

Family Law & Estate Planning Newsletter

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Legal Custody Provisions Provide Decision-Making Authority for Children’s Major Life Issues

By Michele M. Giordano, Attorney

Ofentimes, a potential client walks into a consultation with a good idea of how they would like the custody issues determined in his or her divorce case. However, more often than not, they are not familiar with all of the complexities involved with custody, particularly the concept of “legal custody”. In Michigan, the determination of child custody is not simply about where the children will reside after their parent’s divorce (referred to as “physical custody”). A very important issue of child custody is that of legal custody, which involves decision-making authority for the children’s major life issues.

Michigan legislation is vague about the definition of legal custody, piecemealing the concept in several different statutes. One statute creates a definition of joint custody by stating that “the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.” Additionally, another statute mandates that in determining whether to award joint custody, the court must determine “whether the parents will be able to cooperate and generally agree concerning important decisions affecting the

welfare of the child.” While numerous supplementary statutes define and articulate various scenarios that fall under the legal custody umbrella, such as access to records, restrictions on moving with the child (“100 Mile Rule”), and change of domicile, the grounds for determining whether parties shall share legal custody and all that joint custody involves is really found in Michigan judge-made case law.

Ultimately, many attorneys have carved out language regarding joint legal custody that assists clients in understanding what exactly this provision entails. When parties share legal custody, their Judgment of Divorce will almost always contain some variation of the following provision:

The Parties shall share joint legal custody of the minor child as a result of which they shall:

- a. foster, encourage and support the relationship between the child and the other parent;

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- b. consult and attempt to agree before major decisions are made affecting the child's education, enrichment activities, camp, travel, and medical problems;
- c. have equal access to medical, psychological, and educational records of the minor child;
- d. notify one another of any emergencies relating to the minor child;
- e. keep the other party reasonably informed of the whereabouts of the child and his or her own whereabouts in the event of a medical or other emergency;
- f. inform and be informed about music, school, sports, and other enrichment activities of the child and be provided an opportunity to be present;
- g. use their best efforts to work together to ensure a consistent agreement in matters affecting the upbringing of the child and shall work together to promote the best interests of the child; and

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- h. shall have the authority and responsibility to decide all routine and emergency matters concerning the child while the child is with him or her.

Understanding child custody issues in a divorce means thinking about not only the physical schedule, but also how well two parents can work together in determining and deciding major issues concerning their child's welfare. No matter how broken the relationship is between the parents, having joint legal custody requires that two parents must still be able to effectively communicate with each other when it comes to their children. By making such communication a priority, the entire family, and not just the parties directly involved, will have a much greater chance of walking away from the divorce on a positive path towards the future.

Michele is an attorney in the firm's Grand Rapids office where she focuses her practice on family law, including divorce, post-divorce, custody, and adoption. She can be reached directly at mgiordano@shrr.com or 616-458-8308.



Intra-Family Loans: An Effective Way to Shift Wealth

By George F. Bearup, Attorney

While 2012 is a great time to consider making large gifts to shift wealth to the next generation, estate and GST tax-free, some folks are still reluctant to give away their wealth out of a fear that they may require that wealth to support themselves during their extended lives. For those

who are reluctant, a loan to children or grandchildren may be an attractive alternative.

Intra-family loans are common among family members. Parents often financially help out their children or grandchildren. But these loans can also

be an effective way to shift wealth. The IRS requires that an appropriate interest rate be applied in intra-family loans in order that the loan is not recast as a gift. The key factors that the IRS will look at to determine whether a loan or bona fide debt – and not a disguised gift – is made include the following:

1. Payment of interest;
2. A fixed schedule for the repayment of the Note;
3. Adequate security for the Note;
4. The actual re-payment of the Note;
5. A reasonable prospect that the borrower (child) will actually repay the Note and that the lender (parent) has adequate funds to advance for the loan; and
6. The conduct of the parties indicates the existence of a debtor-creditor relationship between family members, e.g., the Note was listed as a debt by the borrower on a financial statement. Little weight will be given by the IRS to the description of the instrument, e.g., a “Promissory Note,” if the parties’ actions do not comport with the substance of the Note and they do not adhere to the Note’s terms.

Loans are a convenient way to shift wealth. Consider that the current interest rates are at historic low levels. For March of 2012, a loan of less than three years requires a mandatory interest rate of 0.19 percent per year. A loan from three

years to nine years requires a minimum interest rate of 1.08 percent. Loans greater than nine years, requires an interest rate of 2.65 percent. If the parent loans cash to the child, the interest rate required by the IRS will thus depend upon the duration of the Note. The wealth shift occurs if the child reinvests the loan proceeds and earns greater than the interest rate they must pay on the Note to their parent. The net effect is to shift that spread in the interest rate paid and earned to the child, gift tax-free. While the child probably pays income tax on the income earned by the invested loan proceeds, that taxable income may be at a lower marginal rate than the parents’ tax bracket.

For anyone who engages in an intra-family loan, careful adherence to the terms of the arrangement is critical. While adequate loan documentation is helpful, it is not enough to establish a bona fide debtor-creditor relationship; the actions of the family members will ultimately determine how successful they are to shift wealth gift tax-free from parents to children or grandchildren.

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George is a shareholder in the firm’s Traverse City office. He is broadly recognized as a leader in the areas of estate planning and retirement planning and is one of only 2,600 attorneys in the nation elected to be a Fellow of the American College of Trust and Estate Counsel, a national organization that includes attorneys who have demonstrated the highest level of integrity, commitment to the profession, competence, and experience as trust and estate counselors. George can be reached directly at 231-486-4510 or gbearup@shrr.com.



Prenuptial Agreements: Planning Before Marriage Can be Wise and Thoughtful

By Véronique Liem, Attorney

Though they may at times be perceived as unromantic, prenuptial agreements can actually be prepared in an open and fair manner that strengthens a couple's ability to negotiate their financial affairs. Prenuptial agreements are contracts made before marriage to resolve issues of property, and possibly support, upon the end of the marriage. A prenuptial agreement addresses how those issues will be resolved if the marriage ends in divorce or with the death of one spouse.

Circumstances in Preparing an Agreement

Prenuptial agreements are often considered when the future husband or wife have children from a previous relationship, when one or both have significant premarital assets or future inheritances, or when there are business or real estate investments involved. Such agreements must be carefully drafted, with full disclosure of each party's financial situation. Negotiation of the agreement, with both parties represented by legal counsel, is desirable. There should be sufficient time to negotiate before the wedding date. The agreement, though providing consequences of divorce, must not promote divorce

Enforceability

Prenuptial agreements are enforceable in Michigan if they were not obtained fraudulently or unconscionably, or through duress, misrepresentations or insufficient disclosure of material facts. A court may also consider if the facts and circumstances present when enforcement is sought have changed so much, and unexpectedly so, as to make enforcement of a prenuptial agreement unfair and unreasonable. Most often however, the courts find that changes could have been anticipated and that the agreement is binding.

Postnuptial Agreements

Similar agreements can also be prepared after marriage, possibly upon receipt of an inheritance or to address financial concerns associated with different values relative to work, investments and spending. Such "postnuptial agreements" must meet the same requirements as a prenuptial agreement. However, they will be subject to greater scrutiny, in particular to make sure that one spouse has not misled the other in entering into the agreement, perhaps based on a fraudulent promise that it would save the marriage.

Postnuptial agreements must not be used by one spouse in preparation for a divorce or as a substitute to a divorce settlement agreement. Their relative fairness will be reviewed and courts will more likely enforce them if their terms were negotiated at arm's-length by both parties, with assistance of counsel.

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Benefits of Prenuptial/Postnuptial Agreements

Negotiating prenuptial and postnuptial agreements can be emotionally demanding for parties contemplating marriage or addressing financial matters during marriage. However, these agreements hold some important benefits, both tangible and less so:

- Promote openness, honesty, and clarity.
- Shed light on the parties' ability to be fair to each other and reach compromises.
- Help prevent conflicts related to financial matters, all too often a source of significant marital tension.

Véronique is a shareholder in the firm's Ann Arbor office where she focuses her practice on family law and divorce, as well as commercial litigation. She can be reached directly at 734-913-5517 or vliem@shrr.com.



Attorney Profile: Michele M. Giordano – Attorney *and* Counselor

Michele Giordano began her legal career with the intention to practice criminal law, but that changed when she obtained a position at a small firm focused solely on family law. Michele found that her role in family law matters offered greater opportunity to use her skills as a legal counselor.



“Family law attorneys are the epitome of ‘attorney as counselor’ – we deal with the legal issues AND the raw emotional issues of our clients simultaneously,” says Michele. That mix proved to be the exact right fit for Michele who has been practicing family law ever since.

To be certain, practicing family law comes with emotional highs and lows. Michele contends that working with families and children, often bringing consensus and conclusion to difficult issues, keeps her passionate about her career.

Michele recalls her first contested custody case, “I represented a father who petitioned for custody of his son after being concerned about the living conditions at the mother’s house. With my help, this little boy was taken from an extremely unstable home environment to one in which he is still thriving. Just last year, I represented a mother and step-father in the step-parent adoption of three

little girls who couldn’t be happier about being adopted by their mom’s new husband, who they already referred to as ‘dad.’” It’s moments like that (especially those involving children) that Michele finds most rewarding.

On a daily basis, Michele counsels her clients on matters involving divorce, post-divorce, custody, and adoption. In addition, she represents victims of domestic violence and child abuse in trials and hearings.

Michele grew up in St. Clair Shores, Michigan, but moved to Grand Rapids to find a small college with a big city feel. She chose Aquinas College, where she received her Bachelor’s degree and later Michigan State University College of Law, where she received her Juris Doctor. Having previously fallen in love with West Michigan during undergrad, Michele moved back to the area to set up home base.

In her spare time, Michele enjoys being active by doing CrossFit, biking, running and participating in mud runs, road races, and adventure races. She also loves to cook, read, write, host parties, travel, and most of all, spend time with loved ones.

Michele works in Smith Haughey’s Grand Rapids office. She can be reached directly at 616-458-8308 or mgiordano@shrr.com.



The Elder Law Team – Helping protect your quality of life and independence.

We recognize that aging issues are often complex and emotional. Many families find themselves unprepared when faced with difficult decisions that affect their loved ones’ care. We can help make it easier. Ask for any of our elder law attorneys at 877-833-7477(SHRR) or visit <http://bitly.com/elder-law> for more information.

Smith Haughey's Family Law Attorneys

John R. Blakeslee
231.486.4555
jblakeslee@shrr.com

Peter J. Boyles
231.486.4511
pboyles@shrr.com

Michele Giordano
616.458.8308
mgiordano@shrr.com

Charles B. Judson
231.486.4519
cjudson@shrr.com

Veronique Liem
734.913.5517
vliem@shrr.com

Mary R. Pigorsh
616.458.9463
mpigorsh@shrr.com

Megan E. Smith
616.458.5454
msmith@shrr.com

Robert W. Tubbs
231.486.4535
rtubbs@shrr.com

Melissa E. Whitman
231.486.4540
mwhitman@shrr.com

Sharon M. Kelly
Of Counsel
734.730.2048
skelly@shrr.com

Michael D. Lewis
Of Counsel
231.486.4553
mlewis@shrr.com

Smith Haughey's Estate Planning Attorneys

George F. Bearup
231.486.4510
gbearup@shrr.com

Joseph E. Belsito
616.458.2490
jbelsito@shrr.com

James G. Black
616.458.4253
jblack@shrr.com

John R. Blakeslee
231.486.4555
jblakeslee@shrr.com

Scott D. Harvey
231.486.4545
sharvey@shrr.com

Charles B. Judson
231.486.4519
cjudson@shrr.com

Gregory R. Kish
231.486.4557
gkish@shrr.com

Kirk W. Morgan
616.458.3319
kmorgan@shrr.com

Robert W. Parker
231.486.4504
rparker@shrr.com

Robert M. Suarez
616.458.4256
rsuarez@shrr.com

Jeffrey R. Wonacott
231.486.4509
jwonacott@shrr.com

Stephen C. Chambers
Of Counsel
231.486.4546
schambers@shrr.com

Ellen A. Fred
Of Counsel
231.486.4558
efred@shrr.com

Michael D. Lewis
Of Counsel
231.486.4553
mlewis@shrr.com

Jeffrey J. McManus
Of Counsel
231.486.4554
jmcmamus@shrr.com

Patrick J. Wilson
Of Counsel
231.486.4541
pwilson@shrr.com