



INCLINE LAW GROUP^{LLP}
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CURRENTS

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Considering Divorce? Some Issues to Think About In Advance

By Stacey F. Herhusky

Many initial consultations with potential divorce clients occur months or even years before the client proceeds with filing for divorce or legal separation.

Those clients frequently want to know what types of issues they should be contemplating in the time leading up to a potential divorce filing. Typically, once a case is filed, it will be too

late to make changes to estate plans or insurance policies or to take steps necessary to best protect oneself from the financial hardships created by divorce. (continued on page 2...)

A New Look and New Faces

By Cassell von Baeyer

You may have noticed that our quarterly newsletter has taken on a new look! As the first decade of the 21st Century comes to a close, we thought we might celebrate by launching our new "brand" as our marketing consultants call it. You may have first noticed these changes in our website which we launched earlier this year (www.inclinelaw.com). Don't worry, it may be a new look, but we continue our commitment to the highest level of service to our clients.

Along with our new look we have some new faces in the office that we

wanted to introduce you to.

Stacy Crocket has joined our firm as legal assistant to Stacey Herhusky and Jamie Winter. Stacy ("the Crock" as she is affectionately referred to around the office) is a local through and through as she attended Incline Elementary, Middle and High School. Stacy received her BS in Business & Marketing, with a Minor in Spanish from Arizona State University. Like a true Tahoe-ite she likes to do most anything outdoors, especially when her pup can join her.

We also welcome Holly Young to the firm as assistant to John Rogers

and Vera Struc. Holly is originally from San Jose, California. She attended college at San Diego State University and graduated Summa Cum Laude in 2006 with a Bachelor's Degree in Journalism and Business Marketing. She worked in radio, advertising, and law in Southern and Northern California before moving to Lake Tahoe. She loves boating on the lake, hiking through the woods, and of course shopping at the mall.

We are very pleased to have these two very talented and smart ladies join the firm and know that you will enjoy working with them as much as we do.

Considering Divorce? Some Issues to Think About In Advance

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divorce due to automatic financial restraining orders which often issue with the Summons or are ordered by the court shortly thereafter. Here are a few things that should be considered:

1. Joint Tenancy Assets. If you hold property in joint tenancy with your spouse, your spouse will automatically succeed to your interest in that property if you die first. You may wish to convert such joint tenancy assets into tenancy in common ownership. This will destroy the automatic right to succeed to your interest in that property on your death, and will ensure that the property passes under your will or to those entitled by law if you died without a will. You should also be aware that there may be state and federal tax consequences involved in determining whether or not to change an asset from joint tenancy to tenancy in common. It is advised that you meet with a CPA and an estate planning attorney in conjunction with making decisions about proceeding with a divorce.

2. Estate Planning. If you have a will or trust,

it may not be affected by any action in the dissolution of your marriage. Further, any such will or trust will not necessarily be affected by judgments entered by the court in the divorce or separation proceeding. You may wish to consider making a new will, or at least revoking the current will prior to filing for divorce or legal separation.

3. Creditors. You should be aware that you will continue to be liable to third persons from whom you and your spouse have obtained credit for all sums now outstanding. This holds true even if the court later orders your spouse to make all payments due to that creditor, for the court cannot, in a family law proceeding, cut off or materially affect the rights of existing creditors nor force the creditor to look exclusively to your spouse for payment.

Your spouse may continue to charge on accounts, even if restrained from doing so by the court, and you will still be bound and required to pay the creditor. Therefore, you should take action immediately to mitigate the possible ramifica-

tions. It is advisable to notify all creditors by both telephone and then in writing that you will not be responsible for future charges or debts incurred by your spouse. Keep a record of the communications with your creditors, including the date and to whom you have directed your communications.

4. Beneficiaries. It is advisable to consider changing the beneficiaries on your life insurance before you are restrained by the court from making such changes. You may wish to consider checking the beneficiaries on your life insurance policies before filing to determine the present status. This also applies to retirement plans or other "fringe benefits" at your place of employment.

5. Closing Accounts. To avoid possible embarrassment to your spouse and increased friction in your relations with your spouse, you should let him or her know what accounts and credit lines you are closing. Also, prior to separation, if you have not yet separated, secure your account records, notes, stocks and bonds and all other important (continued on page 3...)

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Considering Divorce? Some Issues to Think About In Advance

(continued from page 2...) documents which relate to your case. If you close accounts or have a large sum of cash, be safe and put it in an account in your own name and keep detailed accountings of any funds which were community property.

6. Separate Monies. It is important that separate property monies you receive in the future be kept separate and identifiable. If you receive monies from earnings after separation, or from another separate property source (e.g., from the sale of an asset you owned before marriage, or from a gift or inheritance), keep them in a new account in your

name only. The reason for this is that when separate property is mixed with community property the entire fund may be deemed community property or the costs to retain experts to do the correct tracing can be cost prohibitive. Certain monies or property received after separation may also be community property. Consult with a family law attorney to gain a greater understanding of the definitions of separate property and community property (there are important distinctions even among the few community property states).

7. Separate Property. To the greatest extent

possible, pay all debts on separate property from separate property sources. For example, if you own a separate property piece of real estate with a mortgage thereon, make the payments from post separation earnings (if in California) or from other separate property sources. This will assist in maintaining the position that the asset is, and remains separate property.

Of course there are multitude of other things one can do to properly prepare for a divorce or legal separation. Please feel free to contact our office for a consultation should you have specific questions you would like to address.

“If you receive monies from earnings after separation, or from another separate property source...keep them in a new account in your name only.”

Indemnity Clauses in Written Contracts

By Andrew N. Wolf

In my article “Boilerplate Stuff You Don’t Read – Part 2” (Winter 2008-2009), I explained some important issues surrounding indemnity clauses in written contracts. Indemnity clauses are significant economic terms of written agreements that do not receive the attention they deserve. It seems that laymen consider indemnity clauses “fine print” or “legalese” not relevant to

the actual deal.

In a recent case, the Nevada Supreme Court clarified the requirements for shifting the economic risk of a loss caused by one party’s negligence to the other contracting party. In George L. Brown Ins. v. Star Ins. Co., 126 Nev. Adv. Op. No. 31 (August 12, 2010), the court considered what approach Nevada should adopt in interpreting indemnity provisions when an indemnitee (the party

to be indemnified) seeks to be indemnified on claims arising out of the indemnitee’s own negligence. The court concluded that Nevada should follow the rule used by a majority of states: a contract must explicitly reference the indemnitee’s own negligence before an indemnitee may be indemnified for his or her own negligence. As a result of this approach, a party to a general indemnity clause that

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Indemnity Clauses in Written Contracts

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does not refer to the indemnitee’s own negligence will not be entitled to defense or indemnity until there is a determination, through a trial or pretrial proceedings, showing that the indemnitee is free from fault or establishing the percentage of its fault.

Most homeowners, business owners and their insurance companies would prefer to know whether they will be entitled to indemnity, *before a trial occurs*. Why? Because if the parties’ respective rights to defense or indemnity can be determined early, parties will know in advance who ultimately is responsible for litigation costs and the cost of an eventual award or judgment. Under the Court’s ruling, if the contract does not adequately define indemnity rights, the court will probably be unable to determine these rights until the end of the

case, after everyone has expended litigation costs through trial. (Sometimes, this may be the result even if the indemnity clause is properly drafted.)

The purposes of drafting written contracts include identifying terms of agreement and inducing parties who think they have negotiated a deal on all points to look a bit closer at things they may have overlooked – “Oh you thought you were buying the red Ferrari ... I thought you bought my red VW....” Parties who negotiate a written agreement including an indemnity clause ordinarily would not want to wait until after a trial has occurred to determine who is responsible for indemnifying whom, and whether the risk of a particular loss has been shifted. Such uncertainties can easily contribute to parties and their insurance carriers refusing to settle, and inaccurate assessments of

risk.

As a result of this decision, here is the rule that will be applied in Nevada when one contracting party tries to shift the risk of his own negligence to the other party: “An express or explicit reference to the indemnitee’s own negligence is required to indemnify an indemnitee for his or her own negligence—because the character of such an indemnity is so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation, and no inference from words of general import can establish it. A party demanding indemnity from the consequences of its own negligence must express that intent in specific terms. The purpose of the express negligence doctrine is to prevent surprise to the indemnitor.”

“the Nevada Supreme Court adopted specific rules to promote open government”

Confidentiality of Civil Court Records in Nevada

By John C. Rogers

For many years, civil court records in Nevada could be sealed at the request of the parties. There were few rules or decisions limiting or discussing the basis for sealing civil files.

The sealing of a file essentially closed it to public view. Divorce cases were frequently sealed to provide confidentiality to the parties.

That is no longer the case in Nevada. Beginning

in 2008, the Nevada Supreme Court adopted specific rules to promote open government and the public’s access to civil files. Even before the rules were adopted, certain statutes, (continued on page 6...)



Foreclosure News

By Cassell von Baeyer Foreclosure Moratorium.

By now you have probably heard that several banks have halted foreclosures. The initial foreclosure moratoriums were initiated by Litton Loan Servicing, PNC Financial Services, GMAC Mortgage and JP Morgan Chase. These Lenders/Service providers suspended most of their foreclosure actions in 23 states. What many may not understand is that those early suspensions were only in “judicial foreclosure” states i.e. states in which a lender must go to court in order to foreclose on a property. Both Nevada and California are what are referred to as “non-judicial” foreclosure states which means that a trustee has a power of sale without having to go

to court for approval of the sale. On October 8, 2010, Bank of America Corp. joined the foreclosure “moratorium” on a nationwide basis. As of October 19, 2010, B of A and GMAC have announced plans to resume foreclosure actions at least in those 23 judicial foreclosure states. There has been much discussion about the impact of these moratoriums. The Obama Administration has come out against such moratoriums presumably because it could only serve to worsen the economy by prolonging the real estate crisis. We equate this to the choice to either rip off the band-aid or to pull it off painfully and slowly. However, the Attorney Generals of all 50 states are currently investigating sev-

eral banks and their foreclosure processes. Which begs the question – if the lender’s processes are found to be deficient or not in compliance with foreclosure laws, what happens with the foreclosures that have already taken place? Will those homeowners have the right to unwind those sales? What happens to the status of title to property and the buyer’s who purchased from the banks after a “fraudulent” foreclosure sale? The reality is that the foreclosure was precipitated by a default and failure to pay, therefore do the displaced homeowner’s have any real damages to recover from the banks? There will be those that argue no and then there will be those that (continued on page 6...)

“Both Nevada and California are what are referred to as ‘non-judicial’ foreclosure states which means that a trustee has a power of sale without having to go to court for approval of the sale.”

“Statute 41.470 imputes liability to parents or guardians having custody and control of minors.”

Liability of a Parent for a Child’s Act

By Jamie L. Winter

Have you ever wondered when you, as a parent or guardian, might become liable for accidents or intentional injuries caused by your child? While there is a paucity of guidance with respect to parental liability for acts of children, Chapter 41 of the Nevada Revised Statutes briefly addresses two questions on the topic. Specifically, the Chapter addresses liability

for the willful misconduct of minors and for the use of a firearm by a minor.

Nevada Revised Statute 41.470 imputes liability to parents or guardians having custody and control of minors for acts of willful misconduct that result in the injury or death of another person or injury to the property of another. The statute provides for joint and several liability of the parent or guardian

which may not exceed \$10,000 for the damages resulting from the willful misconduct. Exempted from this liability are persons licensed to conduct a family or group foster home unless said persons took an affirmative action that contributed to the willful misconduct of the child.

Nevada Revised Statute 41.472 charges parental liability relative to the (continued on page 7...)



Confidentiality of Civil Court Records in Nevada

“...if you are a party in a civil case, do not expect any of your files to be closed to public inspection unless you can justify ‘compelling privacy or safety interests.’”

(continued from page 4...) including divorce cases under NRS 125.110, required that certain findings be made by the court to justify sealing parts of the divorce files. Under the rules adopted in 2008, the Nevada Rules for Sealing and Redacting Court Records (“SRCR”), specific findings are required to seal portions of a court file. Under SRCR 5(c) sealing of an entire file is **prohibited**. Under SRCR 5(b), redacting parts of records is preferred.

There is still the

possibility that portions of files can be sealed. But to do so, a court must make written findings that “the specific sealing or redaction is justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record.” (SRCR 3(4).)

A 2008 case, Jo-hanson v. 8th Judicial District Court (182 P.3d 94) decided May 1, further reinforced the importance of case records being available to the public. There the Nevada Supreme Court

determined that a judge’s action sealing an entire file in a divorce case was an abuse of discretion. The Supreme Court reversed the trial judge because the judge had not made any effort to follow the requirements in NRS 125.110.

In summary, if you are a party in a civil case, do not expect any of your files to be closed to public inspection unless you can justify “compelling privacy or safety interests.” For more information on this issue, please consult your attorney.

“...this bill does not bind second deed of trust holders, who are often less forgiving and more aggressive in seeking deficiencies after a short sale.”

(continued from page 5) argue that the failure to process foreclosures legally is an unconscionable violation of due process. Undoubtedly we will be hearing more about all of this.

California Expands Borrower Protections for Short Sale.

California Governor Schwarzenegger signed a new law which prohibits first deed of trust holders from pursuing borrowers for the deficiency after a short sale. The new law provides that written consent of the holder of the first deed of trust or first mortgage to that short

Foreclosure News

sale shall obligate that holder to accept the sale proceeds as full payment and to fully discharge the remaining amount of the indebtedness on the first deed of trust or first mortgage. It should be noted that this bill does not bind second deed of trust holders, who are often less forgiving and more aggressive in seeking deficiencies after a short sale. At the same time, Governor Schwarzenegger vetoed a bill which would have extended the California anti-deficiency provisions (which apply after a foreclosure sale) to refinanced mortgages that were used

to repay the original loan that was used to purchase the property. The current and now still standing law only extends anti-deficiency provisions to borrowers whose have never refinanced i.e. their original purchase money mortgage is still in place and that is the loan that purchased the property that is being the foreclosed upon. Nevada’s anti-deficiency law (NRS 40.455(3)) that went into effect in 2009, is very similar in that it also only provides protections where the foreclosed loan was the original purchase money mortgage.



Liability of a Parent for a Child's Act

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use of a firearm by a minor. Section 41.471 implicates liability for any negligent or willful misconduct of a minor in connection with the use or possession of a firearm if: the parent or guardian knows that the minor has previously been adjudicated delinquent or convicted of a criminal offense; knows that the minor has a propensity to commit violent acts; or knows or has reason to know that the minor intends to use the firearm for unlawful purposes. As in cases of willful misconduct, the parent or guardian is jointly and severally liable for any and all damages caused by the minor's negligent or willful misconduct in connection with the use or possession of a firearm.

Chapter 483 of the Nevada Revised Statutes, also known as the Motor Vehicle Drivers' Licenses (Uniform Act), discusses liability of parents and guardians in cases involving minors operating motor vehicles. Section 483.300 imputes liability to the person who has signed the application of the minor for a permit or license and an earlier provision requires that an application be signed by the applicant's parent or guardian. The

parent or guardian who signed the application is jointly and severally liable for any damages caused by the minor's negligence or willful misconduct while operating the motor vehicle. The parent or guardian who signed the application may thereafter file with the Department of Motor Vehicles a verified written request for cancellation of the minor's license or permit after which the Department shall cancel the license or permit. The parent or guardian who signed the application shall then be relieved from liability on account of any subsequent negligence or willful misconduct of the minor while driving a motor vehicle.

Chapter 486, which addresses the operation, licensing, education and safety of motorcycles and similar vehicles, assigns the same liability imposed by Chapter 483 upon parents or guardians of minors operating motor vehicles.

As a general rule of thumb, minors may enter into a contract in the same manner as adults and a parent is not liable unless the parent co-signs on the contract or the child is acting as an agent for the parent. NRS Chapter 687B, however, expressly addresses instances in which a minor,

not less than 16 years of age, wishes to contract for annuities or insurance, upon his or her own life, body, health, property, liabilities or other interests or on the person of another in whom the minor has an insurable interest. The statute provides that the minor shall be deemed competent to exercise all rights and powers with respect to such contracts as might be exercised by a person of full legal age. Under the provision, the minor is not entitled to rescind, avoid or repudiate the contract or the exercise of a right or privilege under the contract. For contracts entered into by minors under the age of 16, NRS 687B.070(5) requires the written consent of a parent or guardian. Where the parental liability does come into play is in contracts which may result in any personal liability for assessment. In contracts involving such personal liability, a parent or guardian shall assume such liability, in writing, in consideration of the issuance of the contract. This parental assumption must be in a form reasonably designed to inform the parent or guardian of the liability they have assumed.

"As in cases of willful misconduct, the parent or guardian is jointly and severally liable ..."

"...minors may enter into a contract in the same manner as adults and a parent is not liable unless the parent co-signs on the contract or the child is acting as an agent for the parent."

A Law Firm Committed to Excellence & Committed to You.

Incline law Group, LLP is a boutique law firm located on the North Shore of Lake Tahoe. The firm, founded in 1973 by John C. Rogers, has earned a reputation for professionalism, discretion, diligence and positive results.

In short, we are personally committed to excellence and to our clients' success. Our areas of practice include change of residency, creation and management of entities, contracts, real estate, asset protection, family law, commercial transactions, civil litigation and estate planning.

All of our attorneys are licensed in Nevada and California.



From left to right:

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These newsletter articles are not intended as legal advice. Readers may not rely upon them concerning their factual circumstances. Small differences in facts can produce substantially different outcomes. Before proceeding with a matter with legal consequences, readers must consult with legal counsel who can examine the facts and the law as it applies to the particular fact situation. Also, it is critically important to consult with a tax professional before taking action on any real estate matter. There are significant tax consequences and potential risks involved in most real estate transactions.