American College of Trust and Estate Counsel
Family Law Task Force
2025 Annual Meeting
La Quinta, California
Saturday, March 22, 2025, 11:00 am – 1:15 pm

Justin Miller, Chair
Jill Fowler, Vice-Chair
George Karibjanian, Secretary

1. **11:00 am – 11:05 am:** Call to Order at **11:00 am**
   a. Attendance Reminder to Sign-In on Meeting Platform/App
   b. Reminder of ACTEC's Code of Conduct
   c. Introductions of Red Dots, Blue Dots, Sponsors and International Fellows
   d. Executive Committee Liaison, **Melissa J. Willms**
   e. ACTEC Foundation Liaison, **R. Hugh Magill**
   f. Approval of Minutes from Annual Meeting – Secretary **Jennifer Schooley**

2. **11:05 am – 11:10 am:** Brief Family Law Task Force Updates
   a. New "Pre/Post Marital Agreement" checkbox for Practice Area search under "Find a Lawyer" on ACTEC website
   b. Update on cross-pollination with the American Academy of Matrimonial Lawyers (AAML)

3. **11:10 am – 11:45 am:** Community Property and Divorce
   - **John Hartog** will discuss the unexpected and occasionally perverse effects on senior generation and junior generation estate planning when the junior generation becomes embroiled in marital dissolution proceedings.

4. **11:45 am – 12:30 pm:** Cross Border Prenuptial Agreements: Navigating the Dangerous Shoals of Love, Wealth and Marriage Involving Multiple Countries of Origin, Domicile and Residence
   - **Mark Haranzo** will cover the drafting and negotiation of prenuptial agreements involving multiple countries of origin, domicile and residence—an area that can be fraught with complexity and danger for the lawyers involved. These issues are greatly magnified when the agreements involve international couples. Discussion topics will include how best to approach these agreements, addressing such topics as potential jurisdictions; considerations of governing law, including the understanding of the family laws in the potential jurisdictions; and the requirements and enforceability of prenuptial agreements in each jurisdiction, as well as selection and collaboration with experts in those jurisdictions.

5. **12:30 pm – 1:05 pm:** Marital Settlement Agreements: Failing to Consider Trust and Estate Planning
    - **Beth Tractenberg** will lead the discussion.

6. **1:05 pm – 1:10 pm:** Around the Horn
    - PLR 202505002 – Deduction of surrogacy medical expenses versus potential gift tax planning opportunity under §2503(e) medical exclusion.
    - Pennsylvania HB 2303 of 2024 – Filing of premarital agreements with the Register of Wills on or before the date an application for a marriage license is filed.
    - Potential Future Topic – "Planning for Celebrities"—e.g., engagement of Zendaya Maree Stoermer Coleman and Thomas Stanley Holland ("Tomdaya")
    - Other "hot" topics?

7. **1:10 pm – 1:15 pm:** Closing Remarks
    - Congratulations to incoming Chair of the Family Law Task Force, **Jill Fowler**

8. Adjourn by **1:15 pm**

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ACTEC
THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

ACTEC Executive Committee Liaison Report
2025 Annual Meeting

1. Thanks to the Program Committee chaired by Stephanie Loomis-Price (WA), all the Committee members, show-runners and speakers for an impactful line-up of Professional Programs (CLE) for this Annual Meeting.

2. The *L. Henry Gissel, Jr. Spirit of ACTEC Lecture* is Friday, March 21, 10:15 a.m. to 11:15 a.m., presented by Past President, Ann B. Burns, examining the importance of collaborative relationships in our profession. Saturday's schedule features *The Annual Joseph Trachtman Memorial Lecture*, 9:45 a.m. to 10:45 a.m., Counting Down, Counting Up: Flourishing, presented by Past President Stephen (Steve) R. Akers, exploring well-being and how estate planners can help clients and families thrive.

3. As ACTEC Fellows are aware, there is a current shortage of law school graduates pursuing careers in trust and estate law. On behalf of the College, President Susan D. Snyder has reached out to the directors of law school career centers in the U.S., with an invitation to arrange an ACTEC presentation for students about the exceptional career prospects in the trust and estate practice. This initiative is coordinated by the Long Range Planning Committee.

4. Please take a moment to reach out and thank the sponsors supporting this Annual Meeting. The sponsor display area is in the Flores Ballroom Foyer.

5. Following the conclusion of the Annual Meeting, a survey seeking feedback on your meeting experience including the program schedule, opportunities to network, tours, special events and the meeting venue will be sent to all attendees.

6. The 2025 Summer Meeting is scheduled **June 18-22, Montreal, Quebec, Canada at the Le Centre Sheraton.** The Summer Meeting Schedule of Events will be available after the conclusion of the Annual Meeting.

7. The 2025 Fall Meeting dates in Austin, TX have changed. New dates were announced in January and are **October 20-23, 2025.**

8. To be considered at the 2025 Fall Meeting at the Fairmont Austin in Austin, TX, nominations must be received by the national office, ready to poll by these deadlines: Nominations for **International Fellows Monday, June 23, at 4:30 p.m. Eastern Time** and Nominations for **Fellows and Academic Fellows Monday, July 28, 4:30 p.m. Eastern Time**. Nominations received after these deadlines will be held over for the 2026 Annual Meeting at the JW Marriott Water Street & Tampa Marriott Water Street in Tampa, FL.

9. See the *Meetings Announcements* sent each Monday for the list of upcoming National, State, Regional, and ACTEC Fellows Institute Meetings.

10. Keep up with the news, educational opportunities, webinars plus resources of the College and read the *Weekly Update* issued each Friday.

THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

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FOUNDATION

ACTEC Foundation Liaison Report
2025 Annual Meeting

1. The ACTEC Foundation welcomed the 10th Class of Dennis I. Belcher Young Leaders in September 2024. To date, fifteen former Young Leaders have been elected to the College through this Foundation grant-funded program of ACTEC's Diversity, Equity and Inclusivity Committee.

2. Stop by the Foundation's booth for a copy of The ACTEC Foundation's 2025 Annual Meeting Newsletter.

3. The Foundation-funded ACTEC Trust and Estate Talk Podcast has had over 633,000 total podcast downloads from 2018 to 2024.

4. The ACTEC Foundation website has a brand new look! Check it out, and get updates on the programs the Foundation supports and the stories of the people the Foundation has impacted: www.actecfoundation.org

5. The 2025 Mary Moers Wenig Student Writing Competition is now open. 2L and 3L students in ABA-accredited law schools should submit papers by June 30, 2025, and winners will be announced by July 15, 2025.

6. The Foundation is reviewing a new Mission Statement. Come to the Board of Directors meeting on Saturday, March 22 at 1:15 pm Pacific to hear the discussion. The Foundation will also be considering several interesting grant proposals.

Please support your ACTEC Foundation with a donation at actecfoundation.org/DonateNow.

American College of Trust and Estate Counsel
Family Law Task Force
2024 Fall Meeting
Chicago, Illinois
Friday, September 20, 2024, 2:45 pm – 5:15 pm CDT

Justin Miller, Chair
Jill Fowler, Vice-Chair
Jennifer Schooley, Secretary

1. **2:45 pm – 2:50 pm Administrative Announcements**
    a. Justin Miller, Chair, and Jill Fowler, Vice Chair, of the American College of Trust and Estate Counsel (ACTEC) Family Law Task Force, called the meeting to order on Friday, September 20, 2025, at 2:45 pm CDT, at the Marriot Marquis.
    b. Other Administrative Announcements: Red Dots, Blue Dots, and International Fellows were welcomed, followed by a reminder of the ACTEC Code of Conduct and a reminder to check in on the conference app. Executive Committee Liaison, Melissa J. Williams, and ACTEC Foundation Liaison, R. Hugh Magill, also were acknowledged.
    c. Minutes from 2024 Summer meeting held in Toronto taken by Jill Fowler were approved without change.

2. 2:50 pm – 2:55 pm: Update on cross-pollination with the American Academy of Matrimonial Lawyers (AAML) and strategic planning for 2024/2025.

We need to do more! The cross-pollination work is done more at the regional level, so work with members of the AAML for presenting at regional meetings.

3. 2:55 pm – 3:40 pm: Special Guest, Anita Ventrelli, an AAML Fellow, with Schiller DuCanto & Fleck LLP based in Chicago, discussed trust and estate issues with high net worth divorces in Illinois.

Before beginning the discussion, Ms. Ventrilli noted that members of American Academy of Matrimonial Lawyers ("AAML") go through a local exam and a national test. Membership in AAML is a stepping stone for the International Academy of Family Lawyers ("IAFL").

Ethics of Joint Representations: The speaker began the discussion by noting the ethical considerations for attorneys representing both spouses in estate planning, referencing Illinois Rule of Professional Responsibility 1.7 on conflicts of interest. She suggests referring clients to family law attorneys to review how estate plans may affect property distribution in a potential divorce. To illustrate her point on joint representations in estate planning, she discussed a case where husband interfaced with the estate planning lawyer, but it was a joint representation. The parties then got a divorce, and the estate planning lawyer was asked how the planning benefited both spouses. In a joint representation, if both spouses are not advised on how the planning impacts them in divorce, the estate planning lawyer can be in an uncomfortable situation explaining the representation during the divorce.

The speaker notes that family law lawyers may send subpoenas to estate planning lawyers asking if only one spouse really participated. For example, did one spouse only come in on signing day? Were divorce consequences discussed in the process? As an estate planning lawyer, be sure that if the plan impacts both spouses that both are present and participate.

The speaker recommends a conflict-of-interest waiver for concurrent representations. She suggests a lawyer may include a waiver that says one spouse can continue with the representation if a conflict arises, but the conflict waiver should say in writing that the spouse agreeing to the waiver should get his or her own counsel to review the conflict waiver that the spouse is being asked to sign.

If there is an estate plan involving gifts, ask how good the marriage is. There are certain presumptions in divorce. A transfer between spouses is presumed to be a gift. Transfers from parents are presumed to be gifts as opposed to a loan. In Illinois, a gift from one spouse to another converts the property to separate property, but it can influence the divorce. If the separate property is $40M and marital is $2M, the judge may give the spouse with no separate property the entire marital estate. A divorce court, however, may not treat gifts that are made for the purpose of an estate plan as a "gift" that converts the property to separate property.

The typical accountant may not be used in the event of a divorce for purposes of valuation because the accountant may be biased. Valuation experts in the estate planning realm use FMV, but in divorce it could be "fair value," depending on the state where the divorce occurs. FV is typically more than FMV.

When divorce is filed in Illinois, a person can change the estate plan and beneficiary designations. In other states, such as California, community property cannot be transferred. In Massachusetts, an estate planning lawyer may receive an injunction order to not change the plan.

Prenuptials: When advising in the preparation of a prenuptial, ask where the client may live. In Illinois, for example, the right to receive disclosures can be waived, but should be waived before the prenuptial is signed. The agreement should state, "We acknowledge that we have received financial information, and we waive seeing anything further." Many people are unclear on what kinds of trusts and estate planning interests an individual signing a premarital agreement must disclose. If a child's trust is vested, it should be disclosed. If the share is contingent or uncertain, you could also disclose its existence but be sure to note that the interests could be worth more or less. In either case, state that valuations were not conducted and thus the value of assets disclosed may not be accurate.

Parents have a propensity to get involved with the preparation of a prenuptial, and this is often when the kids learn about the estate plan. If a child is the beneficiary of an irrevocable trust, the property is neither separate property nor marital property. Prenups can include, but it may not be enforceable, that there is no imputed income for child support purposes when a grandparent makes a gift to a parent. Younger people with prenups are starting to put in provisions requiring both to put money into the household acct. to pay bills.

Summary and Closing Letters for Both Estate Planning Lawyers and Family Lawyers: The speaker suggests a summary letter describing the documents. Ms. Ventrelli adds that she informs clients that the summary is not a substitute for actually reading the estate planning documents or proposed separation agreements and final decrees. The letters should include instructions on the implementation of estate plan suggestions and should also suggest a period for review (1 year, 3 years, 5 years, etc.). When clients come back in for the review, the lawyer can then ask if the plan is properly implemented.

4. 3:40 pm – 4:00 pm: Catherine Romania provided a brief history of the "black hole" issue, which arose in New Jersey when death occurred during a divorce proceeding. She then discussed a recently enacted bill in New Jersey (P.L. 2023, c.238) that amends the equitable distribution, intestacy, and elective share statutes in order to close the proverbial black hole. Roik v. Roik, a recent case applying the amended statutes retroactively was also discussed.

Before recent legislative changes in New Jersey, if a spouse died during a divorce, the divorce case was dismissed thus preventing the surviving spouse from claiming equitable distribution of marital property. In the context of divorce, this situational "black hole" occurs when one spouse dies leaving the surviving spouse with no legal means to claim his or her fair share of marital assets due to the lack of a final divorce decree. The surviving spouse essentially falls into a black hole where the spouse cannot access equitable distribution of property and by statute may be precluded from claiming an elective share. This term primarily applies to New Jersey law, stemming from the case Carr v. Carr where this scenario was first addressed by the court.

Carr v. Carr, 120 N.J. 336 (1990) – This case involved a divorce action in which husband died (leaving all of his assets to children of the first marriage) during pendency of the divorce thereby terminating the divorce action and wife's claim for equitable distribution. Per the NJ statute, the wife was not entitled to claim elective share – the "black hole." As a result, the NJ Supreme Court remanded case for the lower court to consider creating a constructive trust over the husband's estate assets to avoid unjust enrichment by husband's estate.

The next case to rely upon the legal theory of a constructive trust was Kay v. Kay, 200 N.J. 551 (2010). In this case, the estate of deceased husband (versus the surviving spouse) was allowed to continue a claim for equitable distribution/constructive trust in family court based on claim that marital assets were wrongly diverted by surviving wife and her daughter from previous marriage.

Unlike the cases of Carr v. Carr and Kay v. Kay, the court did not impose a constructive trust in Acosta-Santana v. Santana. The parties were married 25 years when wife filed for divorce. Husband died prior to entry of judgment of divorce leaving his assets to the parties' three children. The executor filed a motion to interplead in the divorce action, arguing it was the decedent's intent that his portion of the estate (his separate assets and his marital assets) pass to his children and that the wife was unjustly enriched if a constructive trust was not imposed. While the wife certainly received a benefit by being the primary beneficiary of defendant's insurance policies and retirement accounts and obtaining full ownership of the house by operation of law, the executor failed to present an argument that these benefits are unjust. The executor's primary argument was that the defendant's intent for his estate cannot be fulfilled if the court does not impose a constructive trust because most of the defendant's property was held

jointly with the plaintiff. The defendant was unable to change the beneficiaries of his insurance policies before he died. However, the record does not indicate that plaintiff committed any fraud or misconduct that would benefit her to the detriment of the marital estate. Thus, the judge correctly found that there were no exceptional circumstances that required equitable relief in this case and denied the executor's motion to interplead and granted summary judgment in favor of plaintiff. Acosta-Santana v. Santana, 2018 N.J. Super. Unpub. LEXIS 2667 (App. Div. (Dec. 5, 2018), certif. denied, 237 N.J. 413 (2019)

In Matter of Estate of Brown, 448 N.J. Super. 252 (App. Div. 2017), the Court agreed that mere separation of a married couple, while one was in a nursing home on Medicaid, was not sufficient to prevent Medicaid from asserting a lien based on the elective share which the surviving spouse could have claimed when the community spouse passed away. Mr. Brown had Alzheimer's and was in nursing care. All assets were in wife's name so he could get Medicaid. The son claimed spouses were living separate and apart so an elective share could not be claimed. Court didn't buy this and said this living situation was only due to the Alzheimer's and thus allowed for the lien.

New Law. As was first suggested by the court in Carr v. Carr, New Jersey finally enacted a new law to address the black hole in January of 2023. The new law allows for equitable distribution after a party dies while a divorce case is ongoing. It permits the court to effectuate equitable distribution when a complaint for divorce or dissolution of civil union has been filed and either party has died prior to final judgment. It also provides that the surviving party would not receive intestate or elective share.

Retroactive Application. The new statute was applied retroactively for cases that were in the pipeline when it was enacted. In Roik v. Roik, 477 N.J. Super. 556 (App. Div. 2024), the parties were married for 45 years. They had already signed a separation agreement in 2021 and were waiting for the final divorce when husband died. The plaintiff (son as executor) wanted the new law applied and separation agreement enforced. The court applied the new law retroactively. The appellate division, knowing that the new law was pending, held the decision until it was enacted. In its decision, the appellate division reversed the trial court finding that because the statute was meant to be curative, it applied retroactively.

5. 4:00 pm – 4:35 pm: Carole Bass and Shari Levitan lead a discussion on "Helicopter Parents, Pre Nups and Plans," about parents who become intimately involved in their children's prenuptial planning, including attendance at meetings with attorneys, paying legal fees and participating in the structuring of the plan. This can lead to deposition testimony that "my parents wanted this."

Shari Levitan has seen an increase in parents getting involved in plans. For the 20 somethings getting married, the first call to the lawyer comes in from Dad wanting to know about prenups generally. "We don't know if we want one," he says. Sometimes the young person is on the Zoom, but the 20 something is texting, and the parents are doing all of the talking. Parents pay the legal bills, initiate the first general call, want to be in the meetings, and suggest language in the document. They also want to see the other party's financial disclosure. A 2019 article noted that AAML lawyers are seeing an increase in parental involvement in prenups. Some parents ask for an agreement template for all of the children before they are even engaged.

Ethics. So, what can you do? Be clear who the client is in the engagement letter and who is paying the bill. Also be clear about what can and cannot be shared with the parents. Our ethical rules require that the client be the person getting married. The client is the one that needs to be "informed," and the lawyer must communicate with the client, not the parent. If parents want to see the agreement, permission must be given by the client. Having a third-party present during meetings (whether a parent or family office) waives privilege.

Privilege. In Accomazzo v. Kemp, 234 Ariz. 169 (2014), there was an agreement and after 12 years a bitter divorce. Wife said the agreement was unconscionable. Husband said he wanted to see all of the attorney's documents because the wife waived her privilege by having her parents present in meetings. The court said it was a mixed question of law and fact. It's an outlier case, but the court said the privilege was not waived because the parents were integral to helping her understand the agreement.

There are some cases in NY where the court extended privilege between parents (a parent/child privilege) even when child is not a minor.

Who Is Paying the Bill? If a parent is paying the bill, you can send the amount due and not the description, so you don't waive the privilege. Parents paying bills for the other spouse can make a gift to that person and not get involved with the payment.

Handling Aggressive Parents. How do you handle parents who want to be more aggressive than the child? You have to be firm and say that as the lawyer you do not recommend saying things the way the parents want to say it. You rely on your experience with having seen other situations. And when one dad wants to speak to the other dad, you try to avoid this situation from occurring.

Nondisclosure Agreements. Nondisclosure agreements are important and should be signed before the prenup because the prenup is not valid until the clients are married. You want a nondisclosure agreement that cites irreparable harm if financials are disclosed. It's meant to be a warning because the reality is that nobody is filing a case for disclosure because a case is public and raises the profile of the family. Get a waiver that a Vaughn affidavit will not be asked for or provided. A Massachusetts case called Vaughn allowed a parent's revocable plan to be subpoenaed.

Prevalence of "I just want it done, whatever" Situations. Be wary of this situation. For an agreement to be valid, you need to have informed consent. You cannot allow a client to have this attitude. Clients in their 20s and 30s can have short attention spans, so Shari Levitan likes to start with a term sheet that is one-page handling of what happens on divorce and death to get them talking on the economics. This approach can be more economical too. An audience member suggested sending the client a questionnaire that's elementary in nature.

6. 4:35 pm – 5:05 pm: Lauren Jenkins discussed the challenges in planning for one spouse that may end up being an issue in a future divorce. A recent example is the New Jersey case of Overdeck v. Seward & Kissel.

Laura Overdeck, the estranged wife of billionaire hedge fund manager, John Overdeck, alleged in a lawsuit against the law firm of Seward & Kissel and one of its partners that they committed malpractice and fraud by not informing her that documents which moved marital assets to Wyoming trusts also ended her claim to those assets. There were two cases: divorce, then malpractice. The divorce case is sealed. The malpractice is not sealed, but is in the early stages of discovery, so we don't have all the facts.

What We Do Know: Husband and wife married in 2002 and the estate planning with the law firm started in 2005. A couple years before the marriage, husband started a hedge fund company called Two Sigma, Investments, L.P. that the law firm also represented. In addition to revocable planning, two NJ irrevocable trusts, a family office, and a foundation were established.

The law firm claims it ended the joint representation of husband and wife in May 2010, and it continued to represent husband and Two Sigma Investments.

In 2013, husband and wife sought a post-nuptial agreement, and the firm told them it could not represent either of them.

In 2018 and 2019 the Wyoming trusts were created, and the old NJ trusts were decanted to these. Husband's father was the trustee of the NJ trusts, and a Wyoming LLC is the trustee of the Wyoming trusts. The Wyoming trusts terminate wife's interest if either filed for divorce, and they allow for future children of husband that are not the wife's.

In March of 2022, wife files for divorce. In May of 2022 the law firm sends her a letter saying it has not represented her since 2010 and delivers her estate planning documents to her. Through the divorce the wife learns these Wyoming trusts are worth $2B and she is now not a beneficiary. The Wall Street Journal reported that husband is worth $7B. The hedge fund is largely marital property.

In October of 2023, wife files a malpractice and fraud claim against the firm and lawyer saying she was a client during the decanting, and she was only told trusts were being decanted for tax purposes. She says the terms of the Wyoming trusts were not disclosed to her. She claims the primary purpose of the decant was to alienate assets from her.

What Discovery Revealed: The parties signed an engagement letter in 2005 that was a very simple one-pager. The termination of marriage and definition of children are the same in NJ and Wyoming. Husband's notes from a meeting with the lawyers say the decanting is "divorce proof." The original trusts were created in 2007, and there are now 7 trusts, 5 of which are in Wyoming. The trustee of the Wyoming trusts is a private trust company that is owned by a special purpose trust and managed by a second special purpose trust.

Rule 1.9 Duties to Former Clients: A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. Work the law firm did under the joint representation was substantially related to what they did after, and so they had a duty to inform and get consent.

The wife tried to get a lot of the information in the divorce case. She is now trying to get it in the malpractice case. This may be her next bite at the apple if she doesn't get what she wants in the divorce case.

An audience member noted that tech guys are not using email and texts that last anymore. They use messaging that self-destructs. So, expect that in cases in the future.

7. 5:05 pm – 5:15 pm: Around the Horn and Closing Remarks

• Each Fellow can indicate certain practice areas on the ACTEC website. We are working on approvals for ACTEC to add a new "Pre/Post-Marital Agreement" checkbox under the ACTEC Practice Area search. Fellows will be able to add this as a practice area by editing their profiles.

• George Karibjanian agreed to serve as secretary for the ACTEC Annual Meeting in La Quinta (March 19-23).

• Proposed topics and speakers for ACTEC Summer Meeting in La Quinta:

– Mark Haranzo will address "Cross Border Prenuptial Agreements: Navigating the Dangerous Shoals of Love, Wealth and Marriage Involving Multiple Countries of Origin, Domicile and Residence."

– Beth Tractenberg will lead a discussion on "Marital Settlement Agreements: Failing to Consider Trust and Estate Planning."

– John Hartog will address "Community Property and Divorce."

The meeting adjourned at 5:15.

ACTEC 2024 Fall Meeting

Chicago, Illinois

Family Law Task Force

Friday, September 20, 2024
2:45pm - 5:15pm

Chair	Justin Miller
Vice Chair	Jill R. Fowler
EC Liaison	Melissa J. Willms
Member and Foundation Liaison	R. Hugh Magill
Member	Frank T. Adams
Member	Carole M. Bass
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ACTEC 2024 Fall Meeting

Chicago, Illinois

Family Law Task Force

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Visitor	William H Pokorny
Visitor	Anne-Marie Rhodes
Visitor	Andrew Rothstein
Visitor	Wendy Rusch
Visitor	Douglas Siegler
Visitor	Al Stashis
Visitor	Suzanne Walsh

THE UNEXPECTED AND OCCASIONALLY PERVERSE EFFECTS ON FAMILY ESTATE PLANNING WHEN THE JUNIOR GENERATION BECOMES EMBROILED IN A MARITAL DISSOLUTION

JOHN A. HARTOG[1]

Family Law Task Force

ACTEC Annual Meeting, La Quinta, CA

March 22, 2025

I. Community Property (CP) vs. Separate Property (SP)

A. Distinctions

1. No single community property system exists in the United States. There are currently ten community property states: Alaska, Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin, which adopted a the Uniform Marital Property Act, which is a form of community property.

2. *Community property* – All property acquired during marriage, including income and proceeds.

3. *Separate property* – Property acquired before the marriage; property acquired during marriage with the proceeds of separate property and maintained as separate property during the marriage, (e.g. not commingled); or property received by gift or inheritance during the marriage. In California, income earned from separate property remains separate property; this rule varies according to state.

B. Altering CP and SP characterization

1. Community property states generally permit spouses to alter *by agreement* the characterization of their property, or an individual asset. Such agreements are referred to as *transmutation agreements.*

[1] Hartog & Baer, APC, Orinda, CA; the presenter gratefully acknowledges the assistance of Ana Allec, an associate at Hartog & Baer, in the preparation of this outline.

2. Alaska, a non-community property state, allows married persons to opt-in to a community property system.[2] Other states may seek to redefine the rights of spouses to achieve a more favorable tax treatment without changing the form of ownership[3].

3. California requires transmutations to be in writing. Spouses have fiduciary duties to each other. The result is that transmutations without the benefit of independent counsel are usually unenforceable.

4. Even in the absence of an agreement, separate property may lose its character when commingled with community property; a gift to the community is presumed.

5. Types of Agreements

    a. Prenup/Postnup – agreements before or during marriage pertaining to characterization and other support payments in the event of death or divorce.

        i. A *premarital* agreement is negotiated at arms-length because the parties do not yet owe each other a fiduciary duty.

        ii. A *postmarital* agreement undergoes severe scrutiny because the parties owe each other a fiduciary duty.

    b. **Trust Instruments as Transmutation Agreements** – Recitation in the document regarding the character of property creates a litigable issue concerning characterization; recitation that community property is listed on Schedule A, and separate property on Schedules B & C create litigable issues when asset listed on wrong schedule.

C. Allocation and Support Issues Involving Trusts

1. During divorce, in California, each spouse has a present, vested, one-half ownership interest in the

[2] Katherine D. Black et. al., *Community Property for Non-Community Property States* (2011) 24 Quinnipiac Prob. L.J. 260, 264.
[3] *Id.* At 269.

community property, and each spouse generally receives half of the community property. Separate property will typically be allocated to the spouse that owns the separate property.

2. Issue 1: The allocation of SP and CP to the spouses during divorce and how it can be affected by "sophisticated" estate planning techniques.

3. Issue 2: CP and SP income is available to calculate spousal and child support payments, but what about distributions from irrevocable trusts?

II. "Sophisticated" Estate Planning Gone Wrong

A. Spousal Lifetime Access Trust (SLAT)

1. The donor spouse uses SP (whether SP or transmuted CP) to create an irrevocable trust for the donee spouse's benefit during their lifetime and for the benefit of residual beneficiaries, more often than not their children or grandchildren.

2. Purpose – reduce taxable estate while the donor continues to enjoy property indirectly. SLATs may be useful, but their drawbacks are apparent in divorce proceedings.

3. *C v. C*

    a. Wife inherited mineral rights (presumed SP), which she first transferred into an LLC that was created by her and her husband (presumed CP).

    b. To fund each SLAT, the spouses executed transmutation agreements and then each spouse transferred their (new) SP into two SLATs, each for the benefit of the other;

    c. During divorce, the wife sought to confirm her SP interest in the mineral rights transferred to the SLATs.

    d. The creation of each SLAT, however, required each spouse to transfer their interest in the property irrevocably, such that the mineral rights were neither CP nor SP because they no longer belonged to either

spouse.

B. Estate Plans to Protect Separate Property

1. Typical reasons for funding a separate revocable trust with spouse's SP.

    a. SP spouse wishes to bequeath that separate property free of partner's interference.

    b. Separate property spouse desires clear segregation of SP from the assets of the joint marital property trust.

2. *H v. H*

    a. Husband, prior to marriage, and before the company went public, acquired a substantial number of Google shares pursuant to an employee stock bonus plan. Following marriage, he transferred the stock into a joint trust, but the property retained its SP characterization (Trust drafted by an ACTEC Fellow).

    b. Husband subsequently created a separate trust for the Google stock (marital storm clouds on the horizon) and then formed an LLC *during marriage* to which he transferred his investments, *including* his Google stock from the separate property trust (without the assistance of the ACTEC Fellow).

    c. On divorce, wife argued that because the LLC, now worth more than a billion, was formed during marriage the LLC interests were CP; she further argued that the funding was CP. Husband argued the funds were his SP and the formation of a business is not equivalent to an acquisition, thus not giving rise to the CP presumption, and the transfer of SP funds into a marital trust was not a transmutation.

    d. This planning was intended to preserve the separate property character, and was not created for tax avoidance purposes; it succeeded in preserving the husband's SP, but not before a three week trial.

III. Irrevocable Trust Distributions and Support Payments

A. Spendthrift Provisions

California imposes exceptions from the enforceability of spendthrift clauses for child and spousal support: Most states have similar exceptions.

B. Right to Distributions

1. Mandatory distributions are available for spousal and child support payments. However, statutes may not provide whether a court may compel a trustee to make discretionary payments to the beneficiary for support payments. Courts may consider:

    a. Settlor's intent – Intent to benefit the beneficiary's children and/or spouse

    b. Trustee's bad faith – Whether the trustee is withholding payments to the beneficiary to avoid support payments.

    c. In *Ventura County Dept. of Child Support Services v. Brown* (2004) 117 Cal.App.4th 144, the California Court of Appeal affirmed the trial court's order compelling trustees to exercise their discretion to make distributions to a beneficiary, the father of seven children, to satisfy a support judgment. The trustee had discretion to make principal and income distribution to the beneficiary and the settlor's intent was to provide for the beneficiary and his children.

2. Beneficiary's right to distribution

    Discretionary vs Mandatory distributions: Pratt v. Ferguson (2016) 3 Cal.App.5th 102. Husband obtained order to compel trustee to satisfy support orders and community property claims from trust when Wife-beneficiary was entitled to mandatory income distributions and discretionary principal distributions, despite spendthrift provisions for both discretionary and mandatory distributions.

3. Control of assets

a. *In re Marriage of D*: Husband, beneficiary of a GST trust established by his mother, managed and had control over the trust assets; court found that assets were available for calculating support payments even though concededly separate property.

i. Settlor-grandmother's intent to create a GST "wealth-accumulation trust" was irrelevant, as the trust's stated primary purpose was to provide for son-Husband's lifetime.

ii. Son-Husband, as beneficiary, had effective control over trust assets and decided when the trust made distributions.

iii. Trust had an independent trustee, but that trustee could be appointed and removed by Husband-beneficiary "at will."

IV. Jurisdiction over the Trust

A. Family court

1. No family court jurisdiction over trusts unless trustee is a party to the dissolution proceeding; *trustee must be joined*.

   a. *In re Marriage of Wendt & Pullen* (2021) 63 Cal.App.5th 647. Husband joined the trustee of Wife's trust after trustee denied distributions to Wife to pay attorney's fees for dissolution proceeding.

   The court found that trial court erred by requiring the non-beneficiary Husband to show bad faith by the trustee when the trustee declined to distribute attorney's fees to the Husband based on his successful motion to join the trustee in the parties' dissolution (not for attorney's fees related to the underlying dissolution proceeding).

B. Probate court

1. Non-beneficiary lacks standing to pursue claim against trust.

   a. *G v. G*: Family court has no jurisdiction over trustee to entertain a claim for attorney's fees related to the dissolution proceeding when trustee is not a party. A

non-beneficiary seeking attorney's fees would lack standing to request the Probate court for orders against the trustee of a trust.

2. Creditor judgment would allow non-beneficiary to pursue claim against trustee. (*Pratt v. Ferguson* (2016) 3 Cal.App.5th 102 [206 Cal.Rptr.3d 895).

V. Conclusion

A. Determine if Probate or Family court has jurisdiction over orders regarding payments from trusts for spousal or child support

B. For allocating assets that may have been transferred to trusts or LLCs, trace the assets and consider whether the asset is part of the marital estate or was it gifted to another, whether in trust or otherwise.

C. For support issues, consider whether the beneficiary's right to trust payments is discretionary or mandatory, or if the beneficiary has control of the assets. If discretionary payments, then determine if trustee is acting in bad faith in withholding payments to beneficiary to avoid support payments.

Cross Border Prenuptial Agreements: Navigating the Dangerous Shoals of Love, Wealth and Marriage Involving Multiple Countries of Origin, Domicile and Residence

Mark E. Haranzo

ACTEC

Family Law Task Froce

La Quinta, CA

03.22.25

Holland & Knight

Prenuptial Agreements, Domestic and International

- In general, **prenuptial agreements** address rights and obligations that accrue in the event of a termination of the marriage by **divorce** or **death.**
- In the US, matrimonial law varies state by state:
  - **Separate property** includes **premarital assets** and **inheritances**, and may protected in the event of a divorce
  - **Marital property** is subject to **valuation and equitable distribution** upon divorce.
  - In **community property jurisdictions**, community property is treated similarly to marital property.
- Foreign jurisdictions have both well-developed and less developed law on prenuptial agreements
  - **France**, *contrat de marriage*
  - **United Kingdom**, *Radmacher* case (2010)
  - **Hong Kong**, *LCYP v. Jek* (2019) Adopting *Radmacher* case and test
  - **New European Union** rules on property regimes of international couples.
- Domestic conflicts of law vs. international conflicts of law

High Net Worth Individuals

- There are many reasons why high net worth individuals may need to consider an international prenuptial agreement:
    - Frequent **travel**
    - **Assets** in **different countries**
    - Multiple **residences** and/or **nationalities**
    - **"Mixed marriages"**: spouses with different domiciles and citizenships
- As the world becomes more **interconnected**, our clients' **wealth** and **relationships** will increasingly span across many different countries and jurisdictions. Unfortunately, most family laws are "local" in nature.

Considerations for Drafting

- Where will the couple marry and live?
  - If the couple plans to live in the US, consider drafting an agreement under the law of the state where the couple will **marry and/or reside**.
    - States have different **residency requirements** to bring matrimonial actions.
    - If the couple plans to live abroad, consider having **foreign counsel** draft the agreement and reviewing it to ensure **relevant US state law** provisions are incorporated.
    - Consider translating the agreement if a party is from, or if the parties plan to reside in, a non-English speaking country.
- Agreement should be drafted to comport with the laws of all relevant jurisdictions, **do not rely on choice of law clause**.
  - A court may ignore a choice of law clause if it finds public policy violations or other strong factors in favor of granting jurisdiction (e.g. unconscionability).
- **Representation**: both sides should have separate counsel, and foreign counsel should be consulted in any jurisdiction where:
  - A party resides, does business or holds citizenship
  - A party or party's family holds significant assets

Considerations for Drafting

- In general, US courts will recognize agreements entered into in other jurisdictions, so long as they are not **unconscionable** or otherwise against **public policy**.
  - "Duly executed prenuptial agreements, including agreements executed in a foreign country, are accorded the same presumption of legality as any other contract." *Stawski v. Stawski* 43 A.D.3d 776 (1st Dep't 2007).
  - *Van Kipnis v. Van Kipnis*, 11 N.Y.3d 573 (N.Y. 2008). Wife attempted to have New York law on equitable distribution apply in divorce, disregarding French prenuptial agreement. Court held that "the agreement constitutes an unambiguous prenuptial contract that precludes **equitable distribution** of the parties' separate property."
  - *Bedrick v. Bedrick,* 300 Conn. 691 (2011). Such agreements must be both fair and equitable at the time of execution **and not unconscionable at the time of dissolution**. See also, *In re Marriage of Facter,* 212 Cal. App. 4th 967 (2013).
- Nevertheless, it is necessary to **consult with foreign counsel** when drafting a prenuptial agreement with international components in order to address (for example):
  - Common Law vs. Civil Law jurisdictions
  - Differences in definition and treatment of **separate, marital and community property**
  - (Non)recognition of **trusts** and other **inherited assets**
  - Forced heirship laws

Additional Asset Protection

- Consider use of trusts or entities in addition to (or in lieu of) a prenuptial agreement.
  - Premarital Asset Protection Trusts
  - Foreign Grantor Trust Planning for benefit of U.S. Persons
  - Update/ Amend prenuptial agreement if circumstances change or upon move to an unanticipated jurisdiction

Presenter

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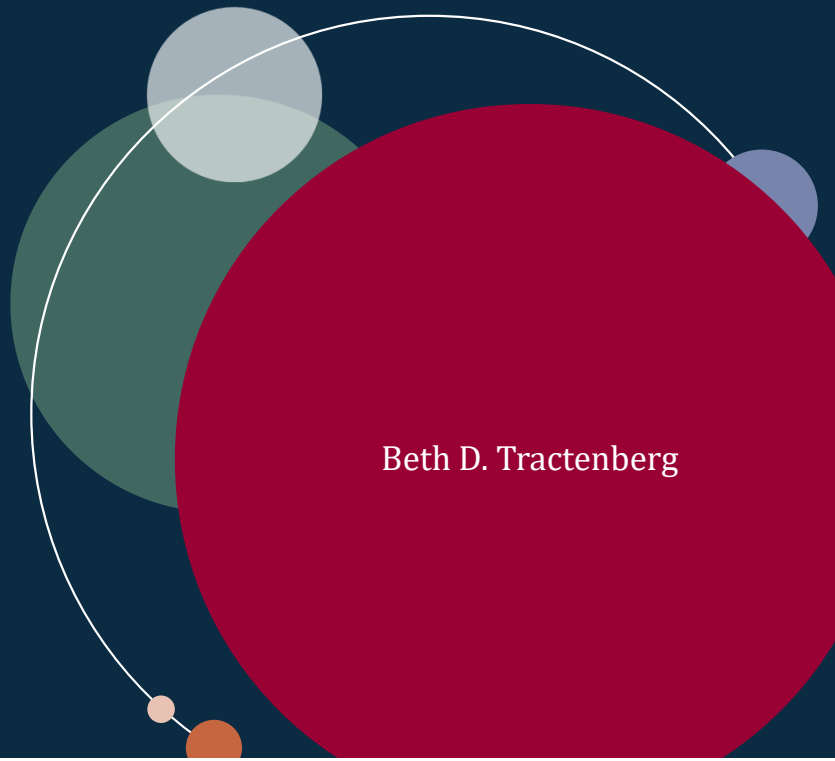
Mark E. Haranzo is chair of Holland & Knight's New York Private Wealth Services Group. Mr. Haranzo focuses his practice on domestic and international private client matters for affluent individuals and their families. His clients include entrepreneurs, corporate executives, family offices, real estate developers, business owners, investors and investment bankers, as well as artists, entertainers, writers, collectors and philanthropists throughout the United States and abroad.

Mr. Haranzo has more than 25 years of experience in all aspects of estate and gift planning for individuals and families, including matters with complex multigenerational or multijurisdictional issues. He advises corporate and individual fiduciaries and beneficiaries on all aspects of trust and estate administration. Mr. Haranzo is dual qualified in the United States and United Kingdom and represents U.S. and non-U.S. clients in the U.S. and abroad. He also represents clients in connection with disputes, such as will and trust contests, fiduciary appointments and contested accountings.

Steptoe

www.steptoe.com

Intersection of Family Law and Estate Planning



Beth D. Tractenberg

Consider how terms defined for one purpose are interpreted in other contexts. For example:

- Separation Agreement uses the term "1/2 of my estate" – is this the gross or net taxable estate, the augmented estate as determined for elective share purposes, the probate estate?

Consider how elective share rights affect division of property on death when one party dies but couple had previously initiated incomplete divorce proceedings.

Consider inclusion of “divorce” provisions in intervivos trusts and/or whether the prenuptial agreement should address renunciation of powers and rights under existing trusts.

- But be wary of conflict implications when representing both spouses in connection with such trust planning.

Consider whether the prenuptial agreement should address notice requirements with respect to minor children and trusts.

Consider whether the prenuptial agreement disclosures need to be modified to address practicality of disclosing all trusts – some trusts may not be known to the parties at the time of the prenuptial agreement (including quiet trusts).

Consider whether you can represent one spouse with respect to the prenuptial agreement and subsequently represent both for estate planning post wedding.

Consider whether you can continue to represent either spouse you've represented jointly if they later divorce.

Internal Revenue Service

Number: **202505002**
Release Date: 1/31/2025

Index Number: 213.00-00

Department of the Treasury
Washington, DC 22204

Person to Contact:

Employee Identification Number:

Telephone Number:

Refer Reply To:
CC:ITA:B2
PLR-107243-24
Date:
October 11, 2024

In re:

LEGEND

Taxpayers	=
Taxpayer A	=
Taxpayer B	=
1	=
2	=
3	=
4	=
State	=
Date	=
Year 1	=

Dear :

This letter ruling responds to a private letter ruling submission dated April 1, 2024, requesting a ruling on the deductibility of medical and related costs and fees arising from in vitro fertilization (IVF) procedures, gestational surrogacy, and related items.

FACTS

Taxpayers are a heterosexual married couple legally married in State. Taxpayer A was diagnosed with 1 in Year 1 and has additional related diagnoses of 2, 3, and 4. 1 requires Taxpayer A to take medication that is contraindicated in pregnancy and has a documented history of being detrimental to pregnancy. As such, Taxpayers will use a pregnancy surrogate and *in vitro* fertilization ("IVF") with Taxpayer B's sperm and a

donated egg from a third party. As stated in the ruling request, Taxpayers seek a ruling under § 213 of the Internal Revenue Code (Code) that would authorize deductions for costs and fees related to the following:

· Medical expenses directly attributed to both spouses;

· Egg donor related costs;

· Medical expenses of sperm donation;

· Sperm freezing;

· IVF medical costs (expenses of embryo creation and storage)

· Childbirth expenses related for the surrogate;

· Surrogate medical insurance related to the pregnancy;

· Legal and agency fees for the surrogacy; and

· Any other medical expenses arising from the surrogacy.

We held the conference of right on Date and considered additional information provided by Taxpayers after the conference in this ruling letter.

LAW AND ANALYSIS

Section 213(a) allows a taxpayer to deduct expenses paid for medical care of the taxpayer, spouse, or dependent (defined in § 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B)), to the extent the expenses exceed 7.5 percent of the taxpayer's adjusted gross income and were not compensated for by insurance or otherwise. Section 152(a) defines a dependent as a qualifying child, including a child of the taxpayer. Section 152(c)(2)(A).

Section 213(d)(1)(A) provides that medical care includes amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. Medical care also includes amounts paid for insurance covering medical care. Sections 213(d)(1)(B) and (D).

Several courts have rejected the deduction of expenses for reproductive technologies, like IVF and surrogacy procedures, as medical care under § 213 when the taxpayer, spouse, or dependent, did not personally use the technologies and/or have an underlying disease necessitating the use of the technologies. See, e.g., Morrissey v. United States, 871 F.3d 1260, 1271 (11th Cir. 2017); Longino v. Commissioner, T.C. Memo. 2013-80, aff'd, 593 Fed. Appx. 965 (11th Cir. 2014); Magdalin v. Commissioner,

T.C. Memo. 2008–293, aff'd without published opinion, 2009 WL 5557509 (1st Cir. 2009). The United States Court of Appeals for the First Circuit, in affirming the Tax Court in Magdalin, explained that *in vitro* fertilization and placement of the resulting embryos in unrelated gestational carriers "affected the bodies of the gestational carriers who … were not the taxpayer's dependents." Magdalin, 2009 WL at 5557509. See also Morrissey v. United States, 226 F. Supp. 3d 1338, 1341-42 (M.D. Fla. 2016) (observing that § 213 is limited to medical care of taxpayer, taxpayer's spouse, or a dependent, and "expenses paid for medical procedures performed on … third-party egg donors and surrogates cannot be deducted").

Here, Taxpayer A has been diagnosed with 1, 2, 3, and 4, and must therefore take medication that is contraindicated in pregnancy and has a documented history of being detrimental to pregnancy. The use of assisted reproductive technologies will not directly and literally affect the structure or function of Taxpayer A's own body but will instead affect the structure or function of a third-party, the pregnancy surrogate. Most expenses paid to effectuate a surrogate pregnancy through assisted reproductive technologies are not expenses paid for the medical care of the taxpayer, the taxpayer's spouse, or dependent and are not deductible as medical expenses because they do not meet this basic requirement of § 213(a)(1).

As such, payments related to the following products and services involving assisted reproductive technologies not being performed on taxpayers are not deductible under § 213: egg donor costs, egg retrieval, sperm freezing, IVF medical costs, legal and agency fees for the surrogacy, childbirth expenses related to the surrogate pregnancy, surrogate medical insurance related to the pregnancy, and other medical costs and fees effectuating and arising from the surrogate pregnancy.

Subject to the gross income limitation, however, the costs or fees paid for medical care, including involving assisted reproductive technologies directly attributable to taxpayers, such as sperm donation from Taxpayer B, are deductible medical expenses under § 213.

CONCLUSION

Based on the facts and representations submitted, the Service concludes that the costs and fees related to assisted reproductive technology, such as childbirth expenses for the surrogate pregnancy, medical insurance related to the surrogate pregnancy, egg donation, and other procedures effectuating surrogacy, not being performed directly on the Taxpayers or that are directly related to the surrogate pregnancy do not qualify as deductible medical expenses under § 213. Medical costs and fees of assisted reproductive technologies and other medical care directly attributable to Taxpayers are deductible within the limitations of § 213, including for sperm donation.

The ruling contained in this letter is based on information and representations submitted by Taxpayers and accompanied by a penalty of perjury statement executed by an

appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

We are sending a copy of this letter to the appropriate operating division director.

Sincerely,

/s/ Robert A. Martin

Robert A. Martin
Branch Chief, Branch 2
Office of Associate Chief Counsel
Income Tax & Accounting

cc:

PRINTER'S NO. 3118

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2303 Session of 2024

INTRODUCED BY HOWARD, HANBIDGE, HOHENSTEIN, M. MACKENZIE, ISAACSON, McNEILL, PROBST, HILL-EVANS, SANCHEZ, CEPEDA-FREYTIZ, SHUSTERMAN, FLICK, DELLOSO AND OTTEN, MAY 20, 2024

REFERRED TO COMMITTEE ON JUDICIARY, MAY 20, 2024

AN ACT

Amending Title 23 (Domestic Relations) of the Pennsylvania Consolidated Statutes, in preliminary provisions relating to divorce, further providing for legislative findings and intent, for definitions, for bases of jurisdiction, for effect of agreement between parties and for premarital agreements; in dissolution of marital status, further providing for grounds for divorce, repealing provisions relating to counseling, further providing for grounds for annulment of voidable marriages, repealing provisions relating to defenses, to action where defendant suffering from mental disorder and to general appearance and collusion, further providing for hearing by master, providing for general order of divorce proceedings, repealing provisions relating to jury trial, further providing for decree of court and repealing provisions relating to opening or vacating decrees; in property rights, further providing for definitions and for disposition of property to defeat obligations; in alimony and support, further providing for alimony and repealing provisions relating to bar to alimony; and repealing provisions relating to mediation.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 3102(a) of Title 23 of the Pennsylvania Consolidated Statutes is amended to read:

§ 3102. Legislative findings and intent.

(a) Policy.--[The family is the basic unit in society and

the protection and preservation of the family is of paramount public concern. Therefore, it is the policy of the Commonwealth to:

(1) Make the law for legal dissolution of marriage effective for dealing with the realities of matrimonial experience.

(2) Encourage and effect reconciliation and settlement of differences between spouses, especially where children are involved.

(3) Give primary consideration to the welfare of the family rather than the vindication of private rights or the punishment of matrimonial wrongs.

(4) Mitigate the harm to the spouses and their children caused by the legal dissolution of the marriage.

(5) Seek causes rather than symptoms of family disintegration and cooperate with and utilize the resources available to deal with family problems.

(6) Effectuate economic justice between parties who are divorced or separated and grant or withhold alimony according to the actual need and ability to pay of the parties and insure a fair and just determination and settlement of their property rights.] It is the policy of the Commonwealth to:

(1) Create a more efficient and just process of marriage dissolution.

(2) Mitigate the harm to the spouses and their children caused by the legal dissolution of the marriage.

(3) Effectuate economic justice between parties who are divorced or separated and grant or withhold alimony according to the actual need and ability to pay of the parties and ensure a fair and just determination and settlement of their

property rights.

* * *

Section 2. The definitions of "qualified professionals" and "separate and apart" in section 3103 of Title 23 are amended and the section is amended by adding a definition to read:

§ 3103. Definitions.

The following words and phrases when used in this part shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

"Economic issue." An issue raised in a divorce proceeding concerning any item of value, including tangible and real property, spousal support, alimony pendente lite, equitable distribution, alimony, counsel fees, costs or expenses and insurance policies.

* * *

["Qualified professionals." Includes marriage counselors, psychologists, psychiatrists, social workers, ministers, priests, rabbis or other persons who, by virtue of their training and experience, are able to provide counseling.]

"Separate and apart." Cessation of cohabitation, whether living in the same residence or not. [In the event a complaint in divorce is filed and served, it shall be presumed that the parties commenced to live separate and apart not later than the date that the complaint was served.]

* * *

Section 3. Sections 3104(a), 3105(a) and (b), 3106 and 3301 of Title 23 are amended to read:

§ 3104. Bases of jurisdiction.

(a) Jurisdiction.--The courts shall have original

jurisdiction in cases of divorce and for the annulment of void or voidable marriages and shall determine, in conjunction with any decree granting a divorce or annulment, the following matters, if raised in the pleadings, and issue appropriate decrees or orders with reference thereto, and may retain continuing jurisdiction thereof:

(1) The determination and disposition of property rights and interests between spouses, including any rights created by any antenuptial, postnuptial or separation agreement and including the partition of property held as tenants by the entireties or otherwise and any accounting between them, and the order of any spousal support, alimony, alimony pendente lite, counsel fees or costs authorized by law.

[(2) The future care, custody and visitation rights as to children of the marriage or purported marriage.

(3) Any support or assistance which shall be paid for the benefit of any children of the marriage or purported marriage.]

(4) Any property settlement involving any of the matters set forth in paragraphs (1), (2) and (3) as submitted by the parties.

(5) Any other matters pertaining to the marriage and divorce or annulment authorized by law and which fairly and expeditiously may be determined and disposed of in such action.

* * *

§ 3105. Effect of agreement between parties.

(a) Enforcement.--A party to an agreement regarding matters within the jurisdiction of the court under this part[, whether or not the agreement has been merged or incorporated into the

decree,] may utilize a remedy or sanction set forth in this part to enforce the agreement to the same extent as though the agreement had been an order of the court except as provided to the contrary in the agreement.

[(b) Certain provisions subject to modification.--A provision of an agreement regarding child support, visitation or custody shall be subject to modification by the court upon a showing of changed circumstances.]

* * *

§ 3106. Premarital agreements.

(a) General rule.--[The burden of proof to set aside a premarital agreement shall be upon the party alleging the agreement to be unenforceable. A premarital agreement shall not be enforceable if the party seeking to set aside the agreement proves, by clear and convincing evidence, that:

(1) the party did not execute the agreement voluntarily; or

(2) the party, before execution of the agreement:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have an adequate knowledge of the property or financial obligations of the other party.

(b) Definition.--As used in this section, the term "premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective

upon marriage.] A premarital agreement shall be enforceable if an executed copy of the agreement is filed with the register of wills on or before the date the application for a license to marry is filed. In the case of marriages formed outside of this Commonwealth, a premarital agreement shall be presumptively valid if an executed copy of the agreement is appended to any pleading filed in a pending Commonwealth action.

(b) Enforceability.--To be enforceable, an executed premarital agreement shall contain one of the following:

(1) A financial disclosure setting forth the assets held by each party at the time the agreement was formed and a representation of each party's reported total income for the tax year immediately preceding the date of marriage.

(2) An express waiver setting forth the waiving party's acknowledgment of entitlement to a full disclosure and an express representation that the disclosure is irrevocably waived.

(c) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:

"Premarital agreement." An agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

§ 3301. Grounds for divorce.

[(a) Fault.--The court may grant a divorce to the innocent and injured spouse whenever it is judged that the other spouse has:

(1) Committed willful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for the period of one or

more years.

(2) Committed adultery.

(3) By cruel and barbarous treatment, endangered the life or health of the injured and innocent spouse.

(4) Knowingly entered into a bigamous marriage while a former marriage is still subsisting.

(5) Been sentenced to imprisonment for a term of two or more years upon conviction of having committed a crime.

(6) Offered such indignities to the innocent and injured spouse as to render that spouse's condition intolerable and life burdensome.

(b) Institutionalization.--The court may grant a divorce from a spouse upon the ground that insanity or serious mental disorder has resulted in confinement in a mental institution for at least 18 months immediately before the commencement of an action under this part and where there is no reasonable prospect that the spouse will be discharged from inpatient care during the 18 months subsequent to the commencement of the action. A presumption that no prospect of discharge exists shall be established by a certificate of the superintendent of the institution to that effect and which includes a supporting statement of a treating physician.]

(c) Mutual consent.--

(1) The court may grant a divorce [where it is alleged that the marriage is irretrievably broken and] 90 days [have elapsed from the date of commencement of an action under this part and an affidavit has been filed by each of the parties evidencing that each of the parties consents to the divorce] after the service of the divorce complaint if each party filed a written consent with the court.

(2) The consent of a party [shall be presumed where that party has been convicted of committing a personal injury crime against the other party.] to a decree of divorce shall be presumed if no answer has been filed setting forth all of the following:

(i) The divorce is contested.

(ii) The economic issues have been filed by the defendant but are not resolved.

(iii) The one-year separation is contested.

(d) Irretrievable breakdown.--

(1) The court may grant a divorce where a complaint has been filed alleging that the marriage is irretrievably broken and an affidavit has been filed alleging that the parties have lived separate and apart for a period of at least one year. [and that the marriage is irretrievably broken and the defendant either:

(i) Does not deny the allegations set forth in the affidavit.

(ii) Denies one or more of the allegations set forth in the affidavit but, after notice and hearing, the court determines that the parties have lived separate and apart for a period of at least one year and that the marriage is irretrievably broken.

(2) If a hearing has been held pursuant to paragraph (1)(ii) and the court determines that there is a reasonable prospect of reconciliation, then the court shall continue the matter for a period not less than 90 days nor more than 120 days unless the parties agree to a period in excess of 120 days. During this period, the court shall require counseling as provided in section 3302 (relating to counseling). If the

parties have not reconciled at the expiration of the time period and one party states under oath that the marriage is irretrievably broken, the court shall determine whether the marriage is irretrievably broken. If the court determines that the marriage is irretrievably broken, the court shall grant the divorce. Otherwise, the court shall deny the divorce.

(e) No hearing required in certain cases.--If grounds for divorce alleged in the complaint or counterclaim are established under subsection (c) or (d), the court shall grant a divorce without requiring a hearing on any other grounds.]

(2) The court may order divorce proceedings in accordance with section 3321.1(b) (relating to general order of divorce proceedings) in circumstances without mutual consent 30 days after one party files an affidavit alleging that the parties have lived separate and apart for more than 90 days and one of the following applies:

(i) The other party does not file a written denial of that allegation within 30 days of receipt of the affidavit.

(ii) A court determines after a hearing that a one-year period of separation has elapsed.

Section 4. Section 3302 of Title 23 is repealed:

[§ 3302. Counseling.

(a) Indignities.--Whenever indignities under section 3301(a)(6) (relating to grounds for divorce) is the ground for divorce, the court shall require up to a maximum of three counseling sessions where either of the parties requests it.

(b) Mutual consent.--Whenever mutual consent under section 3301(c) is the ground for divorce, the court shall require up to

a maximum of three counseling sessions within the 90 days following the commencement of the action where either of the parties requests it.

(c) Irretrievable breakdown.--Whenever the court orders a continuation period as provided for irretrievable breakdown in section 3301(d)(2), the court shall require up to a maximum of three counseling sessions within the time period where either of the parties requests it or may require such counseling where the parties have at least one child under 16 years of age.

(d) Notification of availability of counseling.--Whenever section 3301(a)(6), (c) or (d) is the ground for divorce, the court shall, upon the commencement of an action under this part, notify both parties of the availability of counseling and, upon request, provide both parties a list of qualified professionals who provide such services.

(e) Choice of qualified professionals unrestricted.--The choice of a qualified professional shall be at the option of the parties, and the professional need not be selected from the list provided by the court.

(f) Report.--Where the court requires counseling, a report shall be made by the qualified professional stating that the parties did or did not attend.

(g) Exception.--Notwithstanding any other provision of law, in no case may the court require counseling over the objection of a party that has a protection from abuse order, enforceable under Chapter 61 (relating to protection from abuse) against the other party, or where that party was the victim of a personal injury crime for which the other party was convicted or has entered into an Accelerated Rehabilitative Disposition program as a result of conduct for which the other party was a victim.]

Section 5. Section 3305(a)(5) of Title 23 is amended to read:

§ 3305. Grounds for annulment of voidable marriages.

(a) General rule.--The marriage of a person shall be deemed voidable and subject to annulment in the following cases:

* * *

(5) Where one party was induced to enter into the marriage due to fraud, duress, coercion or force attributable to the other party [and there has been no subsequent voluntary cohabitation after knowledge of the fraud or release from the effects of fraud, duress, coercion or force].

* * *

Section 6. Sections 3307, 3308 and 3309 of Title 23 are repealed:

[§ 3307. Defenses.

(a) General rule.--Existing common-law defenses are retained as to the grounds enumerated in section 3301(a) and (b) (relating to grounds for divorce). The defenses of condonation, connivance, collusion, recrimination and provocation are abolished as to the grounds enumerated in section 3301(c) and (d).

(b) Adultery.--In an action for divorce on the ground of adultery, it is a good defense and a perpetual bar against the action if the defendant alleges and proves, or if it appears in the evidence, that the plaintiff:

(1) has been guilty of like conduct;

(2) has admitted the defendant into conjugal society or embraces after the plaintiff knew of the fact;

(3) allowed the defendant's prostitution or received

hire from it; or

(4) exposed the defendant to lewd company whereby the defendant became involved in the adultery.

§ 3308. Action where defendant suffering from mental disorder.

If a spouse is insane or suffering from serious mental disorder, an action may be commenced under this part against that spouse upon any ground for divorce or annulment.

§ 3309. General appearance and collusion.

The entry of a general appearance by, or in behalf of, a defendant does not constitute collusion. Collusion shall be found to exist only where the parties conspired to fabricate grounds for divorce or annulment, agreed to and did commit perjury or perpetrated fraud on the court. Negotiation and discussion of terms of property settlement and other matters arising by reason of contemplated divorce or annulment do not constitute collusion.]

Section 7. Section 3321 of Title 23 is amended to read:

§ 3321. [Hearing by master] Appointment of hearing officers.

The court may appoint a [master] hearing officer to hear testimony on all or some issues[, except issues of custody and paternity,] and return the record and a transcript of the testimony together with a report and recommendation as prescribed by general rules, or a judge of the court in chambers may appoint a [master] hearing officer to hold a nonrecord hearing and to make recommendations and return the same to the court, in which case either party may demand a hearing de novo before the court.

Section 8. Title 23 is amended by adding a section to read:

§ 3321.1. General order of divorce proceedings.

(a) Written agreements.--If the parties in a divorce

proceeding have no unresolved economic issues pending or pending claims have been resolved by written agreement, the district and municipal courts may receive consents of the parties for transmission to the court of common pleas for entry of a decree of divorce under the divorce caption filed with the prothonotary.

(b) Economic issues.--When economic issues are included in the divorce action or have been raised by either party in the 90 days following service of the complaint, the court of common pleas shall conduct a proceeding within 120 days after service to consider:

(1) Temporary orders to preserve assets.

(2) Discovery necessary to advance the case toward settlement or trial.

(c) Hearing officers.--The court may appoint a hearing officer to hear testimony on all or some divorce issues, and return the record and a transcript of the testimony together with a report and recommendation as prescribed by general rules, or a judge of the court may appoint a hearing officer to hold a nonrecord hearing and to make recommendations and return the same to the court, in which case either party may demand a hearing de novo before the court.

Section 9. Section 3322 of Title 23 is repealed:

[§ 3322. Jury trial.

(a) Application for jury trial.--After service of the complaint in divorce or annulment on the defendant in the manner prescribed by general rules or entry of a general appearance for the defendant, if either of the parties desires any matter of fact that is affirmed by one and denied by the other to be tried by a jury, that party may take a rule upon the opposite party,

to be allowed by a judge of the court, to show cause why the issues of fact set forth in the rule should not be tried by a jury, which rule shall be served upon the opposite party or counsel for the opposite party.

(b) Disposition of application.--Upon the return of the rule, after hearing, the court may discharge it, make it absolute or frame issues itself. Only the issues ordered by the court shall be tried. The rule shall not be made absolute when, in the opinion of the court, a trial by jury cannot be had without prejudice to the public morals.]

Section 10. Section 3323(a) and (b) of Title 23 are amended to read:

§ 3323. Decree of court.

(a) General rule.--In all matrimonial causes, the court may [either dismiss the complaint or] enter a decree of divorce or annulment of the marriage upon the resolution of all economic issues raised by the court or the agreement of the parties.

(b) Contents of decree.--A decree granting a divorce or an annulment shall include, after a full hearing, where these matters are raised in any pleadings, an order determining and disposing of existing property rights and interests between the parties, [custody, partial custody and visitation rights, child support,] alimony, reasonable attorney fees, costs and expenses and any other related matters, including the enforcement of agreements voluntarily entered into between the parties and accompanied by the information required under subsection (b.1). In the enforcement of the rights of any party to any of these matters, the court shall have all necessary powers, including, but not limited to, the power of contempt and the power to attach wages.

* * *

Section 11. Section 3332 of Title 23 is repealed:

[§ 3332. Opening or vacating decrees.

A motion to open a decree of divorce or annulment may be made only within the period limited by 42 Pa.C.S. § 5505 (relating to modification of orders) and not thereafter. The motion may lie where it is alleged that the decree was procured by intrinsic fraud or that there is new evidence relating to the cause of action which will sustain the attack upon its validity. A motion to vacate a decree or strike a judgment alleged to be void because of extrinsic fraud, lack of jurisdiction over the subject matter or a fatal defect apparent upon the face of the record must be made within five years after entry of the final decree. Intrinsic fraud relates to a matter adjudicated by the judgment, including perjury and false testimony, whereas extrinsic fraud relates to matters collateral to the judgment which have the consequence of precluding a fair hearing or presentation of one side of the case.]

Section 12. Sections 3501(a), 3505(d) and 3701(b)(13) of Title 23 are amended to read:

§ 3501. Definitions.

(a) General rule.--As used in this chapter, "marital property" means all property acquired by either party during the marriage and the increase in value of any nonmarital property acquired pursuant to paragraphs (1) and (3) as measured and determined under subsection (a.1). However, marital property does not include:

(1) Property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage.

(2) Property excluded by valid agreement of the parties entered into before, during or after the marriage. To be a valid agreement for the purpose of this paragraph, the agreement shall conform to the requirements of section 3106 (relating to premarital agreements).

(3) Property acquired by gift, except between spouses, bequest, devise or descent or property acquired in exchange for such property.

(4) Property acquired after final separation until the date of divorce, except for property acquired in exchange for marital assets.

(5) [Property which a party] Marital property that one spouse has sold, granted, conveyed or otherwise disposed of in good faith, [and] for reasonable value and with the knowledge of both spouses prior to the date of final separation.

(6) [Veterans'] Social security and veterans' benefits exempt from attachment, levy or seizure pursuant to the act of September 2, 1958 (Public Law 85-857, 72 Stat. 1229), as amended, except for those benefits received by a veteran where the veteran has waived a portion of his military retirement pay in order to receive veterans' compensation.

(7) Property to the extent to which the property has been mortgaged or otherwise encumbered in good faith for value prior to the date of final separation with the knowledge of both spouses.

(8) Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage or after the date of final separation regardless of when the payment was received.

* * *

§ 3505. Disposition of property to defeat obligations.

* * *

(d) Constructive trust for undisclosed assets.--If a party fails to disclose information required by general rule of the Supreme Court and in consequence thereof an asset or assets with a fair market value of $1,000 or more is omitted from the final distribution of property, the party aggrieved by the nondisclosure may at any time petition the court granting the award to declare the creation of a constructive trust as to all undisclosed assets for the benefit of the parties [and their minor or dependent children, if any]. The party in whose name the assets are held shall be declared the constructive trustee unless the court designates a different trustee, and the trust may include any terms and conditions the court may determine. The court shall grant the petition upon a finding of a failure to disclose the assets as required by general rule of the Supreme Court.

* * *

§ 3701. Alimony.

* * *

(b) Factors relevant.--In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors, including:

* * *

(13) The relative needs of the parties <u>with consideration to any cohabitation arrangements in place at the time alimony is due and payable</u>.

* * *

Section 13. Section 3706 and Chapter 39 of Title 23 are repealed:

[§ 3706. Bar to alimony.

No petitioner is entitled to receive an award of alimony where the petitioner, subsequent to the divorce pursuant to which alimony is being sought, has entered into cohabitation with a person of the opposite sex who is not a member of the family of the petitioner within the degrees of consanguinity.

CHAPTER 39

MEDIATION

Sec.

3901. Mediation programs.

3902. Fees and costs.

3903. Review of programs.

3904. Existing programs.

§ 3901. Mediation programs.

(a) Establishment.--A court may establish a mediation program for actions brought under this part or Chapter 53 (relating to custody).

(b) Issues subject to mediation.--When a program has been established pursuant to subsection (a), the court may order the parties to attend an orientation session to explain the mediation process. Thereafter, should the parties consent to mediation, the court may order them to mediate such issues as it may specify.

(c) Local rules.--

(1) The court shall adopt local rules for the administration of the mediation program to include rules regarding qualifications of mediators, confidentiality and any other matter deemed appropriate by the court.

(2) The court shall not order an orientation session or mediation in a case where either party or child of either party is or has been a subject of domestic violence or child abuse at any time during the pendency of an action under this part or within 24 months preceding the filing of any action under this part.

(d) Model guidelines.--The Supreme Court shall develop model guidelines for implementation of this section and shall consult with experts on mediation and domestic violence in this Commonwealth in the development thereof. The effective date of this chapter shall not be delayed by virtue of this subsection.

§ 3902. Fees and costs.

(a) Imposition of fee.--A county in which the court has established a mediation program may impose an additional filing fee of up to $20 on divorce and custody complaints to be used to fund the mediation program.

(b) Assessment of additional costs.--The court may assess additional costs of mediation on either party.

§ 3903. Review of programs.

The Supreme Court shall monitor mediation programs established by courts of common pleas. The Supreme Court shall establish procedures for the evaluation of the effectiveness of the program.

§ 3904. Existing programs.

This chapter shall not affect any existing mediation program established in any judicial district pursuant to local rule.]

Section 14. This act shall take effect in 60 days.

PENNSYLVANIA BAR ASSOCIATION
FAMILY LAW SECTION

REPORT AND RECOMMENDATION REGARDING
HB 2303 OF 2024

The Family Law Section recommends that the Pennsylvania Bar Association oppose HB 2303 of 2024 and any substantially similar legislation unless it is amended substantially as discussed below. While, in general, the Family Law Section supports streamlining the Divorce Code to remove outdated provisions, capture changes in current family law practice, and to make the process more accessible and understandable for family law participants, it opposes changes that will potentially prejudice parties by removing established rights and safeguards, as well as eliminating the option for mediation. The Family Law Section therefore addresses each of the Bill's proposed changes and opposes the Bill unless amended substantially as set forth herein.

REPORT

A. Introduction.

Title 23 of the Pennsylvania Consolidated Statutes, Sections 3101 to 3902, provides authority for the court to enter a decree of divorce or annulment and adjudicate related claims (hereafter, the "Divorce Code").

This Bill represents a sweeping overhaul to the Divorce Code. While some of the proposed changes would remove outdated or unnecessary provisions, others will change presumptions, rights, and processes that were enacted to promote and reinforce the rights of family law litigants to a fair and expedient outcome. The proposed divorce law changes would impact not only family law courts, litigants and practitioners, but also the district and magisterial courts, and litigants and practitioners who appear in those courts. Further, at least one of the changes—removing the

Custody Mediation Programs provision—will have the harmful (and perhaps unintended) consequence of eradicating the court's mandatory custody mediation programs that help litigants in many cases resolve their custody claims before appearing in court.

The Pennsylvania Bar Association previously opposed this Bill as presently drafted by Resolution dated November 22, 2024. The Family Law Section Legislative Committee, co-chaired by Meredith Brennan and Lawrence J. Persick, has since conducted an in-depth review of the proposed changes, with input from experienced family law practitioners across the Commonwealth, and submits this revised Report and Recommendation regarding the Bill's specific proposed changes.

B. Recommendations

The Family Law Section's recommendations as to HB 2303 of 2024 and any substantially similar legislation are set forth below.

1. **Section 3102. Legislative findings and intent**

The Bill proposes to streamline the legislative policies of the Divorce Code from six policies to three policies, and the PBA does not object to this proposed change.

2. **Section 3103. Definitions**

The PBA does not object to eliminating the definition of "qualified professional" since it relates to the counseling provision of Section 3302 that would be eliminated in the proposed legislation (and to which elimination we have no objection, as stated below).

The PBA does object to eliminating the part of the definition of "separate and apart" that provides that the date of separation is presumed to be no later than the date that a divorce

complaint is filed and served because it provides a bright-line rule that is helpful in the absence of an agreement on the date of separation, but is also only a presumption that can be rebutted.

With respect to defining the term "economic issue," the PBA recommends deleting the parenthetical "including tangible and real property" in defining "item of value," since those are two limited categories of an "item of value."

3. **Section 3104. Bases of jurisdiction**

The Bill proposes to eliminate references to custody and child support in this Section. The PBA objects to this provision, because although there are now separate statutes governing child custody and child support, a party should still be able to include a custody count in a divorce complaint. *See also* the comments to Section 3105 below.

4. **Section 3105. Effect of agreement between parties**

Section 3105 currently provides that the court may enforce an agreement between parties whether or not it has been "merged or incorporated into the divorce decree." The Bill proposes to eliminate the "merged or incorporated language" on the basis that the legislature removed the need for incorporation of the agreement when it adopted Section 3105. The PBA opposes this change because parties should have the option to seek incorporation of the agreement in the decree for ease of future reference in enforcement or modification proceedings.

The Bill also proposes to delete subsection (b), which acknowledges that agreements regarding child support and custody are subject to modification upon a showing of changed circumstances. We agree that this language needs to be revised to remove the reference to "visitation," which is no longer a defined term under Section 5322 and to remove the qualification that custody is subject to modification based only upon "changed circumstances" as there is no such requirement under applicable caselaw.

The PBA opposes the elimination of this provision as it would create a void given that there is no other statutory provision providing that agreements between the parties relating to child custody and child support are enforceable regardless of whether they have been entered as an order of the court.

5. <u>Section 3106. Premarital agreements</u>

The Bill proposes a substantial overhaul of the law regarding premarital agreements, including, but not limited to, requiring a premarital agreement be filed with the Register of Wills on or before the date an application for a marriage license is filed; providing that for marriages formed outside of the Commonwealth, a premarital agreement is presumptively valid if a copy of the agreement is attached to any pleading filed with the court; eliminating the burden of proof to set aside a premarital agreement; and changing the requirements for a financial disclosure or waiver thereof.

The PBA opposes the sweeping changes in this section for a number of reasons, including the logistical issues of having some premarital agreements filed with the Register of Wills (if the marriage takes place in Pennsylvania) and others filed with the Prothonotary/Clerk's office (if the marriages takes place outside of Pennsylvania and the agreement is filed with a pleading); concerns about confidentiality; the elimination of the burden of proof; provisions that require disclosure of "assets held by each party" and "reported total income for the tax year immediately preceding the date of marriage" that, defined as such, may *obscure* an actual "fair and reasonable" disclosure; and provisions that conflict with each other such that an agreement "shall be enforceable" if it is filed with the register of wills versus a separate subsection that governs enforceability based upon the financial disclosure provided or waived.

6. **Section 3301(a). Grounds for divorce**

In subsection (a), the Bill proposes to eliminate all fault grounds for a divorce. The PBA supports the elimination of fault grounds for a divorce, with the caveat that marital misconduct would remain a factor for the court to consider in awarding spousal support and alimony, and that the personal injury crime exception to awards of spousal support or alimony *pendente lite* would remain in place.

7. **Section 3301(c). Mutual consent**

The Bill would dramatically change the procedure for entry of a divorce decree on mutual consent. First, proposed 3301(c) would allow a court to enter a decree if ninety days have elapsed after service of the complaint and each party files their consent; however, proposed Section 3301(c)(2) would *presume that a party has consented* to a divorce unless the defendant files an answer to the divorce complaint setting forth all of the following: (1) the divorce is contested; (2) the economic issues have been filed by the defendant but are not resolved; and (3) the one year separation is contested.

Under current practice, the defendant is not required to file an answer to the complaint and no consent is presumed unless the party affirmatively signs an Affidavit of Consent and files it with the court. The PBA opposes this "default" type of procedure where parties may lose important rights, including a waiver of their economic claims. This waiver could be especially challenging for unrepresented parties to avoid and will result in more uncertainty, litigation, and costs over economic issues not addressed in the divorce.

Proposed Section 3301(c)(2) would eliminate the presumed consent to a no-fault divorce where the party has been convicted of certain personal injury crimes against the other party. Those crimes are listed in 23 Pa.C.S.A. §3103. The PBA opposes this change which would

allow perpetrators of domestic violence to use litigation of grounds for divorce to harass and attempt to control the victim. The PBA would like to maintain the option for survivors of domestic violence to secure a divorce decree without unnecessary litigation.

8. Section 3301(d). Irretrievable breakdown

The proposed Bill would eliminate the "irretrievably broken" requirement and would allow the court to enter a decree based on a party's affidavit that the parties were separated for one year if the parties do not contest that date; alternatively, the proposed Bill would allow the court to order the parties to attend divorce proceedings 30 days after one party files an affidavit alleging that the parties have lived separate and apart for more than 90 days and one of the following applies: (1) the other party does not file a written denial of that allegation within 30 days of receipt of the affidavit; or (2) a court determines after a hearing that a one-year period of separation has elapsed. The PBA opposes the Bill as written because it eliminates the existing procedure that clearly sets forth the requirement that a party file a counter-affidavit denying that the marriage is irretrievably broken or that the parties have been separated for more than one year. In the absence of this procedure, a party may unknowingly waive the right to contest the allegation and further, there is no guidance as to how a party denies the affidavit.

For these reasons, the PBA believes that a possible adjustment to the procedural rules, as opposed to a wholesale statutory reconstruction, may be a more efficient means to address the legislative concern of prompt disposition of divorces with economic issues. As an example, allowing for the appointment of a hearing officer under Pa. R.C.P. 1920.51, prior to establishing grounds for divorce, at least for limited issues such as discovery, could facilitate more efficient resolution of a divorce with economic claims. Related to that, a uniform statewide fee for the appointment of a hearing officer would add to the accessibility to hearing officers for divorcing

parties across the Commonwealth.

9. Section 3302. Counseling

The PBA does not oppose the elimination of counseling when requesting a divorce under certain sections of the Divorce Code.

10. Section 3305. Grounds for annulment of voidable marriage

The proposed Bill would permit annulment for a marriage where one party was induced to enter the marriage due to fraud, duress, coercion or force attributable to the other party, whether or not there was a subsequent voluntary cohabitation after knowledge of the fraud or release from the effects of fraud, duress, coercion or force. The PBA opposes the removal of the "subsequent voluntary cohabitation" exception, as this would allow a party who is aware of facts which would support an annulment to hold their right to seek a potential annulment over the other party for years after the fact and despite their voluntary cohabitation which condoned the fraudulent conduct.

11. Section 3307. Defenses

In that the proposed legislation contemplates elimination of fault divorces, elimination of enumerated defenses logically follows.

12. Section 3308. Action where defendant suffering from mental disorder

Elimination of this Section makes sense when considering current procedure on incapacitated individuals facing divorce.

13. Section 3309. General appearance and collusion

This Section appears antiquated and the PBA does not oppose its elimination.

14. Section 3121. Appointment of hearing officers.

The PBA does not object to changing the term "master" to "hearing officer" as the term "master" has already been replaced by "hearing officer" in the Rules of Civil Procedure and in many counties and it is a more appropriate term.

The PBA does not object to the deletion of the words "except issues of custody and paternity" as hearing officers are already taking testimony regarding custody. However, it is unclear if the intention is to specifically address the issue of hearing officers taking testimony on custody issues as other proposed changes would remove custody from this section of the Divorce Code. Again, the PBA believes that the current statutory provisions allowing for parties to raise custody claims in the context of divorce should be retained, and any proposed changes to improve the current divorce or custody procedures are better addressed in rulemaking.

15. Section 3121.1 General order of divorce proceedings

The PBA does not object to simplifying the filing requirements for divorces with no economic issues. However, we strenuously oppose the magisterial district courts or municipal courts being permitted to receive the parties' consents for transmission of the matter to the courts for the entry of the divorce decree. Many district or municipal court judges are not attorneys, and, in any event, they have no experience in family law cases. Many individuals who appear before them are not represented and may not know their rights in divorce and related matters. Allowing parties to consent to divorce before these judges will result in parties unknowingly waiving their economic and personal rights. Further, there is no need for divorce matters to be

diverted from the family courts where they are now being processed. If there is any need to improve the current divorce procedure, these improvements are better addressed in rulemaking.

While the PBA does not object to proceedings being scheduled as a routine matter to address preliminary issues, many courts of common pleas will not be able to schedule these proceedings within 120 days. Moreover, having automatic proceedings to address potentially freezing assets could result in assets being frozen more than is necessary, leading to unintended consequences. In cases where it is appropriate and necessary to freeze assets, a party may file a petition. The issue as to the need to seek economic relief within ninety days is addressed in paragraph 7 (relating to the proposed changes to Section 3301(c)) in this Report.

While the PBA does not object to the court appointing hearing officers to hold economic hearings, which is the practice in many counties, there is no guidance as to when a judge should make the hearing a record or non-record hearing. If the intent is for judges to make independent determinations as to which issues in a certain case should be subject to a record hearing or a non-record hearing, that would lead to significant uncertainty and a lack of uniformity as to how economic issues will be addressed as similar cases could receive different treatment.

16. <u>Section 3322. Jury trial</u>

The PBA does not object to deletion of the option of a jury trial as we are not aware of any counties in the Commonwealth holding jury trials in divorce matters.

17. <u>Section 3323. Decree of court</u>

The PBA does object to the deletion of the reference to "custody, partial custody and visitation rights, child support" for the reasons set forth with respect to Section 3104 discussed above.

18. <u>Section 3332. Opening or vacating decrees</u>

The PBA objects to the deletion of the language regarding opening or vacating decrees without the inclusion of any substitute language. The law currently in place, 23 Pa.C.S.A. Section 3332, specifies only certain grounds for seeking to open or vacate a decree which are appropriate.

19. <u>Section 3501. Definitions</u>

In subsection (a)(2), the Bill proposes to expand the definition of property excluded as marital property pursuant to a valid agreement of the parties entered before, during or after marriage by requiring that this agreement conform to the requirements of Section 3016 (relating to premarital agreements). As stated above, the PBA opposes the sweeping changes to Section 3106 and, therefore, this proposed change.

In subsection (a)(5), the Bill proposes to amend the definition of property excluded as marital property that one spouse has sold, granted, conveyed or otherwise disposed of in good faith, for reasonable value prior to the date of final separation, to require that this disposition have been made with the knowledge of both spouses. The PBA does not oppose this requirement but believes that a disposition "for reasonable value" should still be permitted, even if made without the knowledge of the other spouse. The PBA suggests that the proposed language be changed to a disposition "for reasonable value" **or** with the knowledge of both spouses to allow for exclusion as marital property if either requirement is met.

In subsection (a)(6), the Bill proposes to expand the definition of property excluded as marital property to include Social Security benefits. The PBA does not oppose this change which is consistent with current family law practice.

In subsection (a)(7), the Bill proposes to expand the definition of property excluded as marital property to require that property mortgaged or encumbered in good faith for value prior to the date of final separation be with the knowledge of both spouses. As with subsection (a)(5) above, the PBA does not oppose this requirement but believe that a mortgage or encumbrance "in good faith for value" should still be permitted, even if done without the knowledge of the other spouse. The PBA suggests that the proposed language be changed to a mortgage or encumbrance in good faith for value **or** with the knowledge of both spouses to allow for exclusion as marital property if either requirement is met.

20. <u>Section 3505. Disposition of property to defeat obligations</u>

In subsection (d), the Bill proposes to clarify that the court may award a constructive trust if a party fails to disclose assets with a fair market value of $1,000 or more for the benefit of the parties, but not for the benefit of their minor or dependent children. The PBA does not oppose the requirement that the minor or dependent children be removed as beneficiaries for an undisclosed asset, but recommend that the provision be revised entirely to remove the need for a constructive trust and to provide instead for the court to award equitable distribution of the undisclosed asset, with an additional factor for consideration under 23 Pa.C.S.A. Section 3502 to include the party's failure to disclose this asset and authorizing the award of fees and costs incurred by the aggrieved party.

21. <u>Section 3701. Alimony and Section 3706. Bar to alimony</u>

In subsection 3701 (b)(13), the Bill proposes to expand the "relative needs of the parties" factor for determining the term and amount of alimony to include consideration of any

cohabitation arrangements in place when the alimony is "due and payable." This proposed change must be read in conjunction with the proposed change to Section 3706 below.

In Section 3706, the Bill proposes to remove cohabitation with an "unrelated adult of the opposite sex who is not a member of the family of the petitioner within the degrees of consanguinity" as a bar to the award of alimony; instead, such cohabitation would be considered as a factor in awarding alimony in Section 3701(b)(13), as stated above.

The PBA does not oppose the removal of cohabitation as a bar to alimony since it is difficult to prove. The PBA also does not oppose the expansion of need to include a consideration of any cohabitation arrangements in place when the alimony is due and payable. We suggest that "cohabitation" be further defined to include "with any adult individual, whether or not related or in a romantic relationship with the party" so as to include consideration of any financial arrangements that may affect the needs of the petitioning or responding parties.

22. <u>Chapter 39. Mediation</u>

The Bill proposes to eliminate Chapter 39, which is the only provision in the Domestic Relations Code providing for court-established mediation programs in custody actions. Section 3901(b) permits the court with such programs in place to order the parties to attend an orientation session to explain the mediation process and, thereafter, if the parties consent to mediation, for the court to order the parties to mediate such issues as it may specify. Section 3901(c) allows the court to adopt local rules for the administration of the mediation program, to include rules for qualification of mediators and confidentiality, and to exclude from mediation cases where a party or their child is a victim of domestic violence of child abuse. Section 3901(d) permits the Supreme Court to develop model guidelines to implement this statute. Section 3902(a) provides

for the court to establish a filing fee up to $20 on divorce and custody complaints to fund the mediation program and to assess additional costs on either party. Section 3903 provides that the Supreme Court shall monitor such mediation programs and establish procedures to evaluate their effectiveness. Section 3904 provides that this chapter shall not affect any existing mediation program established by local rule.

The mediation provisions were enacted in 1996—more than 28 years ago—and have been effective in providing for early intervention and resolution of custody matters in the counties where these programs are in place. There is no valid reason to remove the option for courts to establish these mediation programs which can help parties avoid the costs, delays and stress of litigation. As such, the PBA strenuously opposes the removal of Chapter 39.

RECOMMENDATION

The Family Law Section of the Pennsylvania Bar Association strongly urges the Pennsylvania Bar Association to oppose House Bill 2303 of 2024 and any substantially similar legislation, unless amended substantially as set forth above.

Respectfully Submitted,

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Melissa M. Boyd, Esquire, Chair
Pennsylvania Bar Association
Family Law Section
January 17, 2025