PASTERNAK & FIDIS
REPORTER

Reducing the Impact of Commercial Tenant Bankruptcy

Jason W. Henderson

The number of commercial tenant bankruptcies is rapidly increasing. No matter how financially sound a tenant seems at lease inception, there's no guarantee that the tenant won't become another statistic in this alarming trend. So, as a landlord it's important to take all possible steps to protect your interests. Once a tenant files for bankruptcy, bankruptcy laws control what you can collect from the bankrupt tenant or its court-appointed trustee and what can be done with the tenant's lease. As a result, the landlord can end up losing a lot of money or having to deal with an undesirable third party in the tenant's space.

Commercial Tenant Bankruptcy Basics

When a commercial tenant files for bankruptcy protection, the federal bankruptcy code permits the tenant or the tenant's trustee to either assume or reject the tenant's unexpired lease. If the trustee or tenant assumes the lease, the tenant must correct all lease violations, continue to pay rent, stay in the space, and provide adequate assurance that it will meet the lease obligations. The trustee or tenant will also have the right to assign the lease to a third party upon demonstrating to the bankruptcy court adequate assurance of future continued performance of lease obligations.

If the trustee or tenant rejects the lease, the tenant will stop paying rent and move out of the space. In that circumstance, the landlord will likely want to be compensated for early lease termination. However, most landlords will only be able to make a claim, as an unsecured creditor, for damages which cannot exceed the greater of: 1) one year's rent, or 2) 15 percent of the rent for the remaining lease term not to exceed three years.

Finally, the law of most jurisdictions entitles the landlord to collect rent from the bankrupt tenant or its trustee for the period after the tenant files the bankruptcy petition and before the tenant or trustee assumes or rejects the lease. However, it is worth noting that some forms of additional rent, e.g. attorneys' fees, may be hard to recover.

How a Landlord May Protect Itself in the Lease

If your lease is like the most common commercial leases in use, it may not offer any protection if a tenant goes bankrupt. For example, the most typical language relating to tenant bankruptcy or insolvency found in commercial leases reads as follows:

> Events of Default – If tenant files a bankruptcy petition or if involuntary proceedings under any bankruptcy laws or insolvency act are initiated against the tenant the landlord shall have the right to terminate the lease.

The problem for landlords with language similar to the example above is that this type of clause is usually unenforceable under the current federal bankruptcy code. So, what can a commercial landlord do to improve its lease and reduce the impact of a tenant bankruptcy? The answer: Retool your lease and get help negotiating it.

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"Finding Good Financial Help" in the January, 2009 issue of *Washingtonian* names three P & F partners in their list of the area's top financial planners, wealth managers, accountants and estate planners. **Nancy Fax**, **Marcia Fidis** and **Alfred Pasternak** are among the 67 estate experts who were chosen by a *Washingtonian* survey of hundreds of financial experts who were asked: "Whom would you trust with your own money?" Ms. Fax was highlighted as a "top vote-getter." All three partners are fellows of the American College of Trust and Estate Counsel (ACTEC). Ms. Fax is an ACTEC Regent. The *Washingtonian* article suggests those looking for an estate attorney ask for ACTEC credentials because "Only persons who...are recognized by their peers are invited to become fellows of the college."

Reducing the Impact of Commercial Tenant Bankruptcy

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Below are a few concepts that should be negotiated with a prospective tenant and inserted into a commercial lease to help reduce or eliminate the impact of a tenant bankruptcy:

- Consider adding lease language to the list of the tenant's "Events of Default" a clause that provides that a decline in the tenant's net worth will constitute a material lease default entitling the landlord to terminate the lease.

  Benefit: The landlord may benefit significantly if it can terminate the lease before the tenant files for bankruptcy because, if the lease is terminated prior to the tenant filing for bankruptcy, the lease will not be considered part of the bankrupt tenant's assets.

- Get enough security at lease inception to cover up front lease costs such as tenant improvements and brokerage fees.

  Benefit: If the tenant goes bankrupt and the landlord does not negotiate for this contingency and get the security it needs at lease inception, the landlord is not likely to recover these costs once the tenant files bankruptcy.

- Restrict the tenant's ability to assign the lease.

  Benefit: If a bankrupt tenant or its trustee has assumed the lease, it can then assign it. If this happens, the landlord may be forced to accept an assignment of the lease with little say in whom the new tenant will be. This can be especially troublesome if a potential assignee of the lease will have a negative impact on the building or center where the space is located.

- Make lease rejection a default. Add language that states that if, after a tenant files a petition in bankruptcy or insolvency under federal bankruptcy laws or under any state insolvency act, the tenant or its trustee rejects the lease, that the rejection will cause a lease default.

  Benefit: Although the law is unsettled on the effect of a tenant rejecting an unexpired lease, this idea may be helpful in terminating the lease and getting the space back.

In order to protect your interests as a landlord you must take advantage of the opportunity to negotiate lease terms with all commercial tenants to minimize the potential harm that may be caused by tenant bankruptcy.

Washingtonian (February 2009) named P & F partners **Linda Ravdin** and **Faith Dornbrand** in its latest list of top area divorce lawyers. "Breaking Up Is Hard to Do" cautions against "using someone who doesn't practice regularly in the field," and calls Ms. Ravdin "an experienced pro" who is "the one to call if you're interested in breaking - or forcing a spouse to live up to - a prenup."

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Adjusting Alimony and Child Support Payments in Economically Troubled Times

Faith D. Dornbrand

As the economic tsunami batters the nation, divorced spouses and divorced parents battle a sea change in their own households. What if you lose a job? Or just make less money than you used to? What if you can't afford to continue the alimony or child support payments you are making? Or conversely, what if you can't make ends meet on the alimony or child support you have been receiving? Here are some of the key legal issues and factors to consider with your lawyer in assessing your situation.

Can child support be modified?

Yes, child support is always modifiable. This is true regardless of whether support was set initially in an agreement (sometimes called a Separation and Property Settlement Agreement or a Marital Settlement Agreement), or was set by a court. The state has a duty to protect the well-being of children; to carry out that duty the court can review and modify a parental agreement for support of a minor child. In Maryland and Virginia, child support is payable until the later of age 18 or high school graduation (up to age 19). In D.C., child support is payable until age 21.

What do I have to prove to modify child support?

To modify child support, you generally have to show that there has been a "substantial and material change in circumstances" from the time child support was set. This is the standard in Maryland and Virginia. D.C. has the same standard for modification. However, there is some case law that can

Anne (Jan) White, a partner in the Divorce and Family Law Group was named to the 2009 edition of *Best Lawyers.*

P & F attorney **Morriah Horani** is quoted in the February, 2009 issue of *Washingtonian* on the subject of pets who are caught up in custody disputes during a divorce ("Who Gets the Dog?") Ms. Horani's quoted advice: "start a paper trail" if you want to make sure you can keep Fido because "sharing custody of a pet can be tricky." See Ms. Horani's in-depth treatment of this topic in *P & F Reporter* (Winter 2008), "Strategies for Winning the Dog Fight: Pets and Divorce."

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Spotlight on Jason Henderson

Jason Henderson joined Pasternak & Fidis in 2004 and was promoted to principal in January 2007. Along with Vicki Viramontes-LaFree in the Divorce and Family Law Group and Anne Coventry in the Estate Planning and Administration Group, both of whom joined the firm as associates and became partners, he forms the nucleus of the future leadership of the firm.

Jason practices with the firm's Business, Real Estate and Litigation Group where he concentrates in business and commercial matters, such as construction contract disputes, real estate matters of all kinds, including commercial and residential leasing, landlord-tenant disputes, creditor representation, and fiduciary disputes. His clients have included Major League Baseball, national home builders, real estate trusts and local businesses.

Jason was born and spent his early years in Denver, then moved with his family to Dallas for three years. From there the family came to Maryland. He graduated from Sherwood High School in Sandy Spring, Maryland, then went to University of Maryland, Baltimore County, for a B.A. with a double major in political science and sociology.

After graduation Jason pursued his interest in politics, working as an intern for Rep. James A. Barcia from the 5th District of Michigan in the 104th Congress. After the internship, he became executive director of a Capitol Hill lobby aimed at eliminating corporate welfare and protecting the social security trust fund. He also chaired a political action committee associated with the lobby. Jason's interest in politics naturally led him to law school.

In the fall of 1996 he entered Syracuse University College of Law, receiving his law degree in 1999. Following law school he worked in the in-house contracting division of a national health insurance company but found that the work did not utilize all of his newly developed legal skills. He has always envisioned being involved in politics, but once he passed the Maryland Bar in 2001 he decided that private practice would be where he would have the opportunity to practice law and develop his own practice. Thus, in 2001 he launched his career in private practice, becoming associated with a firm in Bethesda, Maryland.

Jason credits Roger Hayden and Mitchell Alkon, senior partners in the firm's Business, Real Estate, and Litigation Group, and Hon. J. Michael Conroy, District Court of Maryland, Montgomery County, a partner in the firm before he became a judge, as mentors. Their approaches to preparing a case were totally different and working with each was a great learning experience.

Jason married his law school sweetheart, Erika, in 2001. Jason claims that convincing Erika, a partner at a large Washington, D.C. law firm, to marry him may have been his greatest achievement as an advocate. Together they have a daughter who is two and a half years old and another daughter due in April. The challenge of balancing their work and personal life is always there. However, Jason and Erika do a lot of planning and try not to panic when the whole plan goes out the window.

Among his most satisfying experiences as a lawyer have been several pro-bono matters. In one of his more memorable pro-bono cases, the client, a decorated Army nurse who had served three tours in Iraq, had been swindled by an investigative firm she hired to assist her in a divorce proceeding. The case went to trial and the nurse prevailed. Afterwards, her base commander called to thank Jason for his efforts on her behalf.

When he's not practicing law, Jason likes to spend time with his family, participate in challenging adventure races, play poker and read.

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Adjusting Alimony and Child Support Payments in Economically Troubled Times

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create additional obstacles and limits on modification of child support in the District. A court decides on a case by case basis whether there has been a material change in circumstances. The court looks at the facts of each specific situation. An involuntary and meaningful reduction in the income of either parent can constitute the kind of changed circumstance that justifies relief.

How do I get child support changed?

You can file an action in court to modify child support. The court will hold a hearing and assess the evidence. The judge will then make a ruling allowing or denying modification.

Another way to modify support is by agreement. Perhaps you and your co-parent can acknowledge a temporary or permanent change in financial circumstances and reach your own solution to the problem. Even when two parents are in general agreement about a modification, or believe they can work out an acceptable solution, each should consult with an attorney as early as possible. Legal pitfalls can threaten even a consensual resolution. Examples of such pitfalls include:

--The timing pitfall

In Maryland, D.C. and Virginia, a child support order can only be modified retroactively to the date an action seeking to modify support was filed. Suppose parents negotiate about modification over a period of several months, fail to reach agreement and then one parent files suit. The parent seeking a change can only be awarded modification from the date of filing; he or she will have lost the right to a modification for the period of the negotiations.

--The failure to get a new court order pitfall

A court may not enforce a private modification agreement that purports to change a child support court order. Failure to get a new court order adopting the agreed modification terms can subject the payor-parent to a suit for arrearages.

My marital settlement agreement provides for me to pay my child's college expenses. Do I still have to do so even though I lost my job?

Generally, yes. A contractual commitment to pay for college or health expenses (or any other expenses of a child) after that child reaches the cutoff age for child support, is not a "child support" obligation. No court, in the absence of an agreement, can order a parent to provide support for an adult, healthy child, and no court has the power to alter the terms of a private contract providing for post-majority payments.

In D.C. a court can award an amount of support up to age 21 that includes college expenses and can modify its order. The court cannot modify that portion of a contract that provides for a parent to pay college expenses incurred after the child turns 21.

What about alimony—is it modifiable?

Alimony awarded by a court can be modified by that court. However, a court that previously awarded short term alimony, as opposed to indefinite alimony, might not have the power—or inclination---to modify such an award even in times of vast economic change.

A well-drafted marital contract will specify whether alimony is modifiable. Courts in Maryland and Virginia will honor a contract that says alimony is non-modifiable. In D.C., however, if the court adopts the agreement into the judgment of divorce, it may be able to modify the contract alimony terms even when the agreement says alimony is not modifiable.

What do I have to prove to change court-awarded alimony?

In all three local jurisdictions, you have to prove that there has been a material change in circumstances. There are slight variations to this requirement. For example, in Virginia, you might also have to establish that the change in circumstance was "not reasonably in the contemplation of the parties when the award was made." A material change in circumstances may consist of a change in needs or a change in ability to pay.

How do I change alimony? Are there pitfalls to be avoided?

The processes described above–negotiation or litigation—are also available for changing alimony. There are similar pitfalls. For example, in Virginia and D.C. alimony cannot be changed retroactively. In Maryland, however, alimony (but not child support!) may in some circumstances be modifiable retroactively to a date preceding the filing of a lawsuit requesting such a change. Additionally, since alimony, unlike child support, is typically taxable to the recipient, there are tax rules that should be considered. The lesson to be drawn warrants repeating—even if you think you and your ex-spouse can reach an agreement to change alimony, you need to consult with an attorney as early as possible to address issues that might not be apparent to you.

I am eligible to retire. Can I stop paying alimony after retirement?

Many people are surprised to learn that court-ordered alimony does not automatically terminate or reduce when an obligor retires. A payor can't assume that upon retirement, he or she can terminate or lower alimony payments. The reason for the retirement and the age of the payor are significant factors in assessing a requested reduction. A 60-year old in good health who voluntarily retires may not get a reduction. A 70-year old who is forced to retire by age or poor health may get relief. There is no bright line rule in Maryland, D.C. or Virginia that a person who reaches a specific age--such as 65 or 67 or 70--has a right to retire and receive a reduction in alimony.

The value of my 401(k) has tanked. How does that affect alimony?

It depends. If alimony was court-ordered or was set in a contract that is modifiable, modification may be available. But a mere change in value of assets may not be enough to warrant a reduction in a support obligation.

If alimony was established in a non-modifiable contract, the contract terms will usually control. If you initially waived all rights to alimony, you won't later be able to get it even if your share of retirement assets is no longer adequate to pay your living expenses. Similarly, if you agreed in a non-modifiable contract to a reduced level of alimony upon reaching retirement age, you will also be out of luck, even if the assets now available for living expenses during retirement are far less than you anticipated.

Conclusion

All of us hope for a complete and swift reversal of the economic storm raging about us. Until then, all of us have to address the painful and complex array of issues posed by changing economic realities. The issues addressed in this article are just some of the issues faced by divorced or separated individuals. While a person in economic distress may want to avoid the expense of consulting with an attorney, failure to do so may result in more substantial financial consequences in the future.

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Take-Backs and Taxes: What Rules Govern the Gift of an Engagement Ring?

Morriah H. Horani
Anne W. Coventry

"[T]he common use of diamonds for engagement rings is not thousands of years old, as some assume. In fact, the tradition only took off in the late 1930s when De Beers, the former diamond cartel, turned to the U.S. consumer to lift its business out of financial difficulties by selling diamonds as engagement rings." Ashman, Angela, "No Diamond Ring? It's OK; He Still Loves You. Probably," *Columbia News Service*; The Journalism School at Columbia University (November 1, 2005). De Beers has all of us believing that tradition calls for a diamond engagement ring costing at least two months of the donor's salary. With so much bling in play in so many engagements these days, what are the rules?

The Rules About Gifts

The Emily Post Institute, arbiter of all things wedding-etiquette, is clear on the subject. "It may be an exquisite 6.1 carat pink diamond ring worth more than a million dollars, but the etiquette guidelines remain the same as for any broken engagement. If an engagement is broken, the bride should immediately return the ring to her former fiancé. The only 'but' in this case is if the ring is a family heirloom of the bride's. She should then keep the ring." (*http://www.emilypost.com/weddings/tips/broken_engagement.htm*.)

Pasternak & Fidis, P.C. is pleased to announce that **Anne W. Coventry** has become a Shareholder in the Firm. Ms. Coventry, who joined the Firm as a Senior Associate in 2007, is a member of the Estate Planning & Administration Group where she concentrates in sophisticated estate planning for high net-worth individuals and families. Her expertise includes federal estate and gift tax matters, estate planning with qualified retirement assets, life insurance, deferred compensation and planned charitable giving. She is a graduate of the Marshall Wythe School of Law at the College of William & Mary where she was on the Law Review and was named to the Order of the Coif. Ms. Coventry is a member of the Maryland, Virginia and District of Columbia Bars.

There is a divergence of opinion across the states about when an engagement ring must be returned. In the early 20th century, many states allowed suits for breach of promise to marry and alienation of affection. These contract-based legal theories allowed for money damages for a broken engagement. Legislatures began to abolish these actions due to the growing belief that they had become a legal menace. Statutes abolishing such proceedings are often referred to as "heart balm" laws. Maryland, the District of Columbia, and Virginia all have a version.

Prior to heart balm laws, courts used a fault-based test to determine the party entitled to keep the ring. Thus a jilted woman got to keep the bounty. Some states, such as California, still consider fault. Today, in most states, courts do not consider fault. Rather, they apply the law of conditional gifts to the dispute. This theory holds that the engagement ring is a conditional gift in contemplation of marriage and the gift is not complete until marriage. If the marriage does not occur, the ring must be returned to the donor. Some have argued that an engagement ring was given on the condition that the parties remain married so that the court in a marital dissolution proceeding could require the return of the ring. Such a claim won in a 1999 Virginia trial in *Reynolds v. Reynolds*.

Maryland has adopted the no-fault, conditional gift rule. The District of Columbia also appears to follow it. Virginia's trial courts, however, have issued motley and sometimes conflicting opinions about engagement ring return. Opinions from the Circuit Court of Fairfax County and the Circuit Court of Nelson County seem to follow the no-fault, conditional gift paradigm.

A 2006 opinion from the Circuit Court of the City of Newport News, *Georgalas v. Kilgore*, 73 Va. Cir. 34 (2006), bucked the trend. The case involved a man who sued his former fiancée for return of a $25,000 engagement ring. The court refused his request, citing the heart balm statute. The court said the man was, in effect, "seek[ing] damages incurred as a result of 'breach of promise to marry.'" The court also reasoned that the broken promise to marry was not a valid contract because Virginia law requires that contracts relating to marriage be in writing to be enforceable. Virginia's higher courts have yet to clarify the law.

Nancy Fax and **Marcia Fidis** were named among the top 25 women lawyers in the 2009 edition of *Maryland Super Lawyers*. Ms. Fax was also listed among the top 50 lawyers in the state. **Faith Dornbrand**, **Linda Ravdin** and **Anne (Jan) White** were listed for the practice area of Family Law and **N. Alfred Pasternak**, along with Ms. Fax and Ms. Fidis, were listed for Estate Planning & Probate.

The Rules About Taxes

When an expensive ring is given at engagement, it may trigger tax consequences. According to federal gift tax laws, if a donor makes one or more gifts to a single recipient in 2009 that total more than $13,000, he or she has made a taxable gift and must file a gift tax return. Anything below that need not be reported and has no gift tax consequences. Making a taxable gift does not necessarily mean the donor owes gift tax. Every individual has a lifetime gift tax exemption of $1 million. To the extent the donor's total gifts to a single individual in a single year exceed the annual exclusion amount, the taxable portion of the gift will consume some of the donor's lifetime gift tax exemption.

There are distinct concepts here: (i) the gift tax annual exclusion; and (ii) the lifetime gift tax exemption. The annual exclusion for 2009 is $13,000 per donor, per recipient, per year. A donor can give away $13,000 every year to as many individuals as he or she chooses — kids, grandkids, in-laws, friends and strangers—without triggering gift tax consequences or filing a gift tax return. The annual exclusion is increased periodically for inflation.

The lifetime gift tax exemption, on the other hand, is a flat $1 million per donor. This is cumulative over the donor's lifetime, and encompasses all of his or her gift recipients.

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Linda Ravdin made a lunchtime presentation on premarital agreements at the Frederick County, Maryland, Bar Association on December 15, 2008. The presentation was entitled: "Premarital Agreements: How to Create a Valid, Litigation-Proof Agreement and Post-Execution Issues."

When a donor's gifts to a single individual in a single year exceed the annual exclusion, he or she begins to use up some of the $1 million lifetime gift tax exemption. So, for example, in 2009 a donor can give a child and 2 grandchildren $13,000 each without filing a gift tax return and without using any of the lifetime gift tax exemption. If the donor is married, together the couple can give $26,000 to each recipient. Beyond that, each begins to make taxable gifts and use up some of his or her lifetime exemption. So, if a couple has given away $26,000 to each gift recipient and now wants to give an additional $50,000 to a daughter ($25,000 from each), they must file gift tax returns and will use up $25,000 of each spouse's lifetime exemption.

If a donor uses up his or her entire $1 million lifetime exemption, any additional taxable gifts will trigger a gift tax, at the rate of 45% of the value of the taxable gifts. In addition, any gift tax exemption that a donor uses up during his or her lifetime will decrease the available estate tax exemption at the donor's death.

Gifts to a Spouse vs. Gifts to a Betrothed

A gift to a donor's U.S. citizen spouse is not a taxable gift because these gifts have an unlimited marital deduction. (A gift to a non-citizen spouse gets different treatment). A gift to a fiancée is not a gift to a spouse. The marital deduction will not apply. The donor must file a gift tax return if the gift exceeds the annual exclusion amount.

A gift between same-sex partners in excess of the annual exclusion is also subject to gift tax and the filing of a gift tax return. A same-sex couple, even if legally married under a state law that recognizes such marriages, is not recognized as married for federal tax purposes.

What does this mean for an engagement ring worth more than $13,000? The tax treatment of the gift under federal law will depend on whether state law requires that the ring be returned.

Completed Gifts vs. Incomplete Gifts

A gift is only a taxable gift when it is completed. A gift is completed only when it is irrevocable. State law determines whether a transfer of an item of property is revocable or irrevocable. State law generally requires, in order for a gift to be effectively made: (i) donative intent, (ii) delivery of the property to the donee, and (iii) acceptance of the gift.

If state law requires that a ring be returned in the event of a broken engagement, as in Maryland or the District of Columbia, then the transfer of the ring to the fiancée is a revocable transfer; it is contingent on the marriage, and therefore is not a completed gift until marriage. In the case of a heterosexual couple getting married, because the gift is not complete until the marriage, the recipient is the donor's spouse at the time of the gift's completion. Consequently, the gift is not taxable.

In the case of a same-sex couple getting married, the gift is not completed until the marriage. However, the recipient has not become the donor's spouse for federal tax purposes; consequently, the gift is subject to the gift tax rules discussed above.

If state law does **not** require the ring to be returned in the event of a broken engagement, then the gift is unconditional and irrevocable. No take-backs means a completed (and thus taxable) gift. If the ring is worth more than $13,000 in 2009, the donor must file a gift tax return to report it, and will use up some of the lifetime gift tax exemption. Worst of all possible scenarios for the donor here: not only does he NOT get the ring back if she later jilts him; he makes a taxable gift to boot.

And what if the donor lives in Virginia, where there is no clear authority as to whether the gift is conditional? What if he lives in Maryland, but his intended lives in Montana? or Virginia? Which law governs the engagement ring? The law has yet to develop a clear answer.

Even if the applicable state law does not require the return of the ring (or its rules are unclear), all is not necessarily lost. *The issue can be settled by a written agreement.* A written contract providing that the ring must be returned in the event of a broken engagement will make the transfer revocable and the gift incomplete until the marriage. It means the donor gets the ring back in the event of a broken engagement and is not making a taxable gift. (But we are having a hard time picturing a marriage proposal that bestows an expensive ring on the one hand and demands a contract requiring its return on the other.)

Anne Coventry, a partner in the Estate Planning & Administration Group, has been selected as the Vice Chair of the Estate Planning Committee of the Taxation Section of the D.C. Bar.

Divorce & Family Law Group partner, **Faith Dornbrand** will present on "Legal Trends in Child Custody" at the May 2009 Annual Conference of the Association of Family and Conciliation Courts in New Orleans.

Roger A. Hayden, II, a senior partner in the firm's Business, Real Estate and Litigation Group, attended an intensive three day training course in Collaborative Law, an emerging dispute resolution process to avoid litigation, and is now a certified Collaborative Law attorney for civil disputes. Mr. Hayden engages in dispute resolution and litigation concerning real estate and lending, business, insurance, employment, estates, trusts, probate and guardianships, as well as business planning and transactions. He is admitted to practice in Maryland, Virginia and the District of Columbia.

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Client Alert: Supreme Court Says Separation Agreement Waiver Not Enough to Change Retirement Plan Beneficiary

Marcia C. Fidis

It is common for a divorcing couple to sign a separation agreement in which each waives his/her right to receive the retirement plan death benefits of the other. Many think such a waiver is the final word on that issue. The U.S. Supreme Court has now made it clear that divorcing spouses with private sector qualified retirement plans must take an additional step to make a waiver of these rights effective. Most private sector retirement plans, such as 401(k) plans, are governed by ERISA, the Employee Retirement Income Security Act.

The Supreme Court decision, issued in January 2009, is *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan*. Here's what happened: Liv and William Kennedy divorced. They had a separation agreement, which was incorporated in their judgment of divorce. In the agreement, Liv waived all of her rights as a spouse, including the right to death benefits, in William's Dupont savings plan account, a qualified retirement plan. William died without changing the beneficiary designation on file with the plan administrator so that, upon his death, Liv remained the named beneficiary.

The Court first recognized that the separation agreement waiver was valid under ERISA. Then the Court had to turn to the question of which document controlled, the beneficiary designation on file with the plan or the separation agreement waiver that was in the divorce court file. It held that ERISA required the Dupont plan to honor the beneficiary designation and pay William's plan account balance to Liv. Because a beneficiary designation on file with the plan trumps a waiver in another document, William should have taken the extra step of contacting the plan and removing Liv as his designated beneficiary.

The purpose of ERISA is to promote efficient administration of retirement benefits by protecting plans from having to look outside the plan records to determine who is entitled to plan benefits at the death of a participant. The goal is to simplify and thereby reduce the cost of plan administration. However worthy the purpose, ERISA can create a trap for a divorcing spouse who does not follow up to change the beneficiary designation of a retirement plan after obtaining a waiver of these benefits in a separation agreement or after a divorce that divests a spouse of death benefits.

The *Kennedy* case applies only to beneficiary designations under a qualified retirement plan or life insurance plan. However, it points up how important it is that parties who have signed a marital settlement agreement, or who have divorced, attend to their estate planning, especially that they take the additional steps necessary to make sure their assets do not go to the wrong person. A waiver in a marital settlement agreement may not always be enough. See the checklist accompanying this article.

In December, **Faith Dornbrand** completed formal mediation training offered by the Collaborative Professionals of Northern Virginia.

On March 19, 2009 Estate Planning & Administration partner, **Anne Coventry**, will be speaking at the DC Bar Estates, Trusts & Probate Law Section program on the topic of "Estate Freeze Techniques and Grantor Trusts."

On March 12, 2009 **Marcia Fidis** and **Anne (Jan) White** will be speaking at the D.C. Bar on the topic of "What Estate Planning Attorneys Need to Know About Divorce Law."

Checklist: Estate Planning after the Marital Settlement/Divorce

In order to prevent an ex-spouse (or soon to be ex-spouse) from receiving assets upon your death, or having the power to make your health care or financial decisions in the event of your disability, early on in your divorce process you should review and change as necessary the following documents:

- Will;
- Revocable living trust (if you use one for your estate planning);
- Advance health care directive;
- Financial power of attorney;
- HIPAA authorization to obtain medical information;
- Life insurance beneficiary (both employer-provided life insurance and privately held policies);
- Bank accounts and certificates of deposit with a beneficiary designation ("Pay on Death" or POD accounts);
- Investment accounts with beneficiary designations ("Transfer on Death" or TOD accounts);
- U. S. Savings bonds with a designated beneficiary;
- Transfer on death real estate deeds (a small but increasing number of states allow you to name a beneficiary on a deed, including Colorado, Missouri, Montana, and Arizona).

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