SMOLENPLEVY
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Report From Counsel

Insights and Developments in the Law **Fall 2013**

Divorce and College: Planning Ahead is Crucial

Alan Plevy

What's your major? Who's your roommate? Dorm room or fraternity house? These are all questions on the minds of parents who are sending their children off to college this fall. But if you are divorced—or thinking about getting a divorce—one of the most pressing questions you'll have to answer is who will pay for college?

Child support generally ends when children reach the age of emancipation. Depending on in which state you reside, the age of majority can be 18, 19 or 21 years old. Unless there is an agreement between parents before the child reaches this age, there is no legal obligation for either parent to pay for college or any post-high school training or education. Even if your children are very young when you and your spouse separate, and you can't imagine them old enough to cross the street without holding your hand, much less graduating from high school, it's critical that you negotiate how college expenses will be handled in your divorce agreement.

"Education is one of the best gifts a parent can give their child," says SmolenPlevy's co-founding Principal, Alan Plevy. "If your child is over 18 when you divorce, a court cannot order either parent to pay for his or her education, so you must take this into consideration when negotiating an agreement."

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SmolenPlevy in the Media

A business can only be successful if it capably handles its legal issues. This is especially true for small businesses, according to Jason Smolen, co-founding Principal of SmolenPlevy, in a recent interview with Bank of America's Small Business Community. In the interview, which appeared on *www.bankofamerica.com*, Smolen stressed the importance of having a legal advisor if you own a small business. "You may know your business," he said, "but an attorney knows the law as it applies to your business. Having a good attorney advising a business can help avoid those pitfalls that could crush one before it gets started. Depending on the business, there are compliance issues, employment issues, and business issues."

Jason Smolen

Smolen added that the most common legal mistakes small businesses make fall into the categories of tax planning, human resources and regulatory compliance. Addressing these issues proactively and properly is the difference between being focused on the growth and success of your business, and spending time and money fixing problems.

With limited resources and personnel, small business owners may be hesitant to retain a lawyer for their business, but Smolen noted that the cost of counsel is well worth it.

Principal Kyung (Kathryn) Dickerson was featured in a *www.Galtime.com* interview on ways in which social media can be used constructively by divorcing couples, especially when it comes to their children.

Dickerson suggested that by logging on, a divorced or separated parent

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Limited Liability Companies—The Best of All Worlds?

A limited liability company (LLC) is a business structure that combines some of the best features of sole proprietorships, partnerships, and corporations. LLC owners, like their counterparts for partnerships or sole proprietorships, report profits or losses on their personal income tax returns. Like a corporation, however, the owners of an LLC have "limited liability," that is, they are shielded from personal liability for debts and claims arising from the business.

The limited liability for LLC owners is not absolute. Owners still can be held liable if they (1) personally and directly injure someone; (2) personally guarantee a loan or business debt on which the LLC defaults; (3) fail to deposit taxes withheld from employees' wages; (4) intentionally commit a fraudulent or illegal act that harms the company or someone else; or (5) treat the LLC as an extension of their personal affairs rather than as a separate legal entity.

The last exception to limited liability is the most significant. It carries the potential for complete removal of the protections for individual owners. If the line between LLC business and personal business becomes too blurred, a court could find that a true LLC does not exist, leaving the owners personally liable for their actions.

Ownership

Most states allow a single individual to be the sole owner of an LLC. An LLC makes the most sense in circumstances where there is a concern about personal exposure to lawsuits stemming from operation of the business. Most laws prohibit establishment of an LLC in the banking, trust, and insurance fields.

Unlike corporations, LLCs can carry on their business without holding regular ownership or management meetings. Of course, formal meetings backed up by written minutes still may be advisable to document important decisions, such as a change in membership or a major expenditure.

Formation

Setting up an LLC is relatively simple. Articles of organization must be filed with the appropriate state office, usually the Secretary of State. The articles of organization include the name and principal office for the LLC, the names and addresses of its owners, and the name and address of the person or company that agrees to accept legal papers on behalf of the LLC.

Even if it is not legally required, the owners should prepare an operating agreement that spells out the owners' rights and responsibilities. The absence of an operating agreement will mean that state statutes will govern the operation of the LLC by default. An operating agreement acts as a guide for resolving common issues that an LLC will face, and thereby helps to avert misunderstandings between the owners. It also underscores the authenticity of the LLC itself, which can be helpful

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Protect Your Plastic

As new technologies change the way we pay for things, criminals are managing to keep pace as they devise ways to separate you from your money. Doing what you can to protect yourself is one part understanding the technology and at least equal portions of vigilance and common sense. Still, we can all benefit from some reminders.

"Phishing" refers to out-of-the-blue e-mails, text messages, or phone calls from superficially legitimate sources, often couched in urgent tones, asking for your credit card or debit card information. The thieves then set up counterfeit cards and run up charges on your accounts. Don't take the bait. You might think that these appeals are too brazen to work, but obviously they work often enough to be a tool in the con artists' toolbox. Follow this rule: Never give out your payment card information in response to an unsolicited communication, no matter its apparent source.

Be careful and attentive when using payment cards at ATMs, shops, and gas stations, and not just because of suspicious-looking characters. The bad guys sometimes steal account information by attaching their own devices over legitimate card readers. Beware of plastic sleeves inside the slot where you swipe a card. Another sign of potential trouble arises when the person you are paying swipes your card on two different devices. One of those swipes may be taking your account information for later fraudulent use.

Don't stick your account statements in the pile of bills to be paid without scanning them closely for discrepancies or suspicious items, such as unauthorized withdrawals. Today you can usually do this online, or even on a mobile phone. Even small bogus transactions are worth reporting to your bank, as thieves sometimes hope to escape the consumer's notice with many small transactions.

Recently, thieves allegedly racked up over $25 million in charges, all in small individual amounts, from hundreds of thousands of cardholders. Let your financial institution know right away if a statement or bill is unusually late. That can signify theft of your information that may be used to commit fraud.

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LLCs

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when a judge is deciding whether the owners are protected from personal liability.

A standard operating agreement includes the members' percentage interests in the business; the members' rights and responsibilities; the members' voting power; allocation of profits and losses; how the LLC will be managed; rules for holding meetings and taking votes; and "buy-sell" provisions that control what happens when a member wants to sell his interest, becomes disabled, or dies. Although it is frequently overlooked when an LLC is created, a buy-sell agreement is important as a sort of "premarital agreement" among the owners. The buy-sell provisions can clarify and ease the transition when the inevitable changes come to the members of the LLC.

Taxes

Since an LLC is not considered separate from its owners for tax purposes, the LLC pays no income taxes itself. Like a partnership or sole proprietorship, an LLC is a "pass-through entity." Each owner pays taxes on a share of profits, or deducts a share of losses, on a personal tax return. The IRS regards each member as a self-employed business owner, not an employee of the LLC. There is no tax withholding, and owners must estimate taxes owed for the year, then make quarterly payments to the IRS.

Conversion

By converting to the LLC business structure, sole proprietors and partnerships can gain the protection afforded to LLC owners without changing the way their business income is taxed. Conversion usually can be accomplished either by filling out a simple form or filing regular articles of organization. Federal and state employer identification numbers will have to be transferred to the name of the new LLC, as will such items as sales tax permits, business licenses, and professional licenses or permits.

The process for creating an LLC is streamlined and free of highly technical considerations. However, there is an important place for professional advice concerning such matters as choosing an LLC over other business structures, preparing or reviewing the operating agreement, and setting up accounting systems.

Plastic

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Periodically review your credit reports from the three major credit bureaus. If an unfamiliar card or transaction shows up, you may already be a victim of identity theft. You get one free report from each of the credit bureaus in a year, so, to maximize your monitoring, get one free report from one of the bureaus every four months.

If, despite your best efforts, you fall prey to the thieves, all is not lost, but neither should you be complacent. As a rule, the federal Truth in Lending Act puts a $50 cap on the consumer's liability for unauthorized charges on a credit card. However, for lost or stolen debit cards and ATM cards, or unauthorized transactions in your checking or savings accounts, the $50 cap is imposed by law (the federal Electronic Fund Transfer Act) *only* if you notify the institution within two business days. Wait longer than that, and the ceiling rises to $500, or even more in some cases. The policies of individual institutions may further limit losses beyond those imposed by statute, so it is a good idea to ask your card issuer about any such limits it uses.

In the Media

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can keep up with their children's friendships, activities and interests. Websites like Facebook, Twitter and Instagram also provide insight into a child's thoughts, moods and day-to-day experiences in a way that just speaking with them for 10 minutes in the evening does not. Skype and Google Hangouts allow parents to see, hear and talk with their children in real-time and can serve to augment in-person visitation or help parents stay in contact with children who may be located in another country.

Kathryn Dickerson

Social media can also help reduce interference by the other parent and give you the ability to establish a relationship more directly with your child, said Dickerson.

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.

Identity Theft Policies for Businesses

The Federal Trade Commission (FTC) has revised and clarified its "Red Flags Rule" to help covered businesses comply with requirements for preventing and responding to identity theft directed at their customers. The Rule requires many businesses and organizations to implement a written Identity Theft Prevention Program designed to detect the warning signs (or "red flags") of identity theft in their day-to-day operations.

The ultimate goal is to make businesses better able to spot suspicious patterns that may arise and to thwart identity theft. Obviously this is good for customer relations, but it also may avoid the necessity for the stressful and costly process of cleaning up the mess once thieves have struck.

The FTC describes an Identity Theft Prevention Program as a "playbook" that must include reasonable policies and procedures for detecting, preventing, and mitigating identity theft. With such a program in place, an organization should be able to (1) identify relevant patterns, practices, and specific forms of activity—the "red flags"—that signal possible identity theft; (2) incorporate business practices to detect red flags; (3) detail appropriate responses to any uncovered red flags, to prevent and mitigate identity theft; and (4) update the program periodically to reflect changes in risks from identity theft.

The Red Flags Rule includes guidelines to help financial institutions and creditors develop and implement a program, including a supplement that offers examples of red flags.

Some general categories of red flags are notifications or warnings from a consumer reporting agency or from the customer himself; suspicious-looking documents or personal identifying information; and unusual use of, or suspicious activity related to, a covered account. The FTC and the federal financial agencies also have issued Frequently Asked Questions and answers to help businesses comply with the Rule.

The Rule requires "financial institutions" and "creditors" that hold consumer accounts designed to permit multiple payments or transactions—or any other account for which there is a reasonably foreseeable risk of identity theft—to develop and implement an Identity Theft Prevention Program for new and existing accounts. The definition of "financial institution" includes all banks, savings associations, and credit unions, regardless of whether they hold a transaction account belonging to a consumer; and anyone else who directly or indirectly holds a transaction account belonging to a consumer.

A 2010 change in the law amended the definition of "creditor" and limits the circumstances under which creditors are covered. The previous definition of "creditor" was so broad in its language and interpretation that it swept too many within the Rule's reach.

The new law covers creditors who regularly, and in the ordinary course of business, meet one of three general criteria. They must (1) obtain or use consumer reports in connection with a credit transaction; (2) furnish information to consumer reporting agencies in connection with a credit transaction; or (3) advance funds to, or on behalf of, someone, except for funds for expenses incidental to a service provided by the creditor to that person.

Divorce and College

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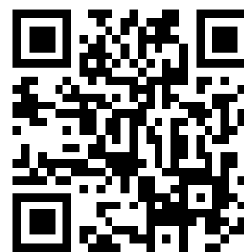
Some important items to discuss with your attorney:

- What percentage of college expenses will each parent be responsible for?
- If you wish to take advantage of a state's 529 college savings plan, will both parents contribute? How much and how often? Which parent is the custodian of the plan?
- Should you restrict where the children can attend college or the limits of each parent's obligation? State schools are significantly less expensive than out-of-state ones.
- What about living expenses during college? Will anyone pay for the plane tickets home? Room and board? Books and extracurricular activities?
- Will either parent be obligated to purchase a computer or other equipment for the student? What if the student regularly changes majors and cannot decide what to do with their education—is there a limit in years or by maintained GPA as to how long each parent is obligated to support the student?

Another important item to keep in mind—if either or both parents remarry, there could be stepchildren or half-children to support and educate which could dilute the paying parent's financial resources.

Plevy recommends that divorcing parents do their best to leave their emotions behind and work together to provide for the best they can for their children. By reaching a consensus early on in the process, each party will have an understanding of what their obligations will be when their child or children are ready to tackle the challenge of higher education.

If you have any questions regarding Divorce or Family Law, please contact Alan Plevy at 703-790-1900 or by email, *abplevy@smolenplevy.com*.



For more information about SmolenPlevy, scan here.