

Family Law Section

NEWSLETTER

Fall 2005

Family Law Newsletter

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Spring Issue:

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EDITOR'S NOTE

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VIEWS FROM THE CHAIR

By Carla G. Holste, Jefferson City

I must begin this article by expressing my deep sense of honor in being appointed as the chair of the Family Law Section for 2005-2006. I have had the privilege of serving on the executive council of the Family Law Section for several years now, including five years as the chair of the legislative subcommittee. As I write this, I have been receiving responses from Section members willing to serve on the legislative subcommittee for the 2006 legislative session. I am proud to report that within a few hours after sending out my email requesting volunteers, I was inundated with replies! It does not surprise me that the response was overwhelming. From my past experience with the Family Law Section, our members are willing to volunteer time toward furthering the goals of the Section. All of us know the impact new legislation can have on our clients.

I have always been impressed by the attorneys I have encountered in my practice. Those of us who practice in the area of domestic relations on a regular basis know full well how important it is for our clients to come to resolutions without the necessity of litigation, especially in the area of custody of children. We have been instrumental in providing programs to assist our clients in the practical aspects of the impact of their divorce upon their children. There are more cases being resolved through mediation than there were several years ago. Our efforts have not been in vain, and that is good to know.

Having said that, there is still work to be done to try and improve the process for our clients and their children. My desire to see the judicial system address the needs of the parties and the needs of their children motivated me to become active in the Family



Law Section. Too many times I have seen children devastated by their parents' divorce and the unfortunate fighting that occurs. At our annual conferences, we have had seminars specifically devoted to high-conflict divorce cases. At the past conference, in our legislation working session, we discussed proposing legislation which would authorize courts to appoint "parenting coordinators" to assist families in the post-dissolution fallout for those high conflict cases. Again, our Section is taking affirmative steps to try and address those issues which are in need.

As I embark upon my first year as chair of the Family Law Section, I encourage the current members to participate and be active in the Section so that your input, suggestions and ideas can be considered and implemented. As my parents always taught me, if you don't speak up, no one hears your voice. If you know a colleague who is not currently a member of the Section, ask them to join! I look forward to working with each of you in the upcoming year as we continue to make the practice of family law both rewarding and significant.

Final Thoughts

by Ann E. Bauer
St. Louis

Fall back. Spring forward. This is the way I remember which way to change the clocks to go to or from Daylight Savings Time. As the days get shorter and we come closer to the “fall back” part of the calendar, we are springing forward in The Missouri Bar.

On September 24 in Kansas City, Joe Whisler passed the presidential baton to Doug Copeland. While there was no formal ceremony for it, this same weekend marked the end of my two-year term as chair of the Family Law Section. Doug Copeland has appointed Carla Holste as our next chair. This is good news for the Section. Carla welcomed me when I was new to the Section Council. She has been a tireless worker on legislative matters, as well as anything else that has come up for the Family Law Section. I am very pleased, as you should be, to have her willing to step forward as the Family Law Section chair. I trust that she will serve us very well in the coming months. I also will enjoy being past chair while she is the chair. If you have anything you would like to share with Carla in terms of our upcoming program year, I am sure she would like to hear from you.

As you will see elsewhere in this newsletter, our Section tried something new at the annual Family Law Conference in August. We had an entire half day devoted to discussing family law legislation and making plans for the upcoming legislative session. The group was not large, but was enthusiastic about trying to be more proactive in family law matters. We discussed longer range planning as well.

After attending the Family Law Conference in August at the Lake of the Ozarks, I thought that I had enough CLE to last awhile. Then I attended The Missouri Bar Annual Meeting in September and found the family law track to have quite a few things that the August conference had not covered. One that was of particular interest to me was titled the “model parenting plan.” The presenters were Mike Albano and Professor Mary Kay Kisthardt, both from the Kansas City area. I have to admit that I was fairly suspicious of what this presentation



might be. I was a little bit suspect of something called a “model” parenting plan, given my belief that too many parenting plans are anything but model, or as I often say, the court form plan that so many people slap on families is “one size fits no one.”

I am glad to report that this model plan is, in reality, a model. Rather than promoting a set schedule, it is a model for looking at the factors and considerations that should go into developing a parenting plan suitable for the particular parents and children who are going to be asked to live by it. In fact, one subtopic was “Problems with Guidelines,” which set forth difficulties with the formula approach to parenting plans. I found this session remarkably helpful, even though I have done extensive reading and thinking about parenting plans. The model plan presented was actually developed by the Commission to Study the American Law Institute Principles of Family Dissolution, part of the AAML (American Association of Matrimonial Lawyers). Partly because we had Missouri representatives serving on the task force that developed the model plan (Mr. Albano and Professor Kisthardt) and partly because Missouri has been considered at the forefront in developing parenting plans, this model plan takes into consideration all aspects of parenting plans that we are required to address under Missouri law. If you have more interest in learning about the model, contact Mike Albano or Professor Kisthardt. Mike Albano’s contact information

Final Thoughts

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is available on The Missouri Bar's website. Professor Kisthardt can be contacted at the University of Missouri-Kansas City School of Law. You also may wish to contact the AAML directly (www.aaml.org). This model parenting plan tries to combine research about children and families in a way I have not seen proposed before. It was exciting to learn that not only has the plan been developed, but also that two Missouri lawyers played a significant role in its development.

I did not go to all of the family law track sessions and hate to highlight one when all of the ones I went to were so excellent. Twelve attorneys from across the state gave their time to make this track a very good one. Every session I went to was full, and with many faces I have not seen at other family law presentations. It is good to know that we can present high quality programs that will draw a crowd. I imagine that it was as rewarding for the presenters to have the opportunity to present with people who are not from their own communities as it was for me to get different perspectives from presenters from St. Louis, Kansas City and out-state on the same panel.

Before I get too sentimental about looking back on my two years as Family Law Section chair, I want to look forward. In addition to Carla Holste as chair for the next year, there will be other appointments made by Missouri Bar President Doug Copeland. We also have a new elected representative to the Family Law Section from the out-state area. She is Susan Jensen, who will serve a three-year term that will expire in 2009. Susan has been active in the Section, including handling newsletter responsibilities over the past few years. She joins Kieran Coyne from St. Louis and Cheri Simpkins from Kansas City as the elected council members.

Without consulting with my successor, I have arranged with The Missouri Bar to host a planning day for next year's Family Law

Section Conference. This will be held on Thursday, November 17, from 10:30 a.m. to 5:00 p.m. in Jefferson City. The Missouri Bar Fall Committee Meetings will be held the day after the planning meeting, on Friday, November 18. The wildly successful Solo and Small Firm Conference is planned by attorneys from across the state gathering together for a planning session such as this one. We have discussed for several years the benefit of having many people together in one day to make plans for the August conference as well as to divide the task of contacting speakers. While we get positive feedback about the August conference, we have received constructive criticism as well. We hope that by planning this year as a group, the conference will be better than ever. Lunch will be provided on the planning day and if you are interested in coming and can only join us in the afternoon, there will be plenty of work left after the lunch.

Information will follow about the planning meeting, either on the list serve or in separate mailings. I have already heard from collaborative lawyers that they are hoping to have a special collaborative law track during the conference in August. Previously they have had a pre-conference half-day seminar. If you are not able to participate in the planning on November 17, your thoughts and comments are welcome in advance. Feel free to e-mail them to me (aebauer@carterbauersoule.com) or Larry Swall, the conference chair (lvswall@aol.com).

I hope that those of you who are reading this column will share your thoughts and get involved in the Section. As I have stated before in this column and to people with whom I have spoken, I have found my participation in the Family Law Section one of the more rewarding aspects of being a family lawyer.

Thank you to all.

What Do You Think?

Should Second Families Be Second Class?

by Allan F. Stewart,
Clayton

Editor's Note: In this column we will endeavor to present a point to evoke your thoughts and elicit your opinions. Selected replies will then be published in the following issues of the newsletter. The opinions expressed in this column are not necessarily those of The Missouri Bar, the Family Law Section, or even the author. All responses should be sent to Allan F. Stewart, 222 South Central, Suite 900, Clayton, Mo. 63105

With the advent of child support formulas and guidelines for calculating fixed amounts for child support comes the problem of fairly apportioning the parent's support obligation. The problem is simple so long as the father and mother have no additional children after the time the support obligation is established, but that is often not the case. People move on with their lives, find other partners, start new families.

With the starting of a new family with new children, additional obligations for child support arise. When the parent starting a new family is already under an obligation to pay support for the children of the prior family, this creates a conflict between the parent's duty to the children of the first family and the children of the second family.

Some might say "too bad" – if one starts a second family by having subsequent children, it is a problem of his own making and he must bear the burden of his actions. But is that a fair or realistic response? People move into new relationships after the breakup of a prior relationship. If the support obligations for the new family are not given consideration, does that not then reduce the children of the new family to second class status behind the children of the first family? A child is a child whether being first born or coming later. Are not all children entitled to an equal right of support from a common parent? When a couple in a relationship have one child and then have a second child, the first born has no claim to a greater portion of support than his after born siblings. Yet when the first child is left with one parent and the other parent moves on to a new relationship and chooses to have more children, should the children of the first relationship suffer a reduction of support?

Most states have opted for support guidelines or formulas that fix the support obligation of the support-paying parent without regard to the birth of subsequent children in a second family. Missouri has adopted a mixed approach. In calculating the support obligation of a parent, Missouri's form 14 provides for adjustments to a parent's income. Line 2a allows an adjustment for child support actually being paid pursuant to another support order. Line 2c allows an adjustment for other children in the parent's custody for whom a support obligation is owed. However, these adjustments are limited based on who is bringing the action, the parent receiving support or the parent paying support. (The comments to use in form 14 give several examples of the application of this rule which space does not allow for recitation here. The readers should consult the comments to use.)

The provisions in this rule are characterized as a "sword vs. shield" application. In essence, if the action to establish or to modify support is brought by the parent receiving support, then the parent paying support may claim an adjustment for other children that parent is supporting. However, if the parent paying support initiates the action, then no adjustment is allowed that parent. This means that a parent who has a support obligation to an earlier established family may not seek an adjustment to that obligation, taking into consideration the support obligation to the second family. The children of the second family must share the burden of the parent's obligation to the first family without regard to their own needs and economic circumstances.

Would the fairest approach be to recognize the equality of all children to whom the support paying parent is obligated by calculating the parent's support obligation under the guidelines and prorating that amount among the total number of children? (For an interesting and extensive treatment of this subject see – Note: *Hastings Constitutional Law Quarterly*, "Second Children Second Best?" by Rebecca Burton Garland at 18 *Hastings Const. L.Q.* 881.)

What do you think?

Tax Topics: Maintenance/ Alimony

by Lisha Masters,
Springfield

Alimony is taxable to the recipient and deductible by the payor. This rule is applicable when the following requirements are met:

1. The payments are made by cash, check or money order;
2. There is a written court order or separation agreement;
3. The parties do not agree that the payments are not to be deemed taxable to the recipient or deductible by the payor;
4. The parties are not residing in the same household;
5. The payments are to terminate when the payor dies;
6. The parties do not file a joint tax return; and
7. No portion of the payments is to be considered child support.

Internal Revenue Code § 71

A standard periodic alimony award will fulfill all of these requirements. Payments not designated as alimony by the parties or the court still may meet the above requirements and therefore be deemed alimony by the IRS should there be an audit or investigation of any kind. (Note: IRS documents continue to refer to spousal support as alimony rather than maintenance.)

Payments to Third Parties

If a judgment or separation agreement requires one spouse to make payments to a third party on behalf of the other spouse, these payments to third parties may qualify as alimony if they meet the seven requirements. §71-1T A-6. For instance, if Husband is required to make the mortgage payments on property awarded solely to Wife, Husband could claim the payments as alimony. The spouse for whose benefit the payments are made would be required to claim the payments as income and would be allowed the interest deduction on their tax return.

If the payor spouse does not claim the mortgage payments as an alimony deduction, then he would be allowed to claim the interest deduction on his taxes. The recipient spouse would not claim the amount of the mortgage payments as alimony and would not be entitled to any interest deduction.

A different rule applies when the property for which payments are being made is still jointly owned. If you are the spouse ordered to pay the mortgage and the home is jointly owned, then you can deduct half of the total payments as alimony and you can claim half of the interest as an itemized deduction. The spouse living in the home would have to claim one-half of the principal payment as income and would be entitled to claim one-half of the interest deduction.

For example, Husband is required to pay the \$1,000 mortgage payment on the home in which Wife continues to reside. \$400 of the payment is principal and \$600 is interest. One-half of Husband's principal payment (\$200) is deductible as alimony and he would be entitled to an interest deduction of \$300. Wife would be required to claim one-half of the principal payment as alimony and is allowed the other half of the interest payment as a deduction. This situation would occur if the parties agree to sell the residence, with one party to make the payments and the other to reside in the home until it sells.

If the property is owned solely by Husband but the Wife is allowed to remain in the home, Husband cannot claim the mortgage, interest, real estate taxes, insurance, etc., as alimony because they are his legal obligations as owner. The payor would be entitled to all applicable deductions with regard to the payment of interest, real estate taxes, etc.

Even though § 71 allows the parties to determine the tax impact of certain payments, the parties do not have to choose the same designation for all payments made. If a judgment requires one spouse to make regular alimony payments, mortgage payments, and tuition to, or on behalf of, the other spouse, the parties may elect to treat the regular alimony payments as taxable to the recipient and deductible by the payor. The parties could then choose to designate the mortgage and tuition as non-taxable to the recipient. If the parties are not entering into a marital settlement agreement, the judge should be asked to clearly designate certain payments as alimony or property and debt division.

A word of caution: The default position is that payments meeting all of the requirements of § 71 will be taxable to the recipient. If the

*Tax Topics:
Maintenance/
Alimony*

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intent of the parties is not consistent with the default position, then a specific designation must be made under requirement number three. This requirement states that the parties may agree that certain payments are not to be deemed taxable to the recipient or deductible by the payor.

Child Support

Child support is not taxable; however, tax issues arise when child support is paid in such a way that it functions as alimony. When negotiating the amount and duration of child support, you must be certain that the termination date or the date for the reduction of child support is linked to, or associated with, an event or contingency related to the child.

A payment will be treated as specifically designated as child support:

a) If payments are to be reduced within six months of the child reaching age 18, 21, or the state's age of majority;

b) If payments are to be reduced on two or more occasions that occur within one year of a child reaching an age between 18 and 24 and the date is the same for each child.

Contingencies related to the child include the child becoming employed, dying, leaving the parent's household, leaving school, getting married, or reaching a certain age or income level. IRS Publication 504. Payments are legally presumed to be child support only if they fall into one of the stated categories.

Consider this example. Husband is ordered to pay child support to Wife in the amount of \$3,000 per month for 36 months, and then support is reduced to \$1,500 per month until the child is emancipated. In 36 months the child is 16½ years old. The reduction does not fall within the six-month period before or after the child reaches the age of majority and is not

associated with a contingency related to the child. On its face, this is an arbitrary date and would be suspect if reviewed by the IRS.

Consider the additional facts that Wife has three years left to complete a college degree and obtain employment at a higher wage. The parties agree that once Wife is receiving this higher income, the child support should be reduced but they do not want to return to court for a modification. This is the underlying basis for the reduction after 36 months.

Why is this important? If the IRS reviews the parties' tax returns and determines that the presumption does not exist as to child support, then the IRS may require the party receiving payments to pay taxes on the difference between the original amount and the subsequently reduced amount. It is then the burden of the taxpayer to overcome the presumption against child support, which can be difficult and costly.

The intent of the parties should be made very clear in the final documents. In the example above, the reduction in child support was intended to avoid a recalculation under Form 14 once Wife was more gainfully employed. To the IRS, it would be the legal presumption that the additional \$1,500 was maintenance.

Conclusion

An article of this nature cannot address all of the nuances associated with the Internal Revenue Code's treatment of alimony and child support; however, recognizing the issues will give you the opportunity to discuss the potential tax liability associated with various forms of support payments. Consultation with a tax attorney or accountant is strongly advised if you are not comfortable interpreting the tax code and IRS publications and forms.

Family Law Legislation: Attorneys Taking A Proactive Role in Family Law

by Susan Jensen,
Springfield

During the August 2005 Family Law Conference, a group met to discuss the upcoming legislative session from a family law perspective. Margaret Donnelly, a Missouri State Representative from St. Louis, and Carla Holste, Missouri Bar Family Law Section Vice-Chair, led the group. After offering some background on how legislation gets passed, Margaret and Carla discussed family law legislation they expect to see proposed during the 2006 session.

A couple of bills are expected to resurface this year. The first is one regarding standby guardianships. This bill establishes a procedure for ill parents to quickly establish guardianships for children that can be easily reversed when the parent recovers from the illness or incapacitation. A procedure for transforming the standby guardianship into a full guardianship is included.

The second bill expected to appear again is one creating covenant marriages in Missouri. A covenant marriage is an alternative to traditional marriage that requires premarital counseling and limits the ability to dissolve the marriage.

Next, the group focused on legislation it would like to see proposed. Several uniform acts not yet adopted in Missouri were discussed. The group believes the passage of these uniform laws in Missouri would be a positive move for Missouri family law. The first is the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The second is an update of the Uniform Interstate Family Support Act (UIFSA). The third uniform act discussed is the Uniform Premarital Agreement Act. Finally, the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was discussed. All of these uniform acts can be found on the National Conference of Commissioners on Uniform State Laws (NCCUSL) website at www.nccusl.org. Many states surrounding Missouri have already adopted these uniform laws.

In addition to the uniform laws, the group discussed other areas where legislation might be needed.

• **Grandparent Custody:** Many practitioners are hearing requests for grandparents requesting statutory provisions

that create de facto custody for grandparents in certain situations. The group discussed whether this can be better addressed in the probate code, rather than in the domestic law codes.

• **Notice Provision for College Child Support Requirements:** Another area of domestic law that was explored was child support for children who are over 18 and attending college. It was suggested to mandate that child support judgments contain a notice setting forth the responsibilities involved in preventing abatement of child support when transcripts are not provided to the paying parent under § 452.340.5, RSMo. This notice would be similar to the relocation notice currently required in all judgments.

• **Parenting Coordinators:** Developing standards for parenting coordinators in Missouri was examined. Oklahoma has enacted a parenting coordinator statute that could be used as a model for Missouri parenting coordinators serving in high conflict custody cases. Their purpose would be to make quick decisions when unmarried parents disagree over parenting decisions and to help educate parents on how to make those decisions themselves without the need for a third party.

• **Privacy Issues:** Concern was expressed over the extent of private information available in domestic court files. Information such as Social Security numbers, addresses, credit card account numbers, and bank account numbers almost always found in divorce judgments and marital settlement agreements filed with the court should be protected from misuse. A rule or statute requiring the closing of records as the routine, rather than the exception, was discussed.

• **Intermediaries:** Adding language in the statutes allowing one attorney to act as an intermediary to put a mediated agreement into final judgment form was discussed.

Committees were formed to determine how best to proceed. Any comments concerning any of the above issues is welcome. Anyone with any interest in legislation is encouraged to attend The Missouri Bar Family Law Section meetings. In addition, anyone willing to attend legislative sessions on family law topics should contact Carla Holste.

***Interested in becoming a part of the Family Law Section?
Return completed application and membership fee to:***

The Missouri Bar • P.O. Box 119 • Jefferson City, MO 65102-0119
Attention: Committees

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Membership in the Family Law Section is \$20 per year.
Please include membership fee with your application.

Family Law Section Newsletter

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