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# Convocation Explores Marriage, Divorce and Death

**T**he estate planners and tax attorneys learned something from the matrimonial lawyers. The matrimonial lawyers learned something from the corporate specialists. And at UB Law School's 14th Annual Alumni Convocation, everyone learned a lot about the complexities of mixing business with the displeasure of divorce.

"Marriage, Divorce and Death: The Impact on Business and the Professions" was the title of the spring convocation. Almost 200 alumni attended the morning seminar before a luncheon and presentation of the 1990 Edwin F. Jaeckle Award to Professor Wade J. Newhouse (see accompanying article).

The unfortunate family in the day's hypothetical case should have seen their lawyers sooner. Presented by Robert B. Moriarty, senior partner in the Buffalo law firm of Moriarty & Condon, and

moderator of the convocation, the case involved the fictional Fervor family. Against a backdrop of the family's closely held corporation, attendees learned of the problems leading up to the Fervors' marital breakup, including heavy drinking, an affair with a tennis pro and an attempted suicide — as well as their divorced daughter's intended marriage to an objectionable, bankrupt accountant.

Paul I. Birzon of Birzon, Zakia, Stapell, Olena & Davis began the discussion with a grim observation. "On the racetrack of life," he said, "death and taxes are still running first and second in certainty. But if you look down the stretch you'll see galloping strongly into third place is divorce."

He went on to note that 1990 is the 10th anniversary of New York State's Equitable Distribution Law, which rests upon the principle that marriage is an

economic partnership. In a divorce, the law states, the presumption is that all property is marital property — and thus jointly owned by both spouses — unless proved otherwise.

It can be a difficult challenge, Birzon said, for a lawyer to properly trace the lineage of items of property to establish that it is separate property, and thus not subject to distribution in a divorce. "This really underscores the importance of clients' keeping good records," he said.

Birzon addressed the issue of invasive disclosure — specifically, how much must one reveal about one's business in a divorce action? "Virtually everything," he said, "from the beginning of the marriage to the commencement of the divorce action is discoverable. The courts and statutes provide for broad and liberal disclosure — whatever is 'material and necessary' to the action, and this has been interpreted rather broadly."



There are limits, though, to what is deemed necessary; Birzon referred to *Rosenberg v. Rosenberg* and *Dignan v. Dignan* as cases in which the court held that certain information about one spouse's business was immaterial in divorce proceedings.

"We've certainly been on an interesting path these 10 years," he said, "and I expect in the next 10 years, assuming we're all still around, it will get even more interesting."

Joyce E. Funda, of the firm Funda & Munley, spoke next on how the courts have defined "property." Beyond the house and the car, she said, rulings have stretched to include as property several non-traditional assets, including professional licenses, certification and academic degrees — "essentially the acquisition of anything that enhances the earning power of the person possessing it."

"The courts have recognized," she said, "that spouses contribute to the acquisition of property not just by going out and earning money, but by raising the kids, keeping house, entertaining business associates, putting off one's career so the spouse can finish school."

The landmark case in this area, she said, was *O'Brien v. O'Brien*, in which a husband's medical license was held to be marital property and thus subject to consideration in an equitable distribution proceeding. "The question," she said, "becomes the value of the asset and the percentage of distribution to the other spouse."

Complications are many in attempting to establish a value for the asset, Funda said. "Courts cannot distribute property for which they have no proof of value," she said. "It has become a battle of the experts, and often it becomes a battle of which expert the court believes. It's crucial that these assets be valued fairly, and that the valuation be made early in the case."

"As you can imagine, this is an area that's ripe for disagreement."

George Zimmermann of Albrecht, Maguire, Heffern & Gregg explored the

ways in which a buy/sell agreement covering the Fervors' business would affect their possible divorce.

Such an agreement would have been a good idea for the hapless family, Zimmermann suggested, because it would have enabled the patriarch, Adam Fervor, to keep his daughter's minority share of stock in family hands rather than allow her to give it to her unreliable and greedy paramour.

He pointed out that the courts recognize a buy/sell agreement in establishing distribution of property in a divorce. "Assuming this stock is marital property," he said, "the court would put a value on it, then allocate a portion of that value to Mrs. Fervor." Zimmermann noted that the court would not award her some of the stock itself; rather, it would give her a distributive share of other assets in lieu of the stock — an important distinction, since Adam Fervor would have to continue running his business after a divorce.

Ann E. Evanko of Hurwitz & Fine next discussed antenuptial agreements and how bankruptcy would affect a property settlement in a divorce, including a divorced spouse's stake in a pension plan.

"Just because you label something a property settlement or alimony doesn't mean it will be treated that way in Bankruptcy Court," Evanko warned.

"Think like a bank. Treat yourself as a secured creditor in any property settlement, not an unsecured creditor."

As for a distribution that involves a share of a pension, "We have to be very careful," she said. "Just obtaining a Qualified Domestic Relations Order is not enough. You need to prepare, file and serve the QDRO. The order needs to be served on the (pension) plan administrator. The language (of the Retirement Equity Act of 1984) suggests it's malpractice for the attorney not to serve the plan administrator."

As for so-called "opting-out" agreements — antenuptial and post-marital — Evanko stressed that their

enforceability depends on proper execution. They must be in writing, she said, prepared in deed-recordable form, and properly signed and acknowledged.

Gayle L. Eagan of Jaeckle, Fleischmann & Mugal focused on estate planning in a divorce situation. Eagan pointed out that Adam Fervor had erred in giving his daughter an outright gift of 29 percent of the corporation's stock, thus relinquishing all control of that interest in the firm. Instead, he could have put her stock into an irrevocable trust; he could have started an employee stock ownership program; or he could have given her the stock over a period of years, to avoid the penalty of a gift tax.

"By his outright gift," Eagan said, "Adam has jeopardized the corporation. Now he has the possibility of a hostile minority shareholder (the daughter's objectionable fiancé).

"As you can see, down the line we've got a lot of potential for a lot of fighting within the business. It keeps us (lawyers) in business, but it's not good for the corporation."

The final speaker was Professor Kenneth F. Joyce, director of the New York State Law Revision Commission. Joyce discussed the differences between title systems and community-based systems.

Because marriage partners are considered economic partners during a divorce action, he said, it is not always the case that one spouse's death during the proceeding means that the distribution process becomes moot. Joyce cited the *Schwartz* case, in which a woman in the middle of divorce proceedings was murdered, allegedly by a hit man hired by her estranged husband. The wife's father sued, arguing that the distribution proceeding should continue, and the court agreed.

"The courts," Joyce said, "are tending to recognize the idea that dissolution of the economic partnership of marriage by death is no different from the death of a partner in a business — the property distribution must go forward." ■