When Drafting Contracts, Consider Family Law Consequences

by Peter W. Buchbauer

Every day, clients across the commonwealth visit attorneys. Most of the time, a future divorce is the last thing on their minds. They want documents prepared or advice about a matter that is pressing to them at the time. They may need representation regarding an injury or workers' compensation claim. Unfortunately for them, months or years later those documents, that advice, or the representation might come back to bite them hard during a divorce.

The general practitioner or non-family law attorney should be aware of potential pitfalls for clients, him or herself, and perhaps his malpractice carrier — because family law matters.

Divorce in Virginia is statutory. The primary statutes are *Code of Virginia* §§ 20-91 (grounds of divorce), 20-107.1 (spousal support), 20-107.3 (property division), 20-108.1 and 20-108.2 (child support), and 20-124.3 (child custody and visitation). Attorneys should review these statutes when they have cases that involve titling or re-titling of property, structuring personal injury awards, or business formation. Another statute to consider whenever one drafts a contract or agreement between spouses is Virginia Code § 20-109. In divorce, annulment, and separate maintenance suits, courts are bound by the terms of any stipulation or contract between the parties that involve "the payment of support and maintenance for the spouse, suit money, or counsel fee or establishing or imposing any other condition or consideration, monetary or nonmonetary."[1]

General law attorneys emphasize the avoidance of recordation taxes as a primary reason for drafting a deed of gift.

Understanding the consequences of these statutes and the subsequent case law may prevent unintended consequences for your client and protect you from unhappy communication with your malpractice carrier or the Virginia State Bar.

Real Property

A client consults a divorce lawyer. She says that she inherited property during the marriage. She and her husband moved into the house and have lived there for years. She asks a burning question: "It's mine, right?" The divorce attorney looks across the desk and properly responds, "It depends."

Under Virginia law, there is a rebuttable presumption that property inherited by one spouse is the separate property of that spouse.[2] She confides that the property was re-titled to the parties jointly, as part of a refinance transaction that paid for her new BMW. "That doesn't make a difference, does it?" she asks the attorney. Again, he properly responds, "It depends."

The lawyer explains that Virginia law provides that re-tiling of property transmutes it from separate to marital property.[3] The re-titling does not presume a gift, which permits you to retrace the property to its separate classification.[4] The re-titling places the burden of proof on your client to retrace the asset to rebut the marital property presumption.

Then the attorney asks the burning question, "Do you have a copy of the deed?"

If the property were simply re-titled from the wife to the husband and wife in a general warranty deed, the wife may preserve her separate property, subject to other facts which might provide evidence of gift. However, if the attorney previously suggested a deed of gift because there would be no recordation taxes, the wife is likely going to be cursing her prior lawyer. In *Utsch v. Utsch*[5], the Supreme Court of Virginia held that parol evidence as to intention was inadmissible when the deed on its face provided for a gift. As such, the gift likely transmuted the separate property into marital property and placed it on the table for equitable distribution at the divorce hearing.

General law attorneys emphasize the avoidance of recordation taxes as a primary reason for drafting a deed of gift. But a review of the *Code of Virginia* makes it clear that husbands and wives can transfer property between themselves without a great tax burden[6] in ways other than employing

the deed of gift — a document that may be toxic to the client if the marriage comes to an unhappy end. Divorce attorneys often see this situation arise because a lender wants both spouses' names on the deed for purposes of the refinance transaction and the real estate lawyer elects the deed of gift as the method of conveyance without advising the client of the potential consequences of use of a deed of gift.

But merely employing a deed other than a deed of gift does not totally insolate a client. Where the deed is not a deed of gift, evidence of intent is still relevant and admissible. We all need to recall the requirements of a gift: donative intent, delivery, and acceptance.[7] Take, for example, a former Washington Redskins quarterback, Joe Theismann. Joe wanted to re-title to himself and his new wife jointly real estate owned by him prior to the marriage. His lawyer did not use a deed of gift, so the question of intent was one of evidence at trial. While the court noted that the evidence of intent was in conflict, it stated:

> [Mr. Theismann] acknowledged that he knew that he had made his wife an owner of the accounts and that he wanted her to share equally in the home. He placed no reservation on the transfers of title permitting him to reclaim the property upon divorce or any other circumstance. Mrs. Theismann presented evidence that Mr. Theismann memorialized the transfers of title in cards that he sent to her, which indicated that the Leesburg farm was now "our home" and that the money was hers to spend. Mrs. Theismann testified that Mr. Theismann bragged that he had made her a "millionaire."[8]

Guess what, Joe? Despite the best efforts of your lawyer to protect you, you gave it up by talking and doing a little too much. So when advising a client who requests the preparation of a deed transferring title from the client alone to the client and spouse, a warning is important: Avoid the deed of gift, and counsel your client to refrain from making statements and conducting himself in a manner that might indicate donative intent, unless it is his intention to make a gift and lose all separate property status in the property. If your client wants to make a gift, get it in writing or confirm it to him in writing, so that your file indicates your advice and the client's intent to make a gift. This can help insulate you from a lawsuit later if the client's memory becomes foggy during his or her divorce proceeding.

Business Situations

There are other cases in which titling makes a significant difference in a family law case. After all, title still controls who will own the asset after the divorce is over.[9] Except when it comes to dividing retirement assets, a court may not order the transfer or sale of an asset that is solely titled to only one party, even if it finds that asset to be marital property. This reality must be considered when assisting a married client regarding the establishment of businesses, business interests, or even the acquisition of valuable personal property.

I recently had a case in which my client worked in the cabling industry, mostly for major government contractors. After many years of this work, he had a brilliant idea, "Why not form my own company and bid on these jobs that I'm working anyway?" Brilliant indeed! He met with counsel and considered his options.

After some reflection, he set up a corporation and placed all of the stock in his wife's name. He and his wife believed that this ownership model would qualify the company for preferences in bidding government jobs. The husband used the many contacts he had established over the years of his employment and assembled a well-trained crew. They soon landed a lucrative seven-figure subcontract working at a major government facility. He and his employees all obtained security clearances. The crew was so efficient that the husband only worked about fifteen hours per week. The wife worked less than that. Her role was to answer the telephone when he was out and occasionally write checks or transport the payroll down to the job site. All went well for a time. When the end came, it delivered a crushing blow to the husband. The company he formed, with the contacts he made over many years and the employees he recruited and trained, was then, and would thereafter be, his wife's. Upon separation, wife effectively fired the husband from "her company." She had his security clearance rescinded. He secured a monetary award to compensate for his marital interest in the company, but he had to

If your client wants to make a gift, get it in writing or confirm it to him in writing, so that your file indicates your advice and the client's intent to make a gift.

start a new business venture — without the employees and his security clearance.

The joint ownership of stock can make the difference in your case at divorce. At least for family law purposes, jointly owned stock is preferable to equal amounts of stock issued in each spouse's name. Jointly owned stock is subject to transfer by court order between the spouses at divorce. Solely owned stock is not. The same is true regarding the title of other personal property of significant value.

Another real-life example occurred in a case in which the husband — the sole breadwinner — had a deep affection for Corvettes. During the marriage, the husband purchased twelve Corvettes. Only one was jointly titled; the others were titled solely to him. During settlement negotiations, the wife requested the jointly titled 1966 car and two others. The husband refused. He persisted in his position that no one was getting "his" Corvettes. The matter went to trial and the wife introduced evidence of the value of all of "his" Corvettes. The court made an equitable distribution of the marital property including a monetary award[10] to the wife to compensate her for the eleven marital Corvettes titled solely to the husband. In order to comply with the monetary award, her husband sold "his" Corvettes at two separate auctions, netting only slightly more than the amount of the monetary award. The wife received the 1966 Corvette and a lot of money. The husband left with a broken heart. Understanding that title can be a boom or bust in a divorce is important when advising clients on how they should own assets — business or otherwise — acquired during the marriage.

Injury Recoveries

Finally, consider the personal injury or workers' compensation award you have secured or negotiated for your client. How you address the constituent parts of the award may make a significant difference if your client should later divorce. The

The joint ownership of stock can make the difference in your case at divorce.

Code of Virginia provides that the court may direct payment of a percentage of the marital share of any personal injury or workers' compensation recovery of either party, whether such recovery is payable in a lump sum or over a period of time.[11] "Marital share" means that part of the total personal injury or workers' compensation recovery attributable to lost wages or medical expenses to the extent not covered by health insurance that accrued during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent.[12] But a failure to have the settlement agreement or order clearly delineate what part is potentially marital and what part is clearly separate (pain and suffering) can make for expensive litigation and unintended consequences for your client.

The 2008 case of *Chretien v. Chretien*[13] demonstrates the impact of family law on personal injury cases. A month after their marriage, a husband and wife were involved in a motorcycle accident. The husband was the driver and the wife was the passenger. The wife settled her claim with the insurance companies involved for $149,928.57. She placed all of her recovery into accounts titled in her name alone. Upon divorce, the conflict dealt with the classification of the remaining funds. Were these funds separate or marital property? The statute governing equitable distribution requires a court to classify the marital share of any personal injury or workers' compensation award as marital property. The balance of the recovery would presumably be separate property. However, because of the overall presumption in favor of marital property, the wife bore the burden of proving that some or all of the personal injury recovery was separate property. In this case, the evidence of the nature of her recovery consisted of a letter from an insurance company stating that the recovery was for "injuries resulting from the motorcycle accident." A letter from another insurance company did not specify the basis of the recovery. None of the information the wife presented from the insurance companies identified whether any part of her recovery was for lost wages or uncompensated medical expenses. Consequently, the court of appeals determined that the circuit court erred in finding that the recovery was separate property.

How much easier would the case have presented if the demand letter clearly delineated the lost-wage claim and the breakdown on the medical specials? How much easier would the case have presented with clear evidence on which of the medical expenses was covered by medical insurance? The wife's personal injury counsel could have created a situation in which she easily

could have established the marital share, if any, and thereby exempt the balance of the recovery as her separate property. Fortunately, the wife in *Chretien* still dodged the bullet. The court found that, even if the recovery were presumptively marital property, the fact that her husband's negligence caused the injuries justified the award of the entire sum to her. So, the wife got to keep the award as part of the distribution, rather than as separate property upon classification.

Conclusion

Family law has developed over the past thirty years into a highly specialized area. With a high divorce rate in the United States, it is prudent for non-family-law practitioners to learn about and consider the potential family law consequences of their representations. When in doubt, consult a colleague who practices extensively in the area of family law. Your client may not believe that divorce can happen to him or her. Your client may not care about the potential family law consequences of your representation at the time. But you can be assured he or she will care if divorce becomes inevitable and you failed to protect his or her interest. Because, for the client and for you, family law matters. ■

Endnotes:

1 *Code of Virginia* Section 20-109 C.
2 *Code of Virginia* Section 20-107.3 A. 1.
3 *Code of Virginia* Section 20-107.3 A. 3 (f).
4 *Code of Virginia* Section 20-107.3 A 3 (h).
5 266 Va. 124, 581 S.E.2d 507 (2003).
6 *Code of Virginia* Section 58.1-810 (3).
7 *Theismann v. Theismann*, 23 Va. App. 557, 471 S.E.2d 809 (1996).
8 23 Va. App. at 566, 471 S.E.2d at 813.
9 *Code of Virginia* Section 20-107.3 C.
10 *Code of Virginia* Section 20-107.3 B and D.
11 *Code of Virginia* Section 20-107.3 H.
12 *Code of Virginia* Section 20-107.3 H.
13 53 Va. App. 200, 670 S.E.2d 45 (2008).