

REPORTER

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Privacy and Online Access to Court Records

By Faith D. Dornbrand

Divorce lawyers are faced every day with issues of privacy. Our clients struggle to obtain resolution of intensely personal matters. Their finances, income, health and children's needs are all explored in the process of resolving a divorce case. In the past, we worried most about protecting the privacy of high-profile clients. We focused on handling these cases to protect the rich, the famous, and the powerful from public attention. But now technological advances in the judicial system pose new issues of privacy, not only to the newsworthy, but also to the average person seeking dispute resolution in the courts.

What is happening? Our courts have always been institutions of public record. Any person can go to the courthouse, look up a filed case, and obtain the actual case record. Anyone can have documents in the case file, including pleadings and exhibits, copied. In the past, this has been a time-consuming process requiring a researcher's physical presence at the courthouse. Now, however, court records are coming online. Our local courts, the courts in which divorce cases are filed and heard, are in the process of making certain information in their records available electronically. These records may soon be accessible by anyone, from the comfort of their own home, on any internet connection. This article will focus on developments in Maryland. Future articles will focus on the development of online case access in the District of Columbia and Virginia courts and how those jurisdictions are addressing privacy issues.

Why is the move towards remote access to information in court files of particular concern in family law cases? A divorce file often contains

not only full, legal names and dates of birth of every child of the family, but often current and prior addresses, the identity of employers, income data, tax returns, bank and investment account numbers and statements, psychological information about parents or children, and social security numbers. Indeed, statutes and court rules concerning family law cases sometimes require litigants to put such information in court filings. For example, statutes and rules specifying what must be in an earnings withholding order for child support and statutes concerning the registration of child support orders issued in other states, require such data. Remote, anonymous, inexpensive access to such files will pose new issues of privacy and increased risk of identify theft.

The federal courts have taken the lead in making case files available electronically. Over the last few years they have implemented a fairly uniform nationwide system of electronic filing of pleadings. Anyone can register to log in to the federal Pacer system. For a per-page fee, anyone can review a file, including images of the actual documents filed in a case.

State and local court systems have moved more slowly to set up remote access systems. Currently, in Maryland, users are able to subscribe and pay an annual fee to dial up the Circuit Court and District Court dockets. (Divorce cases are filed in Circuit Court but some types of family law matters—such as domestic violence cases—are also heard in the District Court). The docket entries in a given case—in other words the index to the filings and events in the case—can be viewed. Unlike the federal court system, in the Maryland state

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Planning for the Continued Enjoyment of the Family Vacation Home

By Patrick M. Schoshinski

In a traditional family-based estate plan, each spouse customarily desires that his or her assets pass to the other and, upon the death of the surviving spouse, any remaining assets be distributed equally among their children. In circumstances where the surviving spouse's estate consists of liquid assets, such as financial accounts and investments, or other assets which are likely to be sold, an estate plan that simply directs assets to be distributed in equal shares to the children generally will be sufficient. This is because each child will receive a separate share of the estate assets which he or she may deal with in any manner he or she wishes without affecting the interests of the other children. However, if you own a vacation home and you want it to remain in your family for the continued enjoyment of your children and future generations of your family, you should consider some special planning in order to avoid unnecessary conflict among those persons you intend to benefit.

Ideally, a vacation home is a place where you and your family can escape, put aside thoughts of your day-to-day obligations and impending deadlines and relax, even if only for a little while. Thus, the true value of the vacation residence comes not only from its fair market value but from the enjoyment and peace of mind it offers to you and your family. The enjoyment that a vacation home offers, however, does not come without responsibility and accountability.

During your lifetime, you, as the property owner, are responsible for payment of all the expenses associated with maintaining the home, such as property taxes, insurance, costs of improvements and repairs. You also are ultimately responsible for deciding who may use the property and when. In short, all decisions concerning the upkeep and use of the vacation home fall squarely on your shoulders. If you own a vacation home, consider including specific provisions in your estate plan concerning how your vacation home is to be used and maintained following your death. Doing so will enable you to pass both the tangible and intangible value of your vacation home to your children and future generations of your family.

Take, for example, a couple with three children who own a vacation home. Each child is married and has children. If the couple implements a traditional estate plan, then, upon the surviving spouse's death, each child will receive an equal one-third interest in the vacation residence. As a result, each child will have rights to use the property, and each child will be responsible for the payment of the expenses of maintaining the property, regardless of how much he or she uses the property.

If all of the children will use the vacation home for an equal number of days each year, and will amicably resolve any issues concerning the use, maintenance and repair of the property, and if each child's interest will remain under his or her control and ultimately pass to his or her descendants, then the traditional estate plan discussed above should suffice. However, these are some pretty big assumptions. Even if the couple anticipates that their children will resolve any issues among themselves, all interested persons will be better served if their estate plan includes provisions designed to address unforeseen circumstances.

For example, a child may relocate to another part of the country following the surviving parent's death and may not be able to use the vacation home as much as the other children, if at all. It is possible that two children and their families may decide to use the vacation home at the same time without notifying the others. Moreover, since each child owns his or her interest in the vacation home outright, he or she could transfer his or her interest to anyone he or she wishes even if that person is not acceptable to the other children. If a judgment is entered against a child, his or her creditors may seize his or her ownership interest.

One common approach to avoiding potential conflicts that may arise under these circumstances is to transfer the vacation home to a trust for the benefit of the children and future generations of the family. The trust could be established either during the owner's lifetime or upon death through a will or other testamentary instrument. The terms of the trust may set forth detailed instructions concerning how decisions are to be made with respect to the maintenance of the property, and

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by whom, and how children and their families are to provide notice to one another with respect to their use of the property. The trust could contain a provision preventing creditors from attaching a child's interest and provisions permitting a child's spouse and children to continue using the property following the child's death. In addition, if a child no longer desires to use the vacation property, the terms of the trust may provide a mechanism by which his or her interest will be purchased by the other children.

A trust is only one of the arrangements that a family might use for the continued ownership and management of a vacation home. In some situations, a family might choose to use a limited liability company, a partnership, or a tenancy in common agreement instead of a trust.

Each family is unique and each property is unique. The arrangements in any given situation should be tailored to meet the objectives of the owners and take into account the overall family dynamics. ●

court dial-up system, the actual court documents themselves are not imaged and have never been available for electronic review. Change is coming.

In January 2006, the Maryland judiciary introduced Phase 1 of its plan to provide statewide public internet access to information from Maryland court files. There is now free, online access to limited information concerning District Court and Circuit Court cases. Any member of the public can access this information. No registration or identifying log-in is necessary. No fee is being charged. The website is <http://casesearch.courts.state.md.us>.

The new Maryland state-wide system is up and running for the District and Circuit Courts for every county in the state, except that information from the Circuit Courts of Montgomery and Prince George's Counties is not yet available. The existing computer system in these two Circuit Courts is not compatible with the new state system. The goal is to have the Circuit Courts for these two jurisdictions participate in the statewide system sometime later this year.

What is available on the free Maryland website? Currently the information available is limited to the names of the litigants, the case numbers, the court, the case type, the case caption and the filing date. (The online listings contain a "date of birth" column, but this seems to be unused.) Thus, the current information available online in Phase 1 is extremely limited. In the second phase of the project, case dockets—the index of papers filed and all orders issued in the case—will be online. Once this occurs, the statewide system will have a comparable level of information available as is currently accessible in the fee-based, dial-up system. While the available information will remain limited, access will be free and not limited to subscribers.

It is unclear when the next phase of the statewide system will be implemented. Maryland still seems to be a long way from a system like the federal system in which not only case dockets, but also images of the actual papers filed in each court case will be viewable remotely. However, it appears inevitable that, in the future, more and more case materials will be available online.

In anticipation of significantly easier access to public records, the Maryland Court of Appeals at the end of October, 2004, adopted a new set of Court rules, Md. Rules 16-1000 et seq., governing access to court records. These rules on access to court records do not change the presumption of open court records. In many ways, they simply confirm existing law. For example, in any given case, a litigant can ask the court to close the record from public scrutiny, but the court must rule on such a request and apply existing case law "enunciated in decisions of the United States Supreme Court and the Maryland Court of Appeals." (Committee Note to Rule 16-1005). Public inspection of case records in certain kinds of proceedings, such as adoption or guardianship proceedings concerning children, delinquency, and child in need of assistance proceedings, is still not allowed.

In the divorce context, there are three provisions in the Maryland Rules of particular interest. Rule 16-1006(h) requires a custodian of records to deny inspection of a case record that "...consists of a medical or psychological report,

PASTERNAK & FIDIS, P.C.

NEWS

P&F welcomes a new associate, **Elizabeth Morris**, in the Divorce & Family Law Group. Liz comes to Bethesda after serving as the supervising attorney at the YWCA of Annapolis & Anne Arundel County Legal Services where she represented economically dependent spouses in divorce and custody proceedings. She has also acted as counsel for victims of domestic violence as a staff attorney at The Women's Law Center of Maryland, Inc., and was a law clerk for The Honorable Edward R.K. Hargadon of the Baltimore City Circuit Court. A *cum laude* graduate of Indiana University of Pennsylvania, Liz was awarded her Juris Doctor with honors from the University of Maryland School of Law. She is an active member of the Young Lawyers Division of the American Bar Association. Liz is also a member of the Young Lawyers Section of the Maryland State Bar Association and is the editor of its newsletter, *The Advocate*.

P & F partners, **Faith Dornbrand**, **Linda Ravdin** and **Marcia Fidis** were highlighted in the February, 2006 edition of *Washingtonian* magazine. The *Power Players* column notes that the addition of Faith to the Divorce & Family Law Group puts P & F in contention for "supremacy in the divorce-law field" in the metro area. *Washingtonian* also mentions the forthcoming publication of a treatise on premarital agreements co-authored by Linda and Marcia due out later this year.

Spotlight on Faith Dornbrand

Faith Dornbrand, one of the metro area's preeminent divorce lawyers, is the latest partner to join Pasternak & Fidis' growing domestic relations practice.

Faith is a Washington area native and a graduate of Winston Churchill High School in Potomac. As early as her first year in high school she had the idea of becoming a lawyer. Her involvement in student government and the debate team was a reflection of that interest. Knowing she would eventually go to law school, when she went to Yale University as an undergraduate, she had the freedom to explore her true love, English literature, without the pressure of worrying about how she would make a living. After she received her undergraduate degree (*magna cum laude*, Phi Beta Kappa), she got in a car with a friend and headed for San Francisco with a plan to work for a year. She had no job waiting for her there but she had friends from Yale who would take her in.

In San Francisco she got a job as a paralegal with a big San Francisco law firm where she worked on a huge antitrust case. The work was dull but she had a window office with a magnificent view of San Francisco Bay. "I had a productive year," Faith reports. "I positioned my desk with the front flat against the huge window, and I spent the year watching the ships cruise in and out of the harbor, contemplating Alcatraz island, and studying fog patterns." When the time came to go back to school, she applied to the Ph.D. program in English literature at University of California at Berkeley and as well as the law school, Boalt Hall. After being accepted at both, she decided the world of law had more to offer than the life of an English professor. Her decision was inspired in part by the role lawyers played in the civil rights movement, changing society to make it more inclusive and fair. During law school, Faith worked at a public interest advocacy group, the consumer affairs division of the F.T.C., and Legal Aid.

When Faith thought about what she would eventually do as a lawyer, specializing in divorce was not one of the options she considered. While in law school she was recruited to become an associate at Hogan & Hartson. H & H had a public interest law department, which made the firm uniquely appealing to her. Naively, she thought she would be practicing public interest law fulltime with all the resources of a big law firm at her disposal, without any pressure to produce revenue. Of course, the real world intruded. Moreover,

because big firm litigation tends to involve huge cases that take years to get to trial, Faith became frustrated at the lack of meaningful trial experience. She decided to look for a high quality small firm where she would be able to get into court and try cases.

That led her to the firm then known as Sherman, Meehan, Curtin & Fox. Peter Sherman, who interviewed her for a position as associate and who became her mentor, asked her if she would be willing to handle family law matters, as well as personal injury matters and other kinds of cases. "Peter explained to me," says Faith, "that if I was willing to do divorce cases, I would certainly have the opportunity to get into court, because people can be so combative in family law matters. When I said I would take any kind of case that would get me into court, I had no idea what I was getting myself into!" What started out merely as a way to get experience became something for which Faith learned she had an affinity. Her career as a family lawyer was launched, and she did get plenty of trial experience. "It's ironic," says Faith, "I was originally drawn to family law so that I could get into court; now my experience and reputation as a trial attorney is what helps me keep many of my clients from having to go to court." Twenty plus years later, Faith still finds tremendous satisfaction in the practice of family law.

Assisting clients through what for many is the most difficult time in their lives can be extraordinarily stressful. When asked how she maintains her sanity, Faith says the key is not to forget one's own family while working hard to help other people through the crisis in theirs. Faith has two sons who attend college out-of-state. "I went to every soccer game I could get to while the boys were growing up," says Faith, "and actually learned to enjoy the game." Handling divorces has given her a heightened sense of appreciation for her own children and for "the wondrous gift" of being able to nurture them and watch them grow to adulthood.

Among the influences in her professional life, she cites the writings of Jake Stein about professionalism. "As a young advocate," reports Faith, "I didn't quite get what he meant when he would preach that the lawyer for the opposing party is not your enemy. As the years went on, that advice really resonated with me. He was right—having experienced, competent counsel on the other side of the table often helps you get a reasonable result for your client." ●

Privacy Alert

If you had a Maryland court proceeding in which private information was included in a court filing, or in exhibits in hearings, you might want to contact an attorney to discuss protecting that information from public scrutiny. You should consider this if your (or your family member's) tax returns were put into evidence, if documents were filed or put into evidence containing social security numbers or if medical or psychological reports were filed or received in your case.

or record from a hospital, physician, psychologist or other professional health care provider, and... contains medical or psychological information about an individual." Rule 16-1006(i) requires a records custodian to deny access to "a case record that consists of the federal or Maryland income tax return of an individual." Rule 16-1007(c) states a custodian shall deny inspection of a case record "or part of a case record" that would reveal any part of the social security or Federal Identification Number of an individual, other than the last four digits."

The court clerks will not scrutinize old case files to find such information and protect it. Affirmative action will have to be taken by anyone concerned with data currently contained in the court files of family law cases. Any litigant who submits or previously submitted private information to a court, in filings, attachments to filings, or exhibits at hearings, even in cases now closed, might want to discuss with his or her lawyer whether and what steps should be taken to protect sensitive information in public records.

The new Maryland rules begin to address the need to protect private information in court records. Several bills have been introduced in the legislature this session to further address these issues. The need to protect private data, at a time when more personal information is available more easily and cheaply than ever before, means lawyers, judges, the legislature, and litigants, will be grappling with the best way to address these issues for years to come. ●

Off The TOPA My Head

By Mitchell I. Alkon

Do you know about TOPA? If you are a landlord or tenant in the District of Columbia, or contemplating becoming one, you should. TOPA restricts a landlord's right to sell residential property and provides for a tenant's right to purchase leased property.

The Tenant Opportunity to Purchase Act ("TOPA") is found in Title IV of D.C. Act 3-86, the Rental Housing Conversion and Sale Act of 1980. Born of concerns that the District's rental housing stock was being depleted and to protect tenants in the event of a sale of their rental homes, TOPA confers on tenants, or a tenants' association, a first right to purchase prior to a sale or demolition of residential real property.

TOPA provides detailed requirements with which a landlord who proposes to sell property must comply:

- The landlord must notify the tenant by issuing him or her an Offer of Sale, stating the sale price of the property, the financing arrangements acceptable to the landlord, and other material terms of sale.
- The tenant has thirty days to provide the landlord and the Condominium and Cooperative Conversion and Sales Branch of the District of Columbia Department of Consumer and Regulatory Affairs with a written statement of interest in purchasing the property. If the tenant fails to provide the written statement within the thirty-day period, the tenant's rights under the Offer of Sale expire, except as to the tenant's right of first refusal, discussed below.
- If the tenant submits a written statement of interest, he or she has a minimum of sixty additional days to negotiate a sales contract.
- The landlord may require a deposit of no more than 5% of the contract price, and the deposit must be refunded if the tenant is unable in good faith to perform under the contract.
- The purchasing tenant has a minimum of sixty days to secure financing and go to settlement. If a lending institution or agency estimates that a financing decision will be made within ninety days of contract ratification, the landlord must provide the tenant with an extension of time consistent with the lender's written estimate.

- If applicable, the selling landlord must provide the purchaser tenant with information regarding the property, including operating income and expenses, capital expenditures, and recent rent rolls.

Tenants also have significant rights after the landlord has signed a contract to sell the property to a third party:

- The landlord must provide a copy of the contract to the tenant.
- The tenant has a fifteen-day right of first refusal period to match the contract. The tenant's right of first refusal applies even if the tenant did not submit a statement of interest or declined to negotiate a sales contract after having received an Offer of Sale.
- If the landlord signs a contract with a purchaser that is more than ten percent less than the price offered to the tenant, or upon other terms that constitute bad faith bargaining, then a new Offer of Sale notice must be issued to the tenant.
- If the property has not been sold within 180 days from the date of the Offer of Sale, the landlord must repeat the same steps described above if it intends to continue to attempt to sell the property.

Although a tenant cannot waive its right to receive an Offer of Sale, a tenant can assign its rights for consideration. In *Allman v. Snyder*, decided December 15, 2005, the District of Columbia Court of Appeals held that, under TOPA, a tenant has an unrestricted right to assign his or her rights and the assignment does not lapse even if the tenant moves out of the property.

The foregoing describes a relatively simple TOPA situation. TOPA becomes more complicated when the property being sold is a multi-unit building (e.g., an apartment building). In that event, each tenant has his or her own TOPA rights. As a result, there can be two or more tenant claims, with each tenant claiming a superior right of purchase. A multi-unit building (5 or more rental units) must form a tenants' association and register it within a certain time period.

Some transactions are exempt from TOPA. These include a transfer, including a sale, by a decedent's estate to a member of the decedent's family, and transfers between husband and wife, parent and child, domestic partners,

siblings, and grandparent and grandchild. There are many other exemptions. Certain exemptions require a Notice of Transfer while others do not.

Selling landlords have tried to come up with methods of selling property that avoid application of TOPA. For example, an owner of an apartment building sold 95% of the interest in the building, retaining 5% and contended that this did not constitute a sale within the purview of the Act. The Superior Court of the District of Columbia disagreed and held that the sale was governed by the Act. See *New Capitol Park Plaza Tenants Association et al., v. D.C. et al* (Superior Court No. 04-CA-7465). To close this apparent loophole, the District of Columbia Council amended the Act to, among other things, broaden the definition of the word "sale."

In sum, tenants have substantial purchase rights under TOPA which landlords must honor before a sale to a third party can be consummated. Conversely, tenants should be aware of the value of their TOPA rights. A third party interested in purchasing tenant-occupied real estate in the District of Columbia must consider the impact TOPA rights can have on the purchase transaction and on any future sale. Potential buyers should also consider that title insurance to cover potential TOPA claims may not be readily available or may be offered only on a special risk basis. ●

TOPA is a complicated statute. We recommend that property owners contact an attorney prior to purchasing or selling rental property in the District of Columbia or when presented with tenant rights issues. Our firm is available to assist with such issues and with title and escrow responsibilities, serving as the title company, and closing transactions. We, at Pasternak & Fidus, P.C., are experienced in working with purchasers, lenders and realtors to effect smooth and successful residential and commercial real estate closings.

The D.C. Government has forms in English and Spanish. The forms, as well as information about landlord obligations and tenant rights under the Act, can be obtained from the District of Columbia Condominium and Cooperative Conversion and Sales Branch at 941 N. Capital St., NE, Room 7100, Washington, D.C. 20002; telephone number 202-442-4610.

PASTERNAK & FIDIS, P.C.

NEWS

The Estate & Planning Administration Group is also growing with the addition of **Sean Flaim** as a Probate Paralegal. Sean is an experienced estate administration paralegal who has worked for firms in Washington, D.C., and Minneapolis, MN. Sean has a background in chemistry and medicine and worked as a research chemist before he developed an interest in law. He is a graduate of the University of Minnesota and attended the Medical College of Ohio.

Nancy Fax has been named as the Maryland State Chair of the American College of Trust and Estate Counsel effective March, 2006.

P & F partners, **Linda Ravdin** and **Vicki Viramontes-LaFree** will be teaching a continuing legal education seminar on division of international organization pension plans at divorce. The program, to be held on March 22, 2006, is sponsored by Legal Services of Northern Virginia.

Maryland State Bar Association President, and P&F partner, **Mike Conroy**, issued a press release in late January, 2006 in response to calls for the

impeachment of Judge Brooke Murdock following her decision on same sex marriage. Speaking for the Maryland State Bar Association, Mike urged those on both sides of this contentious issue to recognize the "ongoing challenge of balancing conflicting freedoms" faced by dedicated and independent judges. "All of us, whatever our opinions of the answer, should acknowledge the legal process, the parties' respect for the rule of law... and the importance of public servants like Judge Murdock who ... work to protect those cherished values."

P & F's Divorce & Family Law Group has added **Deborah Cathers** to their support team as a paralegal. Deb has a wide variety of experience in both family law and general litigation in D.C., Maryland and Virginia. She has a Certificate in Paralegal Studies from the University of Maryland and will shortly be awarded a B.A. in Legal Studies from UMD. A dedicated volunteer, Deb was the Executive Director of a community food bank for many years, was a Girl Scout leader, and for five years was the Coordinator for Montgomery County of the Marine Corps' Toys for Tots campaign.



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