



MEDIATION MATTERS

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*“If you can, help others; if you cannot do that,
at least do not harm them.”*

— Dalai Lama

But I Digress...

The title of my column tells you I should be writing about mediation. Not this month.

A great commotion is occurring in the House of Representatives which could affect many citizens of the State of Michigan – and not in a good way. As we should all know, our law has been well settled when it comes to dividing sole and separate property. The law provides that if a person comes to a marriage with sole and separate property, such as a business, and that party uses marital labor to increase the value of the business during the marriage, or if the non-owning spouse can show need, the appreciation is equitably divided. This has been the law for a long time but especially since *Hanaway v Hanaway*¹, was decided in 1995 and affirmed more than 150 times since.

At the end of May, the Family Law Council of the State Bar learned that House Bills 4672 and 4673, which gut *Hanaway*, were abruptly introduced. Testimony was to be taken and an immediate vote was then planned by the Judiciary Committee and the House. Most members of the Family Law Council were led to believe that the bills would not be taken up until the fall session. Suddenly, however, they were on the “fast track”. Dedicated section members scrambled to Lansing to do what they could to stop the steam roller. Various bar associations representing family lawyers and family judges have all weighed in against the bills. Brian Dickerson of the Detroit Free Press² wrote a

scathing commentary against the bills and the Detroit Free Press editorial staff wrote specifically that the legislation should be dropped as a “quixotic scheme...” to “turn the clock back” on Michigan’s divorce law³.

Why was there such a rush to pass the bills? The lawyer lobbyist, Richard McClellan⁴, pushing the bill, has never been a family law attorney, refuses to identify his paying client. The attorney being paid by the lobbyist also refuses to identify the client(s) and contends he does not know who it is. Dickerson’s take on it is that there is a fat cat about to marry or divorce, bankrolling the effort.

If you want to know what’s so bad about the bills in detail, you can find out on the Family Law Section’s listserv⁵. There are many arguments against and a few in favor of the bills which can be found there. A good analysis of the bills was done by Anne Argiroff, long-time family law advocate. Most of her arguments are shared by the opponents of the bills who claim they eviscerate Michigan law as they fail to recognize that efforts by partners may increase the value of separate property. The bills also deny the partnership theory in marriage, deny acknowledgment of marital effort and make the non-owner into an employee with a tenuous right to seek limited reimbursement with many qualifications. They argue the bills are anti-marriage.

James Harrington, family law specialist, goes so far as to call the newly proposed law the “separate but equal-domestic servitude act”. He claims that passage of the bills will cause much more litigation by forcing attorneys to litigate compensation for the non-owning spouse⁶.

The bills mandate that a trial court can only rule one way: that separate property “shall” be awarded only to the owning spouse.



The bills change Michigan public policy dramatically by totally eliminating MCL 552.401. That statute expressly authorizes a trial court to award separate property to the other non-owning spouse when equitable and when the non-owning spouse contributed to the acquisition, improvement or accumulation of the property. Under the new bills, if the non-owning spouse is to receive anything, it would only be reimbursement, and it must be traceable, leading to proof problems. There are also a number of other limitations on reimbursement which must be dealt with.

At first the proponents of the bills claimed that they "codified" Michigan law. When shown that that might be a misrepresentation, they argued that the bills "clarified" what is perfectly clear law today. Most attorneys think that many aspects of the bills confuse the law.

There are a number of hypotheticals which have been proffered by Diana Raimi, another long-standing family law advocate and author of the Property Division chapter of the ICLE family law "bible"⁷, which question why these bills should be passed. In a letter to the House Judiciary Committee, she wrote (and I paraphrase), criticizing the bills:

- HB 4672 and 4673 are poorly drafted and confusing.
- The emphasis is incorrectly placed on reimbursement to a non-owner spouse instead of sharing. It fails also to recognize need at all.
- The treatment of income is confused.

Raimi also provides hypothetical questions which are helpful to understanding:

Wife and Husband both bring equal assets and savings to the marriage. By mutual agreement, Wife spends her savings to help support the family. Husband leaves his money invested. They agree that it's okay to spend freely and live well because Husband's investments are doing well. Years pass. They accumulate few joint savings and their house doesn't go up in value as they had hoped. When they divorce, Husband says "Too bad we spent all your money, and we have no marital money, but I get to keep all my investments." Under HB 4672-3, is Wife required to live out her last

years in poverty? Wife might have a claim for alimony, but what if Husband doesn't earn much, or is about to retire?

Another Raimi hypothetical asks:

Wife has a stock account at the time of marriage. During the marriage, both parties invest money totaling \$10,000. The stock grows to \$100,000. Under HB 4672-3, if they divorce, the "marital estate" gets back its \$10,000, of which Husband gets half, and the Wife keeps the rest. Suppose that the Husband was a stay-home homemaker and had no other savings because the Wife always told him "everything I have is yours" and that she would take care of him in his old age? Is this a reasonable result?

Those supporting House Bills 4672 and 4673 are few. They include among others, Richard McClellan, the paid lobbyist, the paid consulting lawyer, John Walsh, the sponsor of the bills and chair of the House Judiciary Committee. McClellan apparently admitted that he took a more "direct route" than the norm which is to consult divorce attorneys, family court judges and bar associations as the "bar can be a graveyard for good ideas"⁸.

Members of the Family Law Section of the State Bar are full of ideas to deal with these bills. Some of our leaders believe the law is sufficient, well-defined by case law and no changes are needed. Others believe that some good can be done by introducing a substitute bill that would propose alternatives to the "reimbursement" concept, allowing for guidelines and discretion for judges instead of mandatory provisions; treating prenuptial agreement-defined separate property just like any other separate property.

There is no question that there is much work to be done. A good start is in the making. Debate on the subject of the bills is ongoing. Meetings with Representative Walsh are being sought. However, much more needs to be done. Education of the public, particularly women's groups whose membership will be most adversely affected by the bills should begin. Perhaps inviting interested legislators to some section meetings on the topic would get reciprocal treatment for section members when family law issues are at stake in the legislature.

Attorneys MUST get involved. This is not a time to be an observer and leave it to others. How? Write or call a legislator and let him/her know your position on the bills.



Write the newspaper in your community. Contact a group potentially affected by the present proposed bills and have their members do the same. Pigeonhole a legislator known to you and educate him/her. You have more expertise than most of them as term limits renders them short on history, knowledge and know-how. You can help them understand what is at stake.

I'm a believer in "If it ain't broke, don't fix it". You may think as Diana Raimi does that some clarification and updating may be in order for various statutes dealing with family law but not the harmful ones presently being proposed. Whatever you decide, don't sit idly by. Do something.

Footnotes

1. *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995). In the interest of full disclosure, I represented Mrs. Hanaway in her appeal.

Quoting the essence of *Hanaway*:

"[t]he fruits of [husband's] efforts in the business were both the increase in the value of the business...and the salary he drew over the years. The parties were building an asset as well as enjoying its fruits on an ongoing basis. That [wife's] contribution to the asset came in the form of household and family services is irrelevant. The marriage was a partnership...[T]he asset at issue did not increase in value simply by earning interest. Rather, it appreciated because of [husband's] efforts, facilitated by [wife's] activities at home."

2. Dickerson, Brian, *A New Michigan Divorce Statute Tailored for One?*, [Editorial] Detroit Free Press (June 23, 2011). <<http://www.freep.com/apps/pbcs.dll/article?AID=2011106230514>> (accessed July 7, 2011).
3. *The Silly Season; Legislators Pick Stupid Fights that Pull them Away from Key Issues*, [Editorial] Detroit Free Press (July 3, 2011). <<http://www.freep.com/apps/pbcs.dll/article?AID=2011107030459>> (accessed July 7, 2011).
4. Richard McClellan is a veteran elections law lawyer known for his work on behalf of the Michigan Chamber of Commerce, according to Dickerson, n 2, *supra*.
5. Family Law listserv: <<http://groups.michbar.org/mailman/private/familylaw>> (accessed July 6, 2011).
6. Harrington, James, *Codification or Evisceration?*, Vol 25, No. 33, Michigan Lawyers Weekly, pp 1, 20 (July 4, 2011).
7. Kelly, Curtis, & Roan, eds., *Michigan Family Law* (Ann Arbor, MI: The Institute of Continuing Legal Education, 7, 2011), Chapter 15 - Property Division, by Diana Raimi.
8. Dickerson, n 2, *supra*.
9. HB 4672 and HB 4673 may be viewed at <<http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2011-HIB-4672.pdf>> (accessed July 7, 2011). and <<http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2011-HIB-4673.pdf>> (accessed July 7, 2011).

