

## Report From Counsel

Insights and Developments in the Law

Spring 2014

### “Cyberspying” Between Parents: A Sly Game That Nobody Wins

“Cyberspying” by a parent, who uses technology to monitor what their kids are doing when they’re with their other parent, is a disturbing trend among divorced couples and parents who do not share a home. Parents use these tactics to try to keep an eye on their children or the other parent for various reasons, including trying to change custody arrangements. Recently, SmolenPlevy family law attorneys Alan Plevy and Kyung (Kathryn) Dickerson have noticed a number of parents engage in this behavior.

Checking up on what the other parent is doing when they have custody is easy when the children have smartphones or access to computers with webcams. Some examples include:

- Tracking the kids via their cell phone’s GPS or the “Find My iPhone” app.
- Chatting with the children on webcam sites like FaceTime or Skype, then scrutinizing or questioning what’s going on in the background.
- Insisting the kids connect via webcam at particular times to prove they’re doing certain things, like taking their medication or going to bed on time.
- Setting up webcams on the kids’ laptops to automatically record what’s going on.

“This is an example of when the law

still needs to catch up with technology but more than that, this behavior puts the children in the middle of their parents’ conflict,” says Dickerson, “and to make matters worse, if the parent being

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### SmolenPlevy in the Media and in the Community

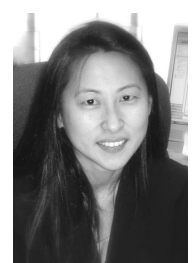


*Alan Plevy*



*Joshua Isaacs*

For the children of divorced or separated couples, the holiday season can be stressful and frustrating if their parents don’t cooperate with regard to gift giving. In an article on the Associated Press’ “The Big Story” website, SmolenPlevy principals Alan Plevy and Kyung (Kathryn) Dickerson suggested ways to make the holidays more joyful for kids who spend their time in more than one home. Read the article, “Holiday gifting can be vexing for kids of divorce,” on SmolenPlevy’s website, [www.smolenplevy.com](http://www.smolenplevy.com).



*Kyung  
(Kathryn)  
Dickerson*

In late January, Dickerson presented “Divorce, Custody and Support: The Discovery Process—Preparing Your Case” at The Women’s Center of Vienna, Virginia.

SmolenPlevy associate Joshua Isaacs was the guest speaker at Keller Williams Kingstowne’s January 14 meeting. Isaacs provided the group of real estate professionals with information about the effect of attorneys’ liens at closing.

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## Before You Start a Business . . .

Both heart and mind must be working well if the owners of a new small business are to experience success. While it is only human nature—not to mention fun—to indulge one’s imagination about what a new business started from scratch could be like, would-be entrepreneurs need to engage in some cold, hard thinking and planning before taking the plunge. At the risk of pouring cold water on some of the anticipation and excitement, what follows is a guide for how to plan for, and think through, the many decisions that must be made well before you have that “Grand Opening” sign made.

- Do you have the perseverance, not to mention the physical stamina and health, to put in long hours if that’s what is needed to make the business succeed?
- Are you, and anyone else financially dependent upon you, prepared to risk your savings in pursuit of the business dream if that’s what it takes?
- Unless you are planning a one-man band of a business, are you comfortable with hiring, supervising, and

possibly having to fire other people?

- Are you reasonably well organized?
- Do you know anything about the paperwork and legal side of running a business, such as payroll and accounting, the permits or licenses you will need, or the regulations and laws that may apply to the business?

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### Why?

This may seem obvious, but you should know just what your reasons are for wanting to start a new business. If the motivations are weak, odds are the business will be a bust, whereas well-founded reasons can help a business persevere through good times and bad. Some common reasons for starting a new business include escaping the whole nine-to-five routine (though it may be replaced by an eight-to-eight routine), answering to no one else, upgrading your standard of living, and being convinced that you can provide a needed product or service.

### Why Me?

Let’s face it, not everyone is cut out to be a captain of industry, or even captain of a small business. Maybe you need not subject yourself to an intensive psychological and life-experience evaluation, but be honest with yourself about whether you have the necessary characteristics, skills, and experience. A few examples give you the idea:

- Can you make yourself pull the trigger on an important decision?
- Do you see competition as exciting or just stress-inducing?
- Are you willing and able to plan ahead?
- Do you like interacting with people you don’t know?

## Tax-Free Gains from Home Sales

One of the most significant tax advantages to owning a home comes at the back end of ownership, when you decide to sell it for a profit. A homeowner can exclude up to \$250,000 of such profit from the federal capital gains tax. For married couples filing a joint tax return, the exclusion jumps to \$500,000.

This big tax break does come with some basic requirements. It applies to the sale only of a principal residence, not of a vacation home or investment property. With some limited exceptions for poor health, job changes, and unforeseen circumstances, the taxpayer must have owned and used the home as a primary residence for at least two of the five years preceding the sale of the home. (But the two years need not be an uninterrupted time span.)

If the history of the home includes some business use, the owner cannot exclude that part of the gain that is equal to the depreciation claimed while the house was used as rental property. This scenario could arise when the owner rents out the house for a period of time but then moves back in, sells it, and otherwise qualifies for the exclusion related to that sale.

There is another two-year rule that comes into play after a taxpayer claims the home-sale exclusion. There is no limit to the number of times that the exclusion can be claimed for multiple sales, but, as a rule, once the exclusion is claimed, the taxpayer must wait two years before claiming another such exclusion.

For a married couple to qualify for the exclusion, it is sufficient if either spouse meets the ownership requirement. However, both spouses must meet the use requirement. Neither spouse is rendered ineligible for the exclusion because he or she had already excluded the gain on a different primary residence during the two years preceding the date of the current sale.

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# Estate Planning—Powers of Appointment

A power of appointment is the power given to someone to allow that person to designate who will receive property or an interest in property. The creator of the power is called the donor, the individual having the power is the powerholder, and the possible recipients of the property are permissible appointees.

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Powers of appointment used for estate planning have many variable forms. The powerholder may hold the power in a fiduciary capacity (such as the trustee for a trust) or nonfiduciary capacity. The power may be presently exercisable by the powerholder or may be exercisable only in the future, such as by the powerholder's will. The powerholder may or may not be the creator of the power. There may be multiple powerholders who must act jointly or a single powerholder. The persons in whose favor the power may be exercised may be unlimited, including the powerholder (sometimes called a general power of appointment), or may be limited. The beneficial interests that may be created in the appointees in whose favor the power may be exercised may be unlimited or limited. Various legal consequences in regard to powers of appointment will be affected by the restrictions imposed on the powerholder.

The trustee of a trust, a common type of powerholder, may be given discretion by the donor to invade principal for a life income beneficiary or for some other person, or discretion to pay income or principal to a named beneficiary, or discretion to allocate income or principal among a defined group of beneficiaries.

In short, the discretion given to the trustee gives the trustee the power to designate beneficial interests in the trust property as future developments indicate. This discretion in the powerholder underscores the primary advantage of using powers of appointment—they provide flexibility to adjust an estate plan to deal with circumstances that may arise years, or even decades, after the estate plan is created. The flip side to this flexibility is the power of

appointment's main disadvantage for some—it means that the donor must give up some control over the ultimate disposition of assets in the estate.

There are other potential ramifications for powers of appointment that should be taken into account. For example, assets subject to a general power of appointment will be included in the estate of the powerholder, which could create unfavorable tax consequences. In addition, an improperly exercised limited power of appointment may become a general power of appointment under the law. All in all, whether to use a power of appointment and, if so, with what characteristics, are questions best answered with the advice of a lawyer well versed in estate planning.

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## Cyberspying

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watched takes away the phone or computer so they cannot be spied upon, the child feels punished by losing their technology.”

### When Used Correctly, Technology Connects Parents and Children

“When used appropriately, technology is a wonderful tool when kids split their time between parents,” Plevy says. When the kids are away, mom or dad can read them a bedtime story via Skype or help them with their homework online. And in unfortunate situations when a parent is abusive or has an alcohol or drug problem, cell phones enable chil-

dren in danger to contact the other parent for emergency help when necessary.

Plevy advises parents who complain about what's going on in the other parent's household to consider what's really important. For example, if you want the kids in bed by 8pm and the other parent lets them stay up until 9—is that really worth a big fight? He adds that compromise and communication go a long way in settling custody disputes, though there are certain issues like abuse which may require the intervention of the court. “Generally, the best course of action is to negotiate with the other parent,” says Plevy. “Try to agree on points of contention like bedtime or where you're taking the children on vacation, so that there's no need to spy.”

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*Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*

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## Business Start-Up

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### Why This Business?

You may have the best motives and a skill set that would be the envy of any MBA graduate, but if there is no niche for your planned business or, simply put, if not enough people will want to buy what you are selling, the new business will fail. The variables here include timing, location, and simply whether your business is feasible or practicable, so that you can be the one to fill that niche that you have first identified. Don't make your business the equivalent of carrying coals to Newcastle.

In economic terms, you want to do some investigation to determine whether there is some currently unmet demand for the product or service you want to supply. Then you want to meet that demand with a product or service that is competitive in quality, selection, price, and/or location.

In short, learn as much as you can about the market you will be in. Learn who your customers will be, and try to understand their needs and desires. Anticipate how your fledgling busi-

ness will compare with any established competitors. What can you do in setting up and running the business to make sure you get your share of whatever market there is for your product or service?

### How?

Turning the idea into bricks and mortar (literally or figuratively) involves a lot of decisions, some of which are best made only after getting professional advice. Still, you should acquire at least a layperson's understanding of the pros, cons, and consequences of each decision.

Choose a name for the business that you find appealing, but also one that is informative for someone hearing it for the first time. Select the most appropriate business form, such as a sole proprietorship, a partnership, or a corporation. Investigate which local, state, and federal laws and regulations will apply to the business. This will run the gamut from laws of universal application (e.g., taxes) to laws specific to your business.

Make an unflinching and detailed examination of your financial picture. How much do you have now, how

much will you need to start the business, and how much will you need to stay in business? Projecting cash flow into the future means taking into account such variables as seasonal trends in sales, the amount of cash taken out of the business for personal expenses, whether and when to expand the business, and the rate at which customers will pay off accounts if credit is extended to them.

Find a location for the business that is convenient for customers, appropriate in size and configuration, and zoned so as to allow your type of business. When you have settled on the product or service you will sell, calculate the inventory you should create, and maintain and locate reliable suppliers.

Finally, if you go to all the trouble and expense involved in creating a small business, don't forget to think about protecting against losing the business from such threats as fire, theft, robbery, vandalism, and liability for an accident. This means taking measures to provide security but also arranging for the appropriate types and levels of insurance.



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