSBA Committee on Ethics, Ethics Docket 03-06) As long as the potential for a charge-back³ to the trust account exists, those funds would be required to remain in the trust account to avoid the prospect of a charge-back jeopardizing the funds of other clients. Attorneys may alternatively make arrangements with

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Chart A

Date	Ref	Payor/Payee	Memo	Deposit	Check	Balance
9/1/08	Deposit	Client A	Adv Fee	\$5,000.00		5,000.00
10/1/08	1234	LawFirm	Atty Fees		500.00	4,500.00
10/7/08	2468	Clerk	Filing Fee		125.00	4,375.00
10/21/08	2512	Server	Service		55.00	4,320.00

Chart B

Client	Last Activity	Balance
Smith	08/11/08	\$1,500.00
Meadows	12/20/08	\$2,000.00
Tollbooth	09/22/08	\$3,000.00
		\$6,500.00

Attorney Trust Account...

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their financial institution to debit any “charge back” from their operating account. The irony with having the charge occur in the trust account is that credit card use is subject to service fees that are immediately debited at the time of using the card to pay the debt. Thus, attorneys must also have arrangements with their financial institution to have the service fees paid from an operating account. Attorneys who wish to simplify matters and have retainers and earned fees all deposited into a trust account with prompt transfer of earned fees into an operating account will be required “to deposit and maintain sufficient funds to cover all potential account fees, charge backs and transaction rescissions.” (MSBA Committee on Ethics, Ethics Docket 03-06)

In short, the new rules constitute nothing new in terms of our obligations to safeguard client and third party funds and property, but should assist attorneys as to how to go

about making and maintaining clear records of those funds and property.

Kristine Howanski is a member of the MSBA Family Law Section Council and the former Chair of the Baltimore County Family Law Committee.

¹ For ease of retrieval, attorneys may wish to consider placing their printed reconciliations, duplicate deposit slips and cancelled checks in their monthly bank statement envelopes once they have reconciled a given month’s statement.

² *It is certainly advisable to maintain client or third party funds in a separate interest-bearing account for the benefit of the client(s) and/or third parties when the fund being held is especially large or will be held for an extended period.*

³ Clients who make credit card payments have a right to rescind that payment, resulting in a “charge-back”.

Uniform Collaborative Law Act Moves Forward

By: Mary S. Pence

The Uniform Collaborative Law Act (“UCLA”) continues to wind its way through the process of the Uniform Law Commission.¹ 215 Commissioners from 50 states and 2 territories, including three from Maryland,² met in Big Sky, Montana, from July 18-25, 2008, to consider the UCLA among numerous other uniform statutes, including one which amends UIFSA.

The UCLA had its “First Reading” on the floor of the Uniform Law Commission where, in general, it was very positively received by the Commissioners.

A Drafting Committee has been at work drafting the UCLA over more than a year’s time. The Drafting Committee will meet again in November, 2008 to consider the issues raised on the floor of the Commission, as well as other written comments submitted. The Act will have its Second Reading before the Uniform Law Commission at its next meeting in the summer of 2009, and hopefully will be passed at that time. It will then go to the House of Delegates of the American Bar Association and then, if approved there, to the individual states for enactment.

The provisions of the UCLA will provide uniformity for Collaborative Law practitioners in the various states, will create a “privilege” for communications within the Collaborative Law process, and will require trial courts to exempt Collaborative Law cases from rigid scheduling rules, among other provisions.

Editors Note: Following up on Mary Pence’s up-date, be advised that the Collaborative Divorce Association is sponsoring a presentation on Collaborative Law by Pauline Tessler and Peggy Thompsom, authors of the book “Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on With Your Life”...the date is Friday, March 13, 2009, and the location is the Marriott Courtyard Gaithersburg Washington Center, 204 Boardwalk Place, Gaithersburg, Maryland...301.527.9000.

For further information contact the Collaborative Divorce Association (Regina DeMeo at 301.951.1530)...or Stuart Skok: sskok@gweblaw.com or Darcy Shoop: dshoop@steinsperling.com.

¹The Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws (“NCCUSL”), has promulgated numerous uniform statutes, including the UCC, the UCCJA and UCCJEA, the Uniform Mediation Act, etc.

² King Burnett from Salisbury, King Hill from Parkville, and Steven Leitess from Baltimore.

Birthdays



October:

Harris Glenn Milstead:

Lutherville's own, star of "Hairspray" and "Pink Flamingoes", and the true animating influence behind John Waters oeuvre, Milstead was a unique performer: never a great singer or dancer, but he would do anything for the role: we won't articulate here **what** he did, but it was certainly attention-grabbing. When I lived in Fort Collins, Colorado in the early 80's I remember trying to describe Milstead and his film persona for my new-found western friends: I failed, but one day my room-mate rushed in with a small poster he found in a bookstore featuring a 300 hundred pound drag queen in sequins, eyebrows painted on like lightning strikes and cracking a whip: yes, it was **Divine**, and I felt like I was home...

November:

Jerry Geisler:

"Get Me Geisler"...Attorney to the Stars! From the 1930's through the late 50's whenever a Hollywood star found themselves in trouble the call went out..."Get Me Geisler"...when film distributor Alexander Pantages was convicted of rape Geisler won the appeal, he defended Errol Flynn on statutory rape charges and when a drunken Busby Berkeley lost control of his car and caused a pile-up that killed three people Geisler won an acquittal by blaming Berkeley's "cancerous tires"...it later turned out that the tire expert who testified on Berkeley's behalf was on the studio payroll...things were so uncomplicated back then...



Child Support Above the Guidelines- What Does the Future Hold?

By: Margaret J. McKinney, Esquire

The Maryland Child Support Guidelines, Family Law Article, Section 12-201 et seq. (“Guideline”), provides clear resolution of the issue of child support when the combined income of the parents is \$10,000 per month or less. However, when the combined income of the parents exceeds \$10,000 per month, the Guidelines in Section 12-204(d) provide only that, “the court may use its discretion in setting the amount of child support.” As discussed in more detail below, Maryland case law provides some guidance with respect to above-Guidelines child support. However, this remains an area of family law in which the practical reality does not necessarily follow the black letter law. In many cases, attorneys and judges simply extrapolate from the Guidelines to the full amount of combined parental income in order to determine the amount of child support. In others, the expenses of the child are the determinative factor in the amount of child support that is awarded. In still others, a combination of those two methods is used. The question of above-Guidelines child support is increasingly prevalent in Maryland as household incomes in the state continue to rise.

According to the 2007 American Community Survey, published by the United States Census in August 2008 (available online at www.Census.gov), Maryland has the highest median household income in the nation.¹ With 5.6 million residents, the median household income state-wide was \$68,080 per year in 2007. In contrast, the median household income nationwide was \$50,740 (according to the 2007 American Community Survey). You might be asking yourself why write (or read) an article on above-Guidelines child support if the median household income in Maryland is only \$68,080 per year. The answer is simple. Nationwide, only approximately 20% of annual household incomes in 2007 exceeded \$100,000 and only 12% were \$125,000 or more. However, in Maryland, approximately 32% of annual household incomes exceeded \$100,000 and 21% of annual household incomes were \$125,000 or more.

The 21% of Maryland households that had income of \$125,000 or more—which represents more than 1.15 million households—do not fall within the income limit of Maryland’s Child Support Guidelines. Another 11% of Maryland households—those with incomes between \$100,000 and \$124,999—come very close to or do exceed the maximum income. Said another way, the Maryland Child Support Guidelines do not apply in more than 21% of Maryland households.

Looking at the numbers by county provides even more perspective on the relevance of this topic. In Calvert, Howard, and Montgomery Counties more than 50% of households have incomes in excess of \$100,000 per year; as do more than 44% of households in Anne Arundel, Carroll, Charles, Frederick, and St. Mary’s Counties. In Baltimore and Prince George’s

Counties, the number of households with annual incomes in excess of \$100,000 is approximately 35%.² As the percentage of households with incomes over \$100,000 increases, the current Guidelines are even less likely to be helpful in establishing child support in these (and other) counties.

Since nearly one-third of Maryland households have incomes exceeding or nearly exceeding the maximum income in the Child Support Guidelines, it is important to understand the law and its application with respect to above-Guidelines child support calculations. Unfortunately, although the law is consistent from county to county, its application can vary considerably from county to county—and even from judge to judge. There is, however, some potential relief that may be available in the not-too-distant future.

Approximately one year ago the Child Support Enforcement Administration convened the Maryland Child Support Advisory Committee (CSAC) to conduct a review of the Guidelines. CSAC is comprised of representatives of the Child Support Enforcement Administration from across the state, legislators, judges and family lawyers. CSAC has been meeting at least monthly for the past year and has conducted a comprehensive review of the Guidelines, as well as best practices from across the country. An economist provided support and extensive data to CSAC to assist in its review of the Guidelines. A report prepared by CSAC and draft legislation will be available for review this fall. In the coming months, there will be opportunities throughout the state for practitioners to learn from CSAC participants about the proposed changes to the Guidelines.

One of the recommendations that will be made by CSAC is to update the Basic Child Support Obligation table to reflect the cost of raising children today—rather than the cost of raising children thirty-five years ago. Because Maryland has never updated its Basic Child Support Obligation table as CSAC will propose, the economic data underlying the Guidelines is still the original economic data relied upon twenty years ago when the Guidelines were enacted. That economic data was collected by Dr. Thomas Espenshade in 1972 and 1973. While it may have been reliable at the time the Guidelines were enacted, it is certainly outdated in 2008.

If you practice in other jurisdictions, you have undoubtedly noticed that child support calculated under the Maryland Guidelines is often significantly lower than child support calculated under the guidelines of other jurisdictions. Now you know at least one of the reasons why. You no doubt also have noticed that the child support guidelines in neighboring jurisdictions

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do not end at \$10,000 of combined monthly income. A very fortunate by-product of updating the Basic Child Support Obligation table as CSAC will propose is that it can be extended to combined incomes of \$30,000 per month. The modern economic data underlying the proposed update to the Guidelines is applicable even at that level of income. Many other jurisdictions have extended their child support guidelines in this manner. For example, the District of Columbia and Pennsylvania child support guidelines are applicable to combined incomes up to \$20,000 per month.

If the Maryland Guidelines are updated as CSAC will propose, the Basic Child Support Obligation table will be extended to \$30,000 per month of combined parental income. With this increase, the Guidelines will apply to many more households in Maryland. In fact, according to the 2007 American Community Survey, if the Guidelines are extended to \$30,000 per month, fewer than 7% of Maryland household incomes will exceed the maximum income in the Guidelines. Thus, by extending the Guidelines, the legislature would be ensuring that there is certainty with respect to child support calculations in more than 93% of Maryland households.³

For those families with incomes in excess of \$30,000 per month, practitioners will have to continue to rely on case law in determining the appropriate amount of child support. What follows is an examination of several of the cases that are the most instructive for practitioners in thinking about this issue.

In 1991, the Maryland Court of Appeals issued the decision that established the frame work for above-Guidelines child support calculations. *Voishan v. Palma*, 327 Md. 318, 609 A.2d 319 (Md. 1991), involved a modification of child support. The original child support award was made in a 1981 divorce decree. The original decree was modified in 1985 to increase the father's child support obligation from \$250/week to \$1,400 per month. The family came back before the court in 1991 on cross motions, one of which was the mother's motion to increase child support. At the time of the hearing, the father's annual income was \$145,000 and the mother's annual income was \$30,000. One of the parties' two children was emancipated. The Anne Arundel County Court ordered the father to pay \$1,550 per month in child support for the remaining minor child. Because the parties' combined incomes exceeded \$10,000 per month, the lower court calculated the child support obligation by determining the reasonable needs of the child and dividing those needs between the parents in proportion to their respective gross incomes. The Court found that the reasonable needs of the child were \$1,873 per month. It assigned 83% of that amount to the father and 17% to the mother, and ordered the father to pay the mother \$1,550 per month.

The father appealed the decision. The father argued first that the maximum amount of child support on the Guidelines table of basic child support, \$1,040 per month for one child, should be the presumptively correct amount of child support for all incomes over \$10,000 per month. The father argued alternatively that the Court should have used strict extrapolation from the maximum amount on the Basic Child Support Obligation table, which would have resulted in a monthly child support obligation of \$1,286 per month. The Court of Appeals rejected both arguments and upheld the decision of the lower court.

In rejecting the father's first argument, the Court found that the legislature did not intend to "cap the basic child support obligation at the upper limit of the schedule." For one child, the cap would have been \$1,040 per month under the father's theory. The Court concluded that if the legislature had intended to cap the obligation at the maximum amount on the schedule, it would not have included Section 12-204(d) in the Guidelines. *Id.* at 325-326. Section 12-204(d) expressly gives judges discretion to set awards in cases where the combined monthly income exceeds \$10,000 per month.

The Court next considered the father's strict extrapolation argument. The father argued that the Income Shares Model of child support, on which the Maryland Guidelines are premised, recognizes that as parental income increases the *percentage* of their income spent on their children decreases. In other words, the economic data on which the Guidelines were based tells us that although the actual dollars spent on children in high income families continue to increase as incomes increase, the percentage of income spent on children actually decreases. The father argued that in light of this premise, the legislature could not have intended child support awards to exceed the maximum *percentage* of combined parental income set forth in the Basic Child Support Obligation table. For one child, the maximum support amount is 10.4% of combined parental income. Although the Court acknowledged the premise of the Income Shares Model, it concluded that the legislature "did not intend to impose a maximum percentage of income or any similar restraint on the judge's discretion" in above-Guidelines cases. *Id.* at 327. The opinion states that during the hearings on the Guidelines, the legislature was repeatedly asked by various groups to limit the discretion of judges and declined to do so. *Id.* The Court's decision sets forth in detail the legislative history of the Guidelines.

Interestingly, both the Maryland Attorney General and the Maryland Chapter of the American Academy of Matrimonial Lawyers filed amicus briefs in *Voishan*. The Court addressed both briefs. It agreed specifically with a portion of the Attorney

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General's brief which stated that "at very high income levels, the percentage of income expended on children may not necessarily continue to decline or even remain constant because of the multitude of different options for income expenditure available to the affluent." *Id.* at 328. The Court ultimately stated that extrapolation from the Guidelines may be a guide in calculating above-Guidelines awards, but it specifically reserved for the judge ultimate discretion in "balancing the best interests and needs of the child with the parents' financial ability to meet those needs." *Id.* at 329 (citation omitted). The Court referred back to the decision in *Unkle v. Unkle*, 305 Md. 587, 505 A.2d 849 (1986), which predated the Guidelines, to say that "[f]actors which should be considered when setting child support include the financial circumstances of the parties, their station in life, their age and physical condition and expenses in educating the children." *Unkle*, at 854. The Court found those factors to be consistent with the principles underlying the Guidelines.

The *Voishan* decision includes a discussion of the position taken by the Maryland Chapter of the American Academy of Matrimonial Lawyers (AAML) in its amicus brief. According to the decision, the AAML took a position exactly opposite of the father's, i.e. that the lower court relied too much on the Guidelines in determining support. The Court characterized the AAML's position as an argument that the lower court should not have relied at all on the Guidelines model because the economic data on which the Guidelines was based did not contemplate parental incomes above \$10,000 per month. The Court described the AAML's argument as being against a strictly proportionate sharing of the child's expenses on the basis that Section 12-204(d) did not include such a mandate. The Court rejected this argument, finding that the lower court "acted properly in apportioning the obligation" based on the parties' respective shares of their combined income. *Id.* at 330. In rejecting the AAML's argument, the Court noted that the proportionate sharing of responsibility employed by the lower court was consistent with pre-guidelines case law as well as the principles of the Income Shares Model.

The *Voishan* Court ultimately said that the trial judge has, "somewhat more latitude than that argued by [the father] but not the unguided discretion of pre-guidelines cases as advocated by the AAML." *Id.* at 331. The Court again cited the brief submitted by the Attorney General as articulating the correct rule—that the Guidelines establish a rebuttable presumption that the maximum award under the schedule is the minimum award in above-Guidelines cases. "Beyond this the trial judge should examine the needs of the child in light of the parents' resources and determine the amount of support necessary to ensure that the child's standard of living does not suffer because of the parents' separation." *Id.* at 333. It is clear from *Voishan* that even in above-Guidelines cases, the Court should apply

the "conceptual underpinning" of the Guideline in determining support, i.e. "that a child should receive the same proportion of parental income, and thereby enjoy the standard of living, he or she would have experienced had the child's parents remained together." *Id.* at 322.

In 1993, citing *Voishan*, the Court of Special Appeals in *Bagley v. Bagley*, 98 Md. App. 18, 29, 632 A.2d 229, 239 (Md. App. 1993) summarized the factors to be considered by the Court in calculating above-Guidelines child support awards as follows:

- 1) the purpose of the Income Shares Model underlying the guidelines, i.e., maintain the children at the same standard of living they would have enjoyed absent the parties' divorce;
- 2) the financial circumstances of each party;
- 3) each party's station in life;
- 4) the age and physical condition of the parties;
- 5) the costs of educating the child;
- 6) the need for consistency of support awards;
- 7) the maximum in the schedule is the minimum for combined incomes above the schedule; and
- 8) the results of extrapolation from the schedule.

One of the issues on appeal was whether the lower court properly excluded "summer camp, vacations, recreation-oriented vehicles, adequate furniture, and social/entertainment expenses" from its calculation of the mother's expenses for the children. *Bagley* at 239. The *Bagley* Court found that the "children are entitled to every expense reasonable for a child of someone with Dr. Bagley's affluence." *Id.* On remand, it charged the lower court with determining whether the children would have had the benefit of those expenditures if the parties had been living together given Dr. Bagley's income and standard of living. The Court directed the lower court to "be cognizant that a child's needs, like an adult's, increase proportionally with their opportunity to participate in educational, cultural, and recreational activities...The end result, theoretically, is a child whose opportunities to realize his/her potential have not been diminished by divorce although the parent may incur greater expenses." *Id.* The Court recognized that the legislature left the calculation of above-guidelines child support to the discretion of judges "precisely because such awards defied any simple mathematical solution." The Court opined that where the social scientists failed "to provide an adequate solution, the trial judge is asked to step into the breach." *Id.* Fortunately, the social scientists can now provide an adequate solution for more than 93% of Maryland households if we update our Guidelines to reflect the current economic data.

Another decision worth reviewing is the Court of Special Appeals decision in the case of *Smith v. Freeman*, 149 Md. App.

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1, 814 A.2d 65 (Md. App. 2001). *Smith v. Freeman* involved a modification of child support. The mother sought an increase in child support based on the increase in the father's income from \$1.2 million to \$3.2 million per year. In 1998, while earning \$1.2 million, the father agreed to pay \$3,500 per month in child support. The father was a professional football player. The parents had never been married and the child lived with the mother. In its decision, the lower court focused on the mother's stated expenses for the child. The lower court said in its oral opinion that a number of the expenses (such as \$900 per month for clothing for the child), and the mother's indulgence of the child that those expenses represented, were so excessive that they were contrary to the best interest of the child. Ultimately, the Circuit Court rejected the mother's request for a modification, finding that the needs of the child had not changed and thus there was no entitlement to an increase in child support.

In deciding the case, the Court of Special Appeals focused first on whether an increase in the income of the party paying support could, standing alone, justify a modification of child support. Finding that it could, the Court remanded the case for further proceedings. Suggesting that they could provide some guidance to the lower court, the Court examined similar cases from other states such as Florida, Vermont, and California. The Court noted that those cases "recognize that the concept of 'need' is relative, almost metaphysical, and varies with the particular circumstances of the people involved, as well as their culture, values and wealth. To be sure, many people, adults and children alike, have far more than they truly 'need' to survive, or even to live comfortably." *Id.* at 83. The Court further noted that there is almost no limit to the luxuries available to the extremely wealthy. *Id.* As an example of how tastes vary within the same economic class, the Court said that, "[w]hile some Marylanders are amply satisfied with a vacation in Ocean City, others prefer to vacation in places like Martha's Vineyard, despite the fact that both beaches front on the Atlantic Ocean." *Id.* The Court opined that the child of a multi-millionaire "generally expects a lifestyle of unusual privilege and advantage... Thus, child care that is not work related, private school, summer camp, lessons, luxury vacations, designer clothes and shoes, toys, travel, cultural and recreational activities, and other material privileges are among the extravagances enjoyed by families of substantial wealth." *Id.*

In other words, in calculating above-Guidelines child support, we must look to the culture in which the child and the parents live in order to determine the appropriate amount of child support. This is not a new concept. Oliver Wendell Holmes said in his lecture *The Common Law*, "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient." This concept has been interpreted broadly as referring to what is acceptable

in society. In Maryland it is clear that when analyzing above-Guidelines child support cases, the Court must examine the expenses related to raising the child and make a determination of what expenses are "reasonable" for child support purposes in light of the family's standard of living. Quoting a decision from Florida, the Court of Special Appeals in *Smith* said that "when a case involves one parent who is unusually rich, 'the crux of the difficulty is settling on whose standard of living determines the needs of the child.'" *Smith* at 82 (citations omitted). Parents often disagree on the appropriateness of expenditures for their children even when they are living (happily or unhappily) within a marriage. Those differences are only exacerbated when the parents separate or divorce.

The question then remains as to precisely how the Court should determine the reasonableness of expenses in above-Guidelines cases, particularly those cases in which there is clearly no limit to a parent's ability to pay. Although one can point to the decisions discussed above to argue that certain expenses should be included, there are still no hard and fast rules. One resolution would be to look to the culture of the family in determining whether an expense is reasonable. If the "family" does not agree on the reasonableness of an expense, one could look to the culture of the community (or communities) in which the family lives. If the dispute about whether the expense is reasonable is of recent origin, should that make a difference to the Court? How should a Court make a judgment, for example, as to whether a child should continue horse back riding lessons after the divorce of his or her parents? Should it make a difference whether the child started riding at the time of separation or has been riding for 10 years? What about travel soccer or pre-Olympic ice skating expenses? How should a court resolve differences in the parents' values with respect to the activities of and expenditures on their children if the parents themselves have rarely, or never, agreed?

The Court of Appeals in *Smith* noted in footnote 9 that judges are responsible for determining what is in the child's best interest and therefore are entitled to determine if an expense is "so excessive and indulgent" that it is not in the child's best interest. *Smith* at 82. Further in footnote 9, the Court recognized that a parent's child-rearing philosophy is deeply personal and that "[w]ithin the parameters of the law, parenting is subject to limited governmental intrusions. In this case, we have merely attempted to point out that, within reason, the extent to which material indulgences are appropriate for a child is a personal decision that generally falls within the domain of parental discretion, and is, of course, affected by the parents' economic circumstances." *Id.*

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CASE NOTE:

I Divorce Thee, I divorce thee- Not in Maryland!

By: Erin Darner Gable

Aleem v. Aleem, 404 Md. 404 (2008)

On May 6, 2008, the Court of Appeals issued an opinion in the case of *Aleem v. Aleem*, which had previously been heard in the Court of Special Appeals (*Aleem v. Aleem*, 175 Md. App. 663, 931 A.2d 1123 (2007)). After the Court of Special Appeals held for the wife, the husband sought review with the Court of Appeals. The Husband presents two questions for the Court's review:

- (1) Did the Court of Special Appeals disregard fundamental principles of international comity and conflicts of laws in refusing to recognize a Pakistani divorce because Pakistan and Maryland employ different "default rules" for the division of property between spouses?
- (2) Did the Court of Special Appeals disregard fundamental principles of international comity and conflicts of laws in concluding that Pakistan lacked jurisdiction to dissolve the parties' marriage because the parties resided in Maryland on diplomatic visas?

Both of the parties were citizens of Pakistan and were married in Pakistan in 1980. On the day of the wedding, in accordance with Pakistan law, an agreement was presented to the wife for her signature. At the time of the wedding the wife was an 18 year old high school graduate and the husband was a 29 year old doctoral candidate at Oxford University. According to the agreement, there was a dower of the equivalent of Two Thousand Five Hundred Dollars but that amount was deferred. Under Pakistan law, unless provided otherwise, upon a divorce all property in the name of the husband would remain in his possession. Further, wife would retain all of her possession and each party was barred from asserting any interest in the other's property. After the marriage, the parties moved from Pakistan to England and then to Maryland. The husband obtained employment at the World Bank. They maintained a residence in the Maryland for over 20 years and had two children who were US citizens.

The wife filed for divorce in Montgomery County. Thereafter, the husband filed an answer and a counterclaim. However, without any advanced notification and while the divorce action was still pending, the husband went to the Pakistan Embassy in Washington, D.C. and performed a *talaq*. Under Islamic law, a husband has the authority to divorce his wife by stating "I divorce thee, I divorce thee, I divorce thee". Under Islamic law, the wife does not possess this right, unless she is expressly given this ability in a written marriage agreement. In the case, the husband did not grant the wife right to a *talaq*. The husband asserts that the Circuit Court for Montgomery County lacked jurisdiction to litigate the division of marital property since the property would be divided in accordance with Paki-

stan law and the marriage contract signed at the time of the parties' marriage. The trial court held "that the marriage contract entered into on the day of the parties' marriage in Pakistan specifically did not provide for the division of marital property and thus, for that reason alone, the agreement did not prohibit the Circuit Court for Montgomery County from dividing the parties' marital property under Maryland Law." In upholding the lower court's ruling, the Court of Special Appeals stated the Pakistan agreement was not equal to a prenuptial agreement and lacked authority.

In deciding this case, the Court examined the issue of international comity. The issue of comity between international countries is not a new issue. The case law on this issue stretches back for over a hundred years. In reviewing precedent, the Court relied on *Lowndes v. Cooch*, 87 Md. 478, 39 A.2d 1045 (1898) which articulated

"This doctrine, however, firmly, established, is nevertheless subject to proper limitation to the effect that a foreign law directly violates some recognized principle of public policy, or some established standard of morality prevailing in the forum exercising jurisdiction, the rules of comity will not compel such forum to enforce the foreign law rather than its own, if to do so would be hurtful or detrimental to the interest and welfare of its own citizens."

The Court went on to examine the case of *Wolff v. Wolff*, 40 Md. App. 168, 389 A.2d 413 (1978). In that case, that the doctrine that the United States is required to give full force and faith to judgments rendered in other countries seldom applies in divorce actions. "A decree will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought."

After indicating that full force and faith does not need to be given to foreign judgments that offends public policy, the Court examined the provisions relating to the division of marital property. As noted in the preamble to Chapter 794 of the 1978 Acts, the Maryland General Assembly said that the division of marital property must be done "fairly and equitably". In stark contrast, the Pakistani law relating to divorce states that under the Islamic law, the husband has the unilateral right to repudiate his wife, without showing cause or without recourse to a court of law. Upon uttering, "I divorce thee" three times, the divorce immediately becomes effective and irrevocable. The right only belongs to the husband.

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If one parent believes in iPods, cell phones, computers and cars for each child but the other objects, perhaps the Court should look to the values of the community. Does the child's school require or rely upon homework to be done on computers? That could be viewed as the community valuing the presence of a computer in every home. The trouble is that values are subjective, will change over time, and are likely to vary depending on the community. A rural community might have different values around, and a different level of access to, certain luxuries than an urban or suburban community—which brings us back to the culture of the family. In Section 12-204(g)(2), the Guidelines state that childcare shall be determined by “actual family experience, unless the court determines that the actual family experience is not in the best interest of the child.” Setting aside those instances in which one parent repeatedly makes expenditures over the objection or contrary to the values of the other parent, actual family experience should reflect the family culture. Thus, basing an above-Guidelines child support award on the historical family expenditures (or if the parties were never married on the actual standard of living in each household), should provide some measure of assurance that the level of child support will be consistent with the child's previous standard of living. However, sometimes even in the highest income families, the family can no longer afford the same level of expenditures after it is divided into two separate households. This makes the eight factors outlined in *Bagley*, along with consideration of the family and community culture, critical in analyzing the appropriateness of above-Guidelines child support awards. If an award is too high, it will not actually be in the best interest

of the child. There is a large body of research that tells us the primary reason people fail to pay child support is that the award was set too high. If a child support award creates an economic hardship for the parent required to pay it, which is possible even in above-Guidelines cases, it can cause just as many problems for children as an award that is too low. In my view, this is yet one more argument in favor of updating and extending the Guidelines to \$30,000 per month. If that occurs, the number of cases that will present these types of problems for the Court (and practitioners) will be dramatically reduced and there will be much more certainty in child support awards.

Margaret J. McKinney, a partner in Delaney McKinney, LLP, of Bethesda, Maryland, has practiced family law in Maryland and the District of Columbia for 16 years. She is a member of the Maryland Child Support Advisory Committee and previously served on the District of Columbia Child Support Guideline Commission.

1 The American Community Survey is based on a sample of 2,082,458 Maryland households. The sampling variability for the household income information contained in this article is set forth on Table B19001, Household Income in the Past 12 Months (in 2007 Inflation-Adjusted Dollars).

2 All statistics on household income can be found at www.census.gov by searching in the American FactFinder data base.

3 Because the highest income category is “\$200,000 or more” per year, it is impossible to know precisely how many Maryland households have incomes in excess of \$360,000 per year.

Case Notes- Aleem v. Aleem ...

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The Court held that *talaq* violated the Equals Right Amendment to the Maryland Constitution because only a husband is able to obtain a *talaq* unless expressed permission is granted to the wife at the time of the marriage. In addition to the blatant violation of the Equals Right Amendment, with the use of a *talaq*, a husband is able to obtain a divorce with no notice to the wife and if the State of Maryland were to recognize the Pakistani divorce, it would abolish a wife's right to seek an equitable division of marital property. Therefore, since the tenements of the *talaq* are so contradictory to the public policy of the State of Maryland, the Court refused to grant comity.

Erin Darner Gable, Esquire, is a member of the MSBA Family & Juvenile Law Section Council.



CASE NOTE

By: Deborah L Webb, Esq.

Raul deArriz, et al v. Laura Klingler-deArriz

No. 07-480, September Term 2007 (Court of Special Appeals, file May 1, 2008)

On May 1, 2008, the Court of Special Appeals of Maryland issued its opinion in the case of *deArriz, et al. v. Klingler-deArriz*. The appellate court determined whether or not the trial court properly applied Maryland Rules 9-210 and 2-648 in preventing the husband's (appellant's) law firm, Brodsky, Greenblatt, Renehan & Pearlstein, Chtd. (hereinafter referred to as "Brodsky firm"), from establishing priority in the proceeds from the sale of the marital home over the monetary award granted to the wife (appellee).

Appellants, Raul deArriz and the Brodsky firm, appealed an Order entered by the Circuit Court for Montgomery County, Maryland granting the wife's Emergency Motion to Reconsider, To Revise and to Alter and/or Amend the Court's Order which ordered the clerk of the court to enter a money judgment in the amount of \$110,000.00 against the Brodsky firm in favor of the wife. Appellants filed their appeal and presented the following issues for appellate review:

1. Whether the trial court erroneously granted the wife's Emergency Motion.
2. Whether the trial court erroneously entered a monetary judgment in the amount of \$110,000.00 against the Brodsky firm in favor of the wife.

HOLDING

For the reasons set forth below, the appellate court reversed the judgment of the Circuit Court for Montgomery County and found that the trial court erroneously granted the wife's Emergency Motion and erroneously entered a money judgment in the amount of \$110,000 in favor of the wife against the Brodsky firm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties entered into a settlement agreement on December 14, 2005, which was incorporated, but not merged, into the parties' Judgment of Absolute Divorce. Pursuant to their settlement agreement, the parties agreed to sell the marital home. Following a seven day divorce trial on the merits, the trial judge made extensive findings of fact and rulings of law, which were set forth in her 39 page Memorandum Opinion that accompanied the Judgment of Absolute Divorce. Both were entered on April 28, 2006.

One of the issues before the appellate court was the order in the Judgment of Absolute that awarded the wife a monetary award in the amount of \$110,000.00 against the husband and commanded that said award be payable upon the settlement of the

sale of the former marital home. The trial judge made a critical decision when she did not reduce the monetary award to a judgment. She explained, on the record, that she was providing a benefit to the husband by preventing substantial interest accruing to him if the court entered a judgment but stayed its execution until the date of settlement.

On October 20, 2006, the parties entered into a contract to sell their home for \$1,075,000 and settlement was scheduled for January 16, 2007. Five days prior to settlement, on January 11, 2007, the parties received a draft settlement sheet. This was the first time that the wife learned that, on October 5, 2006, the Brodsky firm had filed a deed of trust in the amount of \$145,534.28, excluding interest, against the husband's interest in the former marital home.

Four days prior to settlement, on January 12, 2007, the Brodsky firm filed another deed of trust in the amount of \$101,862.30 excluding interest. Both of these liens totaling \$247,396.58 served as payment of the attorney's fees the husband incurred. On that same day, the husband consented to a judgment in the amount of \$22,993.98 for child support arrearages as a result of the filing of a petition for contempt filed by the Montgomery County Office of Child Support Enforcement. Consequently, at the time of settlement, there were four liens encumbering the marital home, which effectively eliminated the husband's interest therein.

Given that the husband would not receive any proceeds from the sale of the marital home, the wife objected to the Brodsky firm's liens taking priority over the monetary award to her. Settlement did not proceed as scheduled on January 16, 2007, because of the controversy regarding the Brodsky firm's deeds of trust.

On January 24, 2007, the husband filed an Emergency Motion to Appoint a Trustee to Sell the Former Marital Home and to Enforce the Parties' Agreement. In his Emergency Motion, the husband sought the following relief: (a) a trustee to be appointed to consummate the sale of the marital home; (b) the appointed trustee to be compensated for his/her service from the wife's net proceeds of sale; and (c) the Brodsky firm to be paid all of the net proceeds due and owing to the husband.

On January 30, 2007, the wife filed an opposition to the husband's emergency motion and filed her own emergency motion. She requested that the trial court revise the Judgment of

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Absolute Divorce *nunc pro tunc* which in essence would give the wife's monetary award priority over the Brodsky firm's two liens.

On February 8, 2007, the trial court heard oral arguments on each party's emergency motion. During that hearing, the Brodsky firm agreed to withdraw its lien in the amount of \$110,000 with the understanding that it would maintain its filing date for purposes of determining priority at a later court hearing. The trial court took the matter under advisement.

Settlement occurred on February 9, 2007. Pursuant to a consent order, the settlement company deposited \$110,000 into the court's registry.

On March 16, 2007, a second hearing took place and the parties disputed whether the Brodsky firm had a right to the funds in the court's registry. During the hearing, the trial court examined the ethical ramifications of the Brodsky firm's deed of trust in relation to Rules 1.7 and 1.8 of the Maryland Rules of Professional Conduct. The trial court again took the matter under advisement and scheduled another hearing for May 10, 2007.

On June 29, 2007, the trial court granted the wife's emergency motion. Pursuant to Md. Rule 2-648, the trial court ordered the clerk of the court to enter a money judgment against the Brodsky firm in the amount of \$110,000 in favor of the wife.

ANALYSIS

MARYLAND RULE 2-535

Appellants initially argued that the trial court erroneously granted the wife's emergency motion because the facts do not support a finding of fraud, mistake or irregularity. Appellants further argued that the trial court is not yielded "unfettered discretion" in revising an enrolled judgment on the ground of "fundamental fairness."

The wife argued that the trial court could revise the Judgment of Absolute Divorce, *nunc pro tunc*, pursuant to Maryland Rule 2-535(b), which provides that "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake or irregularity." She argued that the Judgment of Absolute Divorce and accompanying Memorandum Opinion clearly indicate that the trial court entered a money judgment for the monetary award as of the date of divorce and merely stayed its payment until the parties sold the home. Alternatively, the wife argued that, even if the court did not reduce the monetary award to a money judgment, the express language of the Memorandum Opinion demonstrates the court intended to do so and, thus, can fix the irregularity.

Appellants contended that the trial court did not have the authority to revise the Judgment of Divorce under Maryland Rule 2-535(b) and (d) because the "error" was not an irregularity or a clerical mistake.

At the May 10 hearing, both parties presented their arguments under Md. Rule 2-535. Also, both parties responded to the trial judge's query regarding the applicability of Md. Rules 9-210(b) and 2-648. The trial court ultimately granted the wife's requested relief but not based upon Md. Rule 2-535(b) which was the basis of her Emergency Motion. Instead, the trial court entered a money judgment in the amount of \$110,000 against the Brodsky firm in favor of the wife pursuant to Md. Rule 2-648. Throughout the three hearings and responsive pleadings filed, the wife consistently maintained that she was entitled to the \$100,000 held in the court registry. Consequently, by granting the wife's emergency motion, the court was ordering the wife's entitlement to those funds.

Upon review, the appellate court addressed each party's argument under Md. Rule 2-535(b). The appellate court held that the failure to reduce the monetary award to a judgment was not an irregularity or mistake. In support of its finding, the appellate court cited the case of *Weitz v. MacKenzie*, 273 Md. 628, 631 (1975). The Court of Appeals in *Weitz* held that an irregularity, which will permit a court to exercise revisory powers over an enrolled judgment is defined as "the doing or not doing of that, in the conduct of suit at law, which, conformable to the practice of the court, ought or ought not to be done." Thus, pursuant to Md. Rule 2-535(b), an irregularity is an "irregularity of process or procedure" and not an error "which is legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged." *Id.* The appellate court further cited *Thacker v. Hale*, 146 Md. App. 203, 221 (2002) (which cited *Home Indem. Co. v. Killian*, 94 Md. App. 205, 217 (1992), in support of the holding that there is no irregularity justifying the revisory powers under Rule 2-535(b) "if the judgment under attack was entered in conformity with the practice and procedures commonly used by the court that entered it."

Pursuant to Section 8-205(c), of the Md. Fam. Law Code Ann., the trial court may reduce to a judgment any monetary award to the extent that any part of the award is due and owing. In this case, the trial court intentionally decided not to enter such a judgment. Consequently, the trial court's failure to reduce the monetary award to a money judgment was not an irregularity or a clerical mistake. As such, the wife is unable to show an irregularity by clear and convincing evidence justifying the revisory powers under Md. Rule 2-535(b) because that the Judgment of Absolute Divorce was entered in

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conformity with the practice and procedures commonly used by the trial court.

MARYLAND RULES 9-210(b) and 2-648

To review the trial court's ruling, the appellate court needed to determine whether the husband was a non-complying obligor pursuant to Md. Rule 9-210(b) and whether the Brodsky firm was a transferee with knowledge under Md. Rule 2-648(b).

Appellants argued that the husband was not a non-complying obligor and that the Brodsky firm was not a transferee with knowledge; therefore, the trial court erroneously entered a money judgment against the Brodsky firm in favor of the wife. Moreover, the appellants argued that because the payment of the monetary award was not directed toward any specific or particular property, they cannot be subject to Md. Rules 9-210 and 2-648.

Md. Rule 9-210(b) provides, in part, "When the court has ordered... a monetary award, the property of a noncomplying obligor may be seized or sequestered in accordance with the procedures of Rules 2-648..." The appellate court held that, pursuant to Md. Rule 9-210(b), the husband was a non-complying obligor because he failed to pay the monetary award upon settlement of the sale of the marital home. This meant that the trial court could enter an order to seize his property to "compel compliance."

Next, the appellate court turned to Md. Rule 2-648 in determining how a court may order the seizure or sequestration of the appellant's property to the extent necessary to compel compliance with the Judgment of Absolute Divorce. Rule 2-648 provides:

(a) Generally. When a person fails to comply with a judgment prohibiting or mandating action, the court may order the seizure or sequestration of property of the noncomplying person to the extent necessary to compel compliance with the judgment and, in appropriate circumstances, may hold the person in contempt pursuant to Rules 15-206 and 15-207. When a person fails to comply with a judgment mandating action, the court may direct that the act be performed by some other person appointed by the court at the expense of the person failing to comply. When a person fails to comply with a judgment mandating the payment of money, the court may also enter a money judgment to the extent of any amount due.

(b) Against Transferee of Property. If property is transferred in violation of a judgment prohibiting or mandating action with respect to that property, and the property is in the hands of a transferee, the court may issue a subpoena for the transferee. If the court finds that the transferee had actual notice

of the judgment at the time of the transfer, the transferee shall be subject to the sanctions provided for in section (a) of this Rule. If the court finds that the transferee did not have actual notice, the court may enter an order upon such terms and conditions as justice may require.

In reviewing the applicability of Rule 2-648, the appellate court analyzed the Brodsky firm's claim of priority to the funds in the court's registry. The husband and the Brodsky firm entered into an agreement whereby the Brodsky firm imposed two liens, totaling \$247,396.58 on the husband's interest in the marital home, as payment of his attorney's fees. Perfection occurred at the time each deed of trust was filed and the Brodsky firm established a priority right in the marital home with respect to third party creditors. *See Messinger v. Eckenrode*, 162 Md. 63 (1932)(holding that liens are effective from the date of entry and among "several judgments against the same debtor they take effect according to their date and are entitled to be satisfied in order of their seniority...") When the Judgment of Absolute Divorce was entered and the monetary award was not reduced to a judgment, there was no other superseding liens on the property, other than the mortgage. In its opinion, the appellate court stated that the Brodsky firm's deeds of trust established the Brodsky firm's priority to the \$110,000 held in the registry. In support of its finding, the appellate court cited Md. Code Ann., Cts. & Jud. Proc. Section 11-401(2)(2006), "If indexed and recorded as prescribed by the Maryland Rules, a money judgment of a court constitutes a lien to the amount and from the date of the judgment..."

In further reviewing the trial court's application of Md. Rule 2-648, the appellate court noted that the trial court did not want to allow the husband to "blatantly disregard" the divorce decree by divesting himself of the funds to pay the monetary award. Given that the Brodsky firm held title to the money, the trial court issued a judgment against the firm under Md. Rule 2-648(b) finding that the firm "exposed itself to the sanctions" of the rule when it accepted the husband's remaining proceeds from the sale of the home when it knew the had an obligation to pay the wife a monetary award. However, in contrast to the trial court's reasoning for the application of Md. Rule 2-648, the appellate court noted that, in order to fall within the ambit of Md. Rule 2-648, the property must be "transferred in violation of a judgment prohibiting or mandating action." The appellate court determined that the Judgment of Absolute Divorce mandating the husband to pay a monetary award at the time of the settlement of the sale of the marital home did constitute a "judgment" under Md. Rule 2-648. However, the trial court's decision did not take into account the fact that the Judgment of Absolute Divorce did not mandate an action with respect to the husband's interest

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in the marital home. The Judgment of Absolute Divorce provided that “[appellee] shall be and is hereby granted a monetary award against [appellant] in the amount of \$110,000... said award shall be payable upon settlement of the sale of the family home.” The husband was not ordered to pay the monetary award from the proceeds of sale of the marital home and under *Hart v. Hart*, 169 Md. App. 151, 165 (2006) could not have been ordered to do so.

The Court of Special Appeals in *Hart* held that “Although courts [under then existing law] must consider the value of such jointly titled property in determining the amount of marital property, they [could] not transfer title as a means of adjusting the equities upon divorce. See F.L. Section 8-202(a)(3) ...Consequently, Maryland courts cannot order one spouse to pay a monetary award to the other from the proceeds of the house.” *Hart*, 169 Md. App. at 164-165.

The appellate court found that the trial court erred in entering a money judgment against the Brodsky firm pursuant to Md. Rule 2-648(b) because the trial court effectively ordered that the husband was obligated to pay the monetary award from the funds he received from the sale of the marital home. By entering such an order, the trial court ordered an unenforceable dictate regarding the husband’s use of the proceeds which contradicted statutory law (existing at that time) and case law. The appellate court referred to Md. Fam. Law Code Ann. Section 8-205(a)(2)(Repl. Vol. 2004)* ; *Hart*, 169 Md. App. 151 and *Frederick County Nat. Bank v. Shafer*, 87 Md. 54 (1898) (holding that an “owner is entitled to his property, and to the use of it, whether it be real estate, chattels, choses in action, or money; and no court has the right to lay hold of it, or interfere with his lawful use of it, simply to await the result of a suit at law”) in support of its position.

Equitable Lien.

The appellate court also determined that no equitable lien was established because the Judgment of Absolute Divorce did not mandate that the husband pay the monetary award from the proceeds yielded from the sale of the marital home. The appellate court relied on the case of *Pence v. Norwest Bank Minnesota, N.A.*, 363, Md. 267, 287 (citing *Chevy Chase Bank v. Chaires*, 350 Md. 716, 731 (1998)) in explaining how and when equitable liens are created. The Court of Appeals explained that “[t]he modern conception of a lien is that it is a right given by contract, statute or rule of law to have a debt or charge satisfied out of a particular property.” *Id.* at 287. No equitable lien was created in this case because the Judgment of Absolute Divorce did not mandate the husband to pay the monetary award from his share of the proceeds of sale from the sale of the marital home and no particular property was

identified from which the husband’s monetary award was to be paid to the wife.

Constructive Trust

The appellate court further decided that the Brodsky firm did not hold the funds in the court registry in a constructive trust for the wife’s benefit. The appellate court cited *Hartssock v. Strong*, 21 Md. App. 110, 118 (1974) in holding that, in most cases, unless there is an acquisition of property in which another individual has an equitable claim, no constructive trust may be imposed. Given that the wife had no interest to the husband’s interest in the marital home, the proceeds from the sale of the marital home did not belong to her. Hence, no construct trust was established.

Epilogue

The trial court viewed the actions of the husband and his attorneys in making the contemplated source of funds to satisfy the monetary award unavailable to the wife as a “conspiratorial alliance.” The trial court was troubled by the totality of the husband’s actions: (i) he ignored court orders by failing to pay child support for his two children in the amount of \$22,993.98, as well as alimony, for which the arrearage was \$44,370.02 at the time of trial; (ii) the husband failed to pay the wife her attorney’s fees pursuant to a court order that compelled him to pay them in monthly installments; and (iii) the husband transferred his remaining interest in the marital home to his attorneys, in order to deprive the wife the ability to recover her monetary award, which the trial court deemed as the most egregious action. The trial judge noted that there is a “possible conflict of interest created by the Brodsky [f]irm’s deeds of trust, which may run afoul of [Maryland Lawyer’s Rules of Professional Conduct] 1.7 and 1.8” Under the circumstances, the court noted that it was questionable whether the creation of the two liens was “fair and reasonable” to the husband. Moreover, it noted that by entering into the two liens and subsequently arguing to uphold them, the Brodsky firm exposed the husband to several detrimental scenarios including contempt, an interest bearing judgment and attachment of his other assets.

The trial court never made a determination of whether placing a lien against the husband’s interest created a conflict of interest with the Brodsky firm’s belief that it could provide competent and diligent representation to the husband. Given that neither party raised the issue of the validity of the deeds of trust in relation to the Maryland Rules of Professional Conduct and the trial court never ruled upon that issue, that issue was not properly before the appellate court pursuant to Md. Rule 8-131(a). The appellate court commented that “[B]luntly put, the trial court,

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understandably so, felt that it had been stung because it had been for appellant's benefit that, with clear purpose and intent, it had not entered a money judgment. Consequently, given that the genesis of the controversy at the core of this appeal is the particular action of the trial judge, we take no position in this opinion on whether ethical bounds were crossed. We leave the issue for another day and other fora."

SUMMARY

In conclusion, because the husband was a non-complying obligor pursuant to Md. Rule 9-210(b) but that the Brodsky firm was not a transferee with knowledge pursuant to Md. Rule 2-648(b), the trial court, (purporting to grant the wife's Emergency Motion that she filed pursuant to Md. Rule 2-535(b)), erred in granting the wife's Emergency Motion. The trial court also erred in entering a judgment for a monetary award to the wife against the Brodsky firm, which firm had obtained a judg-

ment against the proceeds from the sale of the marital home for its legal fees. For the reasons stated above, and given that the wife's monetary award against the husband was not reduced to a judgment, the Brodsky firm's lien had priority to the husband's interest in the proceeds of sale from the marital home.

Deborah L. Webb is a principal of Lerch, Early & Brewer, Chtd. located in Bethesda, Maryland and is a member of your Family and Juvenile Law Section Council focusing her practice in Family Law. If you have any questions or comments related to this article, please contact Ms. Webb at (301) 657-0725 or dlwebb@lerchearly.com.

*In 2006, the Generally Assembly amended Md. Fam. Law Code Ann. Section 8-205(a)(2) to permit the transfer of ownership of an interest in the real property jointly owned by the parties. However, the Amendment became effective October 1, 2006, after the case *sub judice* was filed and decided by the trial court.



Website of the Month

www.lawpractice.org

The web presence of the ABA Law Practice Management Section. As of September 2008 all previous issues are available online in the archives. Topics include marketing, finances, technology and more.

Great resource.

CASE NOTE:

Issues: Proof of mutual and voluntary separation—Monetary award—Attorney's fee award

By: Mary Kramer

***Flanagan v. Flanagan*; Court of Special Appeals, No 395, September Term 2007, filed September 10, 2008; Opinion by Judge Hollander**

Facts: The parties married November 23, 1984, and had no children. Wife Appellee left the family home February 2, 2005. Wife filed for absolute divorce on April 11, 2006, alleging constructive desertion. Husband answered, and filed a counter complaint for absolute divorce on the ground of actual desertion. Each party sought monetary award and counsel fees. At the time of the divorce hearing Husband was 68 and Wife was 64.

The parties filed a 9-207 joint statement of marital and non-marital property shortly before their divorce hearing agreeing that 4 items were marital property:

- 1-a home valued at \$165,000.00 and encumbered by a mortgage of \$91123.78 and a home equity loan of \$19998.76, leaving a net equity of \$53877.46.
- 2-Husband's retirement account valued at \$10,941.73.
- 3-Wife's 401(k) valued at \$2567.32, from which Wife had borrowed \$1886.84, which had a net value of \$640.48
- 4-Wife's 403(b) valued at \$1630.26

The joint statement further indicated that "The parties agree that all issues with regard to the remaining property that they hold have been resolved." Further evidence indicated that the parties each had credit card debt, and drove older automobiles. After the time of the separation Husband continued to make the payments on the mortgage and the equity loan. Wife paid rent on an apartment. Wife left \$3200 in a joint account when she left. Husband stated he used the money to pay joint expenses.

Husband worked at an auto parts store, worked part time as an auctioneer, and received social security. In 2006 his total income was \$39696. Wife worked as an administrator at Grayce B. Kerr Fund, earning \$47,844 in 2005, but contemplated retirement in October 2006. She expected to continue working after retirement, and would receive \$1061 in social security. Wife testified that she was taking medication for cholesterol, depression, and panic attacks, and was under the care of two therapists.

Wife claimed she left Husband because he was engaging in "internet sexual contacts", and was drinking excessively. Husband admitted to "prowl[ing]" for women on the internet, but stated it was due to sexual dysfunction. He further stated that after Wife had learned about his dalliance, she had assisted him in overcoming his sexual issue. He further stated that his drinking consisted of "a couple of cocktails" before dinner.

The trial judge awarded the parties a divorce on the grounds of a one year mutual and voluntary separation, notwithstanding the fact that neither party had filed a pleading alleging such. He further determined that the parties' joint statement indicated that all property issues other than the marital home had been resolved. He found that the home was worth \$165,000, subject to a mortgage of \$91,123.78 and other liens of \$19,998.76, leaving a net value of \$53,877.46. He ordered sale of the home, with the proceeds to be divided equally. The court then made a monetary award "adjustment" to Wife of \$30,000 which "may be paid to her from the net proceeds of the sale of the Kerr Avenue home." In addition, the judge awarded Wife \$2500 in counsel fees. The judge made a separate award to Husband of \$1,045.81 as Crawford contribution.

Husband appealed, asserting numerous errors, including 1) that the trial court erred in granting the divorce on the grounds of mutual and voluntary separation; 2) that the trial court erred in granting a monetary award that amounted to 87% of the total marital property in the case; 3) that the trial court erred in offsetting Wife's apartment rental from the award of Crawford credits to Husband; and 4) that the trial court erred in awarding counsel fees.

Holdings: On review, Husband contested the award of the divorce on the ground of voluntary separation. The Court of Special Appeals engaged in a detailed analysis of the proof necessary to establish that ground, noting that "the evidence must establish that the parties were separated voluntarily for the requisite period." Although it is true, the Court noted, that a separation that begins as a desertion may later become voluntary at a later date, the time for the 12 months of mutual and voluntary separation begins to run on the date that the parties agree to separate and not to resume the marital relationship, even if they actually separated earlier in time, and that this 12 months must have occurred prior to filing the complaint for divorce.

Surprisingly, after finding that the chancellor erred in granting the divorce on the ground of voluntary separation, the Court found the error to be harmless. It reasoned that both parties wanted a divorce, and that the evidence presented and findings of the trial judge would have been sufficient to support an award of divorce based on constructive desertion, a ground asserted by Wife.

The Court of Special Appeals found that the Chancellor abused his discretion in granting a monetary award that was the equiv-

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alent of 87% of the total value of marital property without an explanation as to why the award was so “startlingly large in light of the total value of the marital property.” The Court specifically noted that the parties, by agreeing to the division of certain property, had rendered that property non-marital in character, and the trial court was correct to exclude it from marital property. However, the trial court should have included the non-marital property in its analysis of the equities of the parties under FL Section 8-205(b)(2)-(3). The Court of Special Appeals vacated the monetary award, and remanded it.

With respect to the issue of Crawford credits, the trial court did not abuse its discretion in taking Wife’s apartment rental payments into account as an offset to Husband’s claim, since Husband had the benefit of the use of the home. However, the trial court should have considered the home equity payments as well as the mortgage payments in determining the amount of contribution that would be equitable. Thus, the award of contribution was vacated and remanded. A thorough review of the cases regarding Crawford credits is included in the decision.

Finally, the Court vacated the counsel fee award, not only because it vacated the monetary award, but also because the trial judge failed to make the necessary findings as to the financial needs and resources of each party and the relative justification for prosecuting or defending the action. In addition, the judge should have discussed the reasonableness of the fees.

Practice Considerations: The *Flanagan* case reminds us all that mutual and voluntary separation is not a “default setting” for when fault related grounds are undesirable. Facts must be brought forward (and corroborated) that demonstrate that the separation has continued for 12 months AFTER the date on which it became mutual and voluntary with the intention of ending the marriage, and that those 12 months preceded the filing of the complaint or petition.

Flanagan also adds piece to the monetary award puzzle, suggesting that a monetary award of 87% of the total marital property *without explanation as to why the award was so high* will not be upheld on appeal.

Flanagan further brings the issue of *Crawford* credits into the present, clarifying the level of discretion given the trier of fact, as well as alerting attorneys to the potential impact of the non-contributing spouse’s rental payments, and the potential of equity loan payments being eligible for inclusion in *Crawford* contribution.

Mary Kramer is a family law and juvenile master in Howard County Circuit Court. She is also the chair of the Howard County Bar Association Family Law Committee.

