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SEPARATE MAINTENANCE

by James D. Vitale, Esq.

Introduction

Some of the most common reasons people give for seeking a legal separation rather than divorce include steering clear of a prohibition their religion may place on divorce, avoiding a loss of military benefits or of medical insurance, and avoiding a loss of medical services to an institutionalized spouse. *See* NRS 123.259.

Separate maintenance is a tool used to determine and settle temporary possession of real and personal property and each spouse's financial responsibilities to the other, as well as those responsibilities relating to custody, visitation and support of any minor children, without legally dissolving the marriage. A decree of separate maintenance, with few exceptions, functions similarly to a decree of divorce, except that the marital status of husband and wife continues to exist.

Jurisdiction and Procedure

NRS 125.190 allows for a person to maintain an action for separate maintenance based upon the following grounds: (a) insanity existing for two years prior to commencement of the action; (b) separation for one year or longer without cohabitation; (c) incompatibility; or (d) desertion by a spouse for a period of at least 90 days. NRS 125.250 mandates that proceedings and practice in actions for separate maintenance "must be the same, as nearly as may be, as those provided in actions for divorce."

Generally, separate maintenance can be maintained as an independent cause of action without the necessity of filing for divorce, pled concurrently as a first cause of action with divorce as the alternative course of action, or pled as a cross complaint. The Nevada Supreme Court has held that divorce statutes can be applied to separate maintenance actions, including injunctive relief to prevent non-compliant spouses from leaving the state. *Summers v. District Court*, 68 Nev. 99, 227 P.2d 201 (1951).

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Since the statutes applicable to divorce may be applied, practitioners should make a habit of reviewing the same divorce, child custody and support statutes normally used in divorce proceedings. *See* NRS Chapters 125, 125A, 125B and 125C.

►*Residency Requirements*

The suit can be brought in the county in which either party resides or in the county in which the spouse may be found. *See* NRS 125.250. This special filing direction was devised specifically to permit a wife to sue her fleeing husband for support either in the county where she remained, or the county to which he fled after deserting her. *Hilton v. Second Judicial Dist. Court*, 43 Nev. 128, 135-136, 183 P. 317-319 (1919). Keep in mind that at the time of the *Hilton* decision, the requisite residency time for filing for divorce was six months. Thus, the additional unique ground of desertion for a period of 90 days was specifically designed to shorten the time when an abandoned spouse could seek relief from the court. *Id*, at 136, 183 P. at 320. Of course, the period of residency for actions of divorce or separate maintenance has since been shortened to six weeks. Please note that the *Hilton* case could be read more as a venue ruling than a jurisdictional case, possibly leading to the conclusion that there is no residency requirement in actions for separate maintenance. The statutory direction to make actions for separate maintenance the same, as nearly may be, as actions for divorce, however, would seem to belie such a conclusion. In other words, the safer course is to ensure residency whether suing for divorce or for separate maintenance.

►*What's In It for Your Client?*

While the basic terminology is different, litigants in separate maintenance actions are entitled to similar relief as those litigants in divorce cases: child custody, child support, spousal support, alimony, possession of property and attorneys' fees and costs are all fair game. While the case is ongoing, the court can also award temporary spousal support, child support, and preliminary attorney's fees and costs. *See* NRS 125.200. The court can separately provide for both "preliminary and final orders" relating to child custody and support. *See* NRS 125.230. Additionally, to keep the assets from shifting during the proceedings, a party may obtain a *lis pendens* or ask the District Court to prohibit the other spouse from disposing of any property during the pendency of the proceedings.

One substantive difference between relief available to separate maintenance litigants as opposed to divorce litigants involves issues surrounding property division. The separate maintenance statutes are framed in terms of ***possession*** rather than ownership of property. In addition to several provisions making separate maintenance orders and decrees modifiable at any time and automatically terminable at death, the scope of authority granted to courts in separate maintenance actions seems to contemplate only temporary, changeable orders as to property.

As in all cases, a prenuptial agreement ("PNA") changes the landscape. Except when prohibited

by a valid PNA, the court may issue permanent orders for spousal support or child support, pursuant to NRS 125.210, as well as issue orders awarding "possession" of "any real or personal property of the other spouse." However, NRS 125.210(3) provides that the court may "change, modify or revoke its orders and decrees from time to time." An important point to keep in mind is that the Nevada Supreme Court has suggested that in an action for separate maintenance, a party may obtain an injunction preventing a spouse who is trying to avoid support payments from leaving the state. *Summers v. Dist. Ct.*, 68 Nev. 99, 104, 227 P.2d 201, 204 (1951).

►What's the Down-side?

The "anything goes" game.

There is very little authority and the statutes are antiquated, making this an area for fairly wide interpretation. The statutory permission for the District Court to make orders concerning "any real or personal property of the other spouse" does not expressly include authority for the District Court to make orders concerning the parties' community property or joint tenancy property, although including such authority within the District Court's powers seems rational.

It may or may not be final.

Similarly, it appears that NRS 125.210(3) makes it impossible to make an order unmodifiable, but balanced against the requirement that procedures are to be "as nearly as may be" to divorce procedures, it appears there is an open question whether a property settlement agreement could be entered, unmerged, and force a "permanent" and unmodifiable result. There is also an open question whether the drafters of the provision intended to supersede the finality rules such as NRCP 60.

The PNA problem.

NRS 125.200(2) and NRS 125.210 restrict the court from making any support and property awards if contrary to the provisions of an enforceable premarital agreement. *See also* NRS 123A.

"'Til death do us part" - sort of.

The NRS 125.210(4) limitation on the lives of the parties does not reconcile with NRS 125B.130, which allows the court to hold a parent's estate liable for child support. Both statutes are derived from older statutes and court rules, and both have been amended in the past several years. The Legislature could have resolved this issue, but it went unnoticed. Public policy would probably lean toward resolving the question in favor of finding jurisdiction to hold a parent's estate liable for child support, but the matter has never been addressed by the Nevada Supreme Court.

Pursuant to NRS 125.210(4), no order in a separate maintenance action is effective beyond the joint lives of the parties. In *Pearson v. Pearson*, 77 Nev. 76, 82, 359 P.2d 386, 389 (1961), the Nevada Supreme Court held that a wife, in her cross-claim for separate maintenance against her husband, could not seek recovery of sums expended by her for past support of either herself or of the minor children of the parties, whether or not she would be entitled to entertain an independent action therefor. Therefore, for spousal support obligations the limitation seems clearer, and any such orders end upon death. Please note that greater latitude is permitted a court entering an order in a divorce action where alimony payments must cease upon the death of either party "unless otherwise ordered" by the court. *See* NRS 125.150(5).

It is unclear whether property divisions made in a separate maintenance decree disappear upon the death of a party, since the statute speaks of "possession" and not ownership, and since subsection four expressly terminates the effectiveness of all such orders at death. Even if such is the intention of the statute, it is unclear whether parties and courts are ***forbidden*** to come up with some permanent disposition of spouses' property interests in separate maintenance proceedings.

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NOTICE TO SECTION
AUDIT OF ACCOUNTS

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The State Bar of Nevada has recently conducted an audit of the Family Law Section accounts and expenditures for the past four years. It found all accounts to be in order and with no improprieties.

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►*Modifications to Decrees*

Under NRS 125.210(3), the court has continuing jurisdiction to "change, modify or revoke its orders and decrees from time to time." Pursuant to NRS 125.270(1), however, the court does not have authority to modify "accrued installments" of payments from one spouse to another, but has authority only to modify installments not yet due at the time the motion is filed. Unchanged since 1949, the statute includes a provision that it does "not preclude the parties from entering into a stipulation as to accrued installments prior to the time a motion for modification is filed. NRS 125.270(2)."

An order granting or denying preliminary relief to a party during the pendency of proceedings for separate maintenance is not appealable, just as such a preliminary order would not be appealable in a divorce action.

►*Enforcement Proceedings*

NRS 125.240 asserts that any relief awarded in an action for separate maintenance "may be enforced by the court by such order as it deems necessary." The statute further provides that the court may appoint a receiver, require security, issue execution, sell real or personal property and punish disobedience of any order as a contempt. NRS 125.280 permits the court to enter a judgment for arrears together with costs ("not to exceed $10") and attorney's fees.

In *Lemp v. Lemp*, 62 Nev. 91, 95, 141 P.2d. 212, 214 (1943), the court upheld a determination that Nevada lacks jurisdiction to make any order that would affect, supersede, or set aside any rights under a decree of separate maintenance obtained in another state. And in *Summers v. Dist. Ct.*, 68 Nev. 99, 107, 227 P.2d 201, 205 (1951), the court held that Nevada has jurisdiction to enforce, including by use of execution and even contempt powers, the separate maintenance decree of a foreign jurisdiction that has been domesticated.

►*What Happens If One Party Wants to Re-Marry?*

The general rule is that a separate maintenance decree does not survive a divorce decree. Once a decree of divorce is obtained, the dissolution of the marriage relation extinguishes the subject matter which forms the basis of the claim for separate maintenance. *See, Summers v. Summers*, 69 Nev. 83, 92, 241 P.2d 1097, 1101 (1952); *Herrick v. Herrick*, 55 Nev. 59, 68, 25 P.2d 378, 380 (1933); *Carroll v. Carroll*, 51 Nev. 62, 66-67, 268 P. 771, 771-72 (1928). Nor does a separate maintenance decree bar a party from bringing a subsequent action for divorce. *See Clark v. Clark*, 80 Nev. 52, 59, 389 P.2d 69,73 (1964); *Lagemann v. Lagemann*, 65 Nev. 373, 380, 196 P.2d 1018, 1021 (1948).

Please note that if it is a foreign separate maintenance decree (or by choice of law), it may survive a subsequent Nevada divorce decree if the foreign jurisdiction holds that separate maintenance survives divorce. Nevada must give full faith and credit to the foreign separate maintenance decree while the foreign jurisdiction must give full faith and credit to the subsequent Nevada divorce which terminates the marital relationship. *See Estin v. Estin*, 334 U.S. 541, 545-46 (1948); *Farnham v. Farnham*, 80 Nev. 180, 181, 391 P.2d 26, 26 (1964); *Summers*, 69 Nev. at 88-89, 241 P.2d at 1099-1100; *see also Lagemann*, 65 Nev. at 383-84, 196 P.2d at 1023; *George v. George*, 56 Nev. 12, 18, 41 P.2d 1059, 1060 (1935).

Likewise, Nevada must give full faith and credit to findings by a foreign court in a separate maintenance action where there was personal jurisdiction over the parties. *Clark*, 80 Nev. at 58, 389 P.2d at 72; *Koch v. Koch*, 62 Nev. 399, 401-02, 152 P.2d 430, 430-31 (1944); *Silverman v. Silverman*, 52 Nev. 152, 167, 283 P. 593, 597 (1930); *Vickers*, 45 Nev. at 279, 199 P. at 77. The converse also holds, that if the state issuing the separate maintenance award ***did*** have jurisdiction over both parties, and the Nevada court issuing a divorce did ***not*** have jurisdiction over both parties, the Nevada court could not terminate a support order granted by that other state, and an order or decree purporting to do so would be void. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

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UNDERSTANDING THE CUSTODY EVALUATION: WHAT CAN CUSTODY EVALUATORS TELL US?

by William O'Donohue, Ph.D., Brie Moore, Ph.D., and Lauren Tolle, M.A.

Rates of divorce have skyrocketed over the last 20 years, with the majority of cases involving children under the age of 18.[1] In these cases, the court must make a determination concerning a custody arrangement that protects what many states, including Nevada, call "the best interests of the child."[2] Nevada has had a unique role in the history of divorce in the United States. As one of the first states to move toward a no fault divorce law, "going to Reno" became a popular euphemism for divorce, and for a few decades a small divorce industry developed in Reno.

Typically, the child's best interests are served in the context of joint custody or an arrangement that provides substantial contact with the both parents.[3] However, certain egregious factors, such as child abuse, emotional instability, or excessive inter-parent conflict, may render a joint custody arrangement unsuitable to protect the child's best interest.

Mental health professionals are increasingly asked to provide recommendations regarding the placement of children. Researchers have discovered that many child custody evaluators often do not adhere to recommended assessment practices.[4] Instead, evaluators frequently over-rely on clinical judgment, which can be riddled with bias and subjective influence.[5] Furthermore, there are currently no clearly defined – let alone reinforced – standards for determining competence and training in child custody evaluators.[6] The guidelines provided by various organizations (e.g., the American Psychological Association) are often vague (e.g., "multiple sources of information must be used" – but provide no information on what these should be). It is therefore vital that judges and attorneys become informed consumers of child custody evaluators and evaluations. Informed consumers can weed out poorly constructed evaluations that are based on clinical judgment, faulty logic, and problematic assessment strategies, rather than systematic arguments soundly grounded on the best empirical knowledge available in this area. The purpose of this article is to provide a model to help attorneys better understand what components should be present in quality custody evaluations.

Egregious Parenting Factors

O'Donohue, Beitz, and Cummings[7] have suggested six factors, based on empirical literature of children's adjustment post-divorce, that are thought of as egregious parenting factors. The reasoning is that no parent is perfect, and a custody evaluation should not be a laundry list of minor imperfections. Instead, the standard should be identification of major problems that affect the best interests of the child. These factors should be taken into account when conducting custody evaluations. We present and discuss each below so that attorneys, judges, and child advocates can be informed consumers of custody evaluations. **These factors are:**

1. A history of or potential for future child abuse or neglect;
2. Poor parent-child attachment;
3. Poor parenting skills (developmentally sensitive);
4. Emotional instability/ mental disorder of the parent;
5. Environmental instability; and,
6. Exaggerated conflict.

1: *Child Abuse.* When keeping in mind that the purpose of custody evaluations are to keep the best interest of the child in mind, it is clear that placing a child with an abusive parent would not be in their best interest. A quality evaluation would assess for the presence of factors that have been shown to differentiate abusive families from non-abusive families. However, it is important to note that mental health professionals have no special ability to make definitive judgments about contested matters of historical fact. If one parent alleges that the other neglected their child in the past, the mental health professional can collect some relevant information but has no crystal ball to look into the past and tell definitely what happened. If the report does this, the attorney should see this as a serious error. However, the psychologist may give some pertinent information within their expertise. For example, abusive families typically manifest more negative emotional tone (i.e., not happy and overtly cheerful), more difficult child behaviors (i.e., the child acts out more than is the norm, is more irritable or agitated), and more inappropriate parental response to the child's good behavior (i.e., parent ignores positive behavior).[8]

2: *Attachment.* A healthy, secure attachment to parents plays an important role in the functioning of children and adolescents.[9,10] Attachment is defined as "any form of behavior that results in a person attaining or maintaining proximity to some other clearly identified individual who is conceived of as better able to cope with the world. It is most obvious whenever the person is frightened, fatigued or sick, and is assuaged by comforting and caregiving" (i.e., a child is frightened, cries and seeks a parent to whom they are closely attached for soothing).[11] Separations from a caregiver to whom the child is attached are considered detrimental to development, and can involve problems with peer relationships, aggression, poor school performance and self-esteem.[9,12-14] Currently, there are inadequate assessments for measuring child-parent attachment. Direct observation of parent-child interactions is frequently recommended. To protect against subjective value judgments by evaluators, it is recommended that evaluators focus on types of emotions expressed, how conflict is managed, and how parents attempt to control or direct their child's behavior.[15] However, as a caveat, psychologists have no assessment methods which can validly measure attachment with accuracy. At best they can provide fallible clinical judgment.

3: *Parenting Skills.* Deficits in parenting skills that can be harmful to a child's well being need to be assessed and reported. Parenting skills involve logistics from changing a diaper, to being able to appropriately discipline children of various ages, to soothing a child when they are frightened. Three parenting styles have been identified by Baumrind[16] which differentially affect child development: 1) Authoritarian parenting is associated with low warmth, high control, frequent use of punishment, and lack of consideration of child views; 2) Permissive parents are unconditionally accepting of children's behavior without attempting to modify it along prosocial lines; and 3) Authoritative parents are warm, involved, consistently enforce developmentally appropriate expectations and favor reinforcement over punishment to control behavior. Studies show that preschool through adolescent children who are raised by authoritative parents fare better on virtually every indicator of psychological health than peers raised by non-authoritative parents.[17] The Child-Rearing Practices Report[18] and The Alabama Parenting Questionnaire[19] are among the best choices available for standardized assessment.

4: *Emotional Instability.* Four mental health problems among adults are of particular concern when understanding the consequences of divorce: 1) depression; 2) anti-social behavior; 3) major mental illness (i.e., schizophrenia and bipolar disorder); and 4) personality disorders.[20] When parents' mental health problems are related to children's functioning, measurement of parental psychopathology is clinically and legally relevant to the evaluation of child custody or placement (i.e., a depressed parent may not be able to be as emotionally available for their child as a non-depressed parent, but also may be). The evaluator needs both to make an accurate diagnosis (making clear how each DSMIVR diagnostic criterion is met), as well as make the case of how this mental health problem affects the child's best interest. This is best done by a thorough clinical interview assessing child and parental psychopathology, particularly psychotic, mood, anxiety, impulse control, and personality disorders as defined by the Diagnostic and Statistical Manual of Mental Disorders. However, not all mental disorders affect the child's best interest (e.g., simple phobias) so this is not a game of diagnostic "gotcha."

5: *Environmental Instability.* Environmental stability is important for promoting child security.[21] Many factors fall under the umbrella of an "instable environment," including severe economic hardship, lack of monitoring, parents' lack of routine and parents' schedules and whether or not they facilitate child needs. This is clinically and legally relevant to the evaluation of child custody or placement. Some good measures include home observation, collateral contacts and testing such as the FACES IV,[22] the Family Assessment Measure[23] and the Family Environment Scale.[24]

6: *Parental Conflict.* Parental conflict is associated with deleterious effects on child and adolescent functioning and has been shown to be a stronger predictor of adjustment than family structure.[25] Studies show that approximately 25 percent of parents are in "high conflict" post divorce, which results in severe adjustment problems for children with effects seen into adulthood.[26] One of the most overt forms of parental conflict is parental violence and other acts of marital aggression, exposure to which is the most harmful for children. Parents can inappropriately triangulate their children in their war against their ex-spouse. A good assessment will use a thorough history, collateral contacts, direct observation and the use of standardized measures, such as the Conflict Tactics Scale,[27] to assess parental conflict.

(cont'd. on page 8)

Top Ten Evaluation Questions to Ask when Looking at a Custody Evaluation

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1. ***Has the evaluator been clear on the overall model they have used to determine the best interest of the child?*** Did they look at any of the six factors mentioned above? If not, what is their model of factors affecting the children's best interests? Is the model of child's best interests complete and does it have a good argument supporting it?

2. ***Does the evaluator clearly connect assessment information with their inferences and conclusions?*** If anyone receives a diagnosis, is the evaluator clear on how the specific diagnostic criteria were met? If the evaluator gives a recommendation (sole custody) does the evaluator provide a clear and valid argument on how specific findings of their evaluation (e.g., parent diagnosis) led to this conclusion? Do they consider other arguments and contrary facts, if any?

3. ***Does the evaluator use valid psychological assessment methods to gather information?*** Methods such as the Rorschach inkblot test, Child Apperception Test, Draw a House-Tree-Person and many instruments developed for custody such as the Bricklin Perceptual Scales[30] have very problematic psychometrics.[25] If these are used, then the evaluation's conclusions are a problem.

4. ***Does the evaluator gather and use all reasonably relevant information?*** Have they spoken to teachers and pediatricians about their views of the child's best interests? If they recommend placement in a setting, have they directly observed this and the individuals in that setting? (The first author recently was involved in a custody dispute in which one evaluator recommended an out-of-state placement but had no contact with the principals in that setting, no direct observation of this setting and had not evaluated the claims about the alleged problematic quality of the setting.)

5. ***How does the evaluator deal with value issues?*** Mental health professionals generally are not experts in this. If one parent wants music lessons for the child and the other baseball practice (assuming both can't be done), does the mental health professional make a value judgment regarding the relative merit of these two activities? Custody evaluations often involve value decisions and, at a minimum, the evaluator should explicate his or her argument regarding these.

6. ***Does the evaluator use concepts that are not sound or quite controversial?*** The mental health field has a lot of variability and too much problematic quality, and thus some constructs (e.g., inner child) are not well-accepted in the field.

7. ***Does the evaluator seem biased?*** Some evaluators may side with one gender; some may be reactive to some kinds of issues (e.g., infidelity). Remember that evaluators are human, too, and as such, bring their own biases. Good evaluations should fairly document and then evaluate the concerns of each parent about how the other parent meets the children's best interests. In this section of the report the attorney or judge should evaluate for potential biases by seeing if the logic in dismissing or accepting claims is systematically faulty.

8. ***How did the evaluator handle the idiosyncratic features that usually arise in each case?*** Is the reasoning explicit, sound and grounded on research? For example, the first author has been faced with issues of pornography usage. There is no explicit research on this in custody evaluations. I reasoned explicitly in the report that some hidden (from the children) use was allowable (otherwise, if the standard were higher, there would need to be a lot more foster care placements given the size of the pornography industry) provided three conditions are met: 1) the pornography is not deviant; 2) its usage is not so excessive that it interferes with quality of parent-child relationship; and 3) the usage by the parent remains outside the child's knowledge.

9. ***Did the evaluator try to make decisions about matters of fact that mental health professionals have no specialized knowledge about?*** If the mother is claiming that an unwitnessed and unreported physical abuse incident happened to her nine years ago, and the father is denying that, this contested factual matter is beyond the expertise of the mental health professional to settle. Still, we have witnessed reports in which the mental health professional attempts to settle these.

10. ***Is the report developmentally sensitive?*** If multiple children are involved, does it contain separate arguments for the best interest of each child? Is it sensitive to particular unique developmental needs and how these can be addressed now and in the future? Is it appropriately forward-looking? If the child is three years old now, does it consider issues that can arise when the child is a teenager?

Article Summary

Custody evaluations are difficult. Conducting a sound one is important, given the lives it affects but can also be difficult, given the state of knowledge in the field. Evaluations, like most human products, vary in quality. This article attempts to provide an insider prospective so that attorneys and judges can better assess the quality of the evaluations they see.

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PRINCIPAL RESIDENCE PRINCIPLES

by Susan L. Myers, Esq.

The marital residence often is the main asset in a divorce. The parties and their advisors need to consider the current Nevada real estate market when making decisions regarding how to handle the house. Of course, some clients will have equity in their house, and counsel should be aware of the tax implications. This article will discuss a few of the financial and tax considerations regarding the family home to keep in mind as you advise your clients.

Just Because Your Spouse Got the House, Doesn't Mean You're Off the Hook on the Debt

As home prices fall against the backdrop of adjustable-rate mortgages resetting, 100% financing, interest-only loans and maxed-out home equity lines of credit, you may be seeing more clients who are "upside-down" in their homes. My hairdresser told me recently that her brother had just gotten divorced, and that he was going to have to move in with her because he and his now-ex-wife owe more on the mortgage(s) than the house is worth, and can't afford to sell. The brother had quitclaimed his interest in their house to his ex-wife. The brother apparently did not realize that the transfer did not take him off the mortgage. The fact that he did not know this was more alarming because he was represented by counsel. In fairness, I do not know whether he was not advised, or just did not listen.

In any event, this scenario points out the need to make sure that clients understand that, in the eyes of the mortgage lender and credit bureaus, they cannot simply shift the responsibility to the spouse receiving the house by agreement or a court decree. Think back to your first-year contracts and civil procedure classes. The couple and the lender are parties to a contract. However, the lender is not a party to the divorce. The divorcing spouses cannot compromise the rights of the lender, who relied on the credit history, assets and income of the couple. The court in the divorce case has no jurisdiction to compromise the lender's rights, and thus cannot require the lender to let one of the spouses out of the contract. So the spouse obtaining the interest in the house, and taking over the mortgage, needs to refinance or sell the house, which should be part of any property agreement or order relating to the disposition of the house. Otherwise (assuming the wife "got the house"), if the wife stops paying, the husband's credit is on the line, as could be his assets if it is a recourse loan.

The Dry Stuff: Tax Consequences of Transferring or Selling the Family Home

Transfers

Your client might want to know if there are tax consequences for transferring the residence to his or her spouse, or receiving his or her spouse's interest in the house. Generally, the answer is no. If a person transfers his or her interest in a marital residence while married, or to a former spouse if the transfer is incident to divorce, then there is no gain or loss recognized. IRC §1041(a). One exception: if the transferor spouse is a nonresident alien, the non-recognition rules do not apply. IRC §1041(d).

Timing is everything in being able to take advantage of the non-recognition rules if the transfer is made after the divorce (or annulment) is final. A transfer to a former spouse is incident to a divorce if the transfer: (a) occurs within one year after the date the marriage ceases, or (b) is related to the cessation of the marriage. IRC §1041(c). To be "related to the cessation of the marriage," both of these conditions must apply: (1) the transfer is made under the original or modified divorce or separation instrument, and (2) the transfer occurs within six years after the date your marriage ends. See IRS Publication 504, *Divorced or Separated Individuals.*[1]

Sales

So what happens when the residence is sold? As of May 6, 1997, taxpayers may exclude up to $250,000 ($500,000 for joint filers) of gain on the sale of a principal residence. To qualify for this exclusion, the taxpayer must have

owned and used the home as his or her principal residence for periods aggregating at least two of the five years immediately prior to the sale. In addition, the exclusion may be used no more frequently than once every two years. A reduced exclusion is available if a husband and wife, or either as a result of divorce, must sell a marital residence before owning and using it two of the previous five years. Treas. Reg. 1.121-3(e) indicates that a divorce is an "unforeseen" circumstance. An unforeseen circumstance is an exception to the requirement that taxpayers must own and use a residence two of the last five years to qualify for the exclusion. Thus if the parties meet the requirements for the exclusion and sell the house before they divorce, they would report the gain in accordance with their agreement to split the proceeds assuming they file separately, and take the exclusion, up to the limit, accordingly.

If a spouse, or former spouse, sells a principal residence which was received in an IRC 1041 (property) transfer, then the ownership period from the transferor spouse is "tacked-on" to the transferee spouse's ownership period for purposes of satisfying the two-out-of-five-year rule. For example, if: 1) the husband owned and lived in the house for two years prior to marriage; 2) the marriage lasted only one year and, 3) at which time ownership was transferred to wife, then the wife would be able to "tack-on" her ex-husband's three-year ownership for purposes of the rules, but not his prior residency. Please note that divorce is an exception to the "owned and used" for the two-out-of-five-year rule. In the above example, if wife were to sell the property prior to having lived in it for two years, she would have to *prorate* the $250,000 exemption based on the number of qualifying months she both owned and lived in the residence.

This example further assumes that both spouses stay on the deed to the house as owners. It should be noted that a spouse's sole use of the marital residence prior to entry of the divorce decree may not be tacked onto the non-occupant spouse's use period, if the non-occupant spouse ultimately receives the residence. Additionally, a taxpayer may elect to *not* use the exclusion provisions.

In connection with any sale, the seller must know the basis in the property to determine whether there is, in fact, a gain. Assuming a transfer of the home after July 18, 1984, from a spouse or former spouse incident to a divorce, the transferee spouse's basis in the home is generally the same as the transferor spouse's adjusted basis just before the transferee spouse received it. If the house had been owned jointly and the transferor spouse transferred his or her interest therein to the other spouse, the transferee's basis in that interest is the same as the transferor's adjusted basis. The transferee keeps his or her basis in the half he or she already owned. The transferee's basis in the home is then the total of these two amounts.

Losses, Short Sales and Mortgage Forgiveness Debt Relief

Refinancing a home in the current credit environment may be difficult, especially for a divorcing person who must now rely on one income. If there is not sufficient equity, your client, or your client and his or her spouse, might have to sell the house at loss, meaning that the amount realized (selling price less selling expenses, such as commissions) is less than the adjusted basis of the home. A loss on the sale of a principal residence cannot be deducted.

But what if your client faces selling the marital residence at a loss but does not have the cash to pay off the mortgage? A short sale could be an option in certain situations. In a nutshell, a short sale is when the lender agrees to an arrangement whereby the house is sold for less than is owed. Each bank handles these a little differently, so your client needs to understand his or her lender's policies. Generally, the lender agrees to accept the proceeds of the sale of the house in lieu of a full payoff of the outstanding mortgage balance (but the lender also could require a promissory note for all or some of the balance). If the lender is forgiving a portion of the loan balance, this forgiveness will cause the issuance of a Form 1099 (income from discharge of indebtedness under IRC §108).

However, the Mortgage Forgiveness Debt Relief Act of 2007 (the "Act") provides some, well, relief, for homeowners who have mortgage debt discharged in connection with short sales, loan restructuring and foreclosures. The Act allows individuals to exclude from gross income any discharges of qualified principal residence indebtedness for discharges for a three-year window, *i.e.,* tax years 2007 through 2009, if the loan balance was less than $2 million, or $1 million for a married person filing a separate return. As discussed in more detail in the *Nevada Family Practice Manual* (Second) 10.9-10.11, the Act has specific requirements, so if your client does not meet them, he or she could still be subject income from discharge of indebtedness.

Conclusion

While you are not a real estate or tax expert (and it is always a good idea to consult such attorneys or a CPA), it is important to at least be conversational with these principles when there is a marital home involved. In addition to the IRS publication relating specifically to divorced or separated individuals, IRS Publication 523, *Selling Your Home*, provides some good general information.

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Footnote:

[1]IRS Publications are available at www.IRS.gov.

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