TIFFANY & BOSCO
P.A.

TB LAW

NEWSLETTER

Experienced Lawyers Committed to Results

ISSUE FOCUS

Personal and Professional Break-Ups

Minimizing the Consequences

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ANNOUNCEMENTS

MILESTONES

We Are Celebrating Our 40th Anniversary!

BY MICHAEL E. TIFFANY

Where did the time go? It does not seem that long since my original partner and I formed our law firm. We started in a building in downtown Phoenix that was filled with lawyers, and I kept wondering how prospective clients would find us. They did.

Michael E. Tiffany

At first, we took anyone who came in the door. Then, we became selective — we only represented clients who we thought would pay their bills.

In 1967, most lawyers were general practitioners. After a couple of years of each of us doing everything, my partner and I agreed that he would handle all of the litigation and I would do everything else, including managing our firm.

Our firm has passed through five major economic cycles, growing and contracting, but always ending up better than before. As we grew, we developed a culture of caring for and respecting our clients, lawyers, and staff.

Early on, we committed to providing quality legal services, on time, and for a fair fee. To do this, we insisted that our lawyers only do what they know how to do, and to be the best that they can be.

"Tiffany" has always been a part of our firm's name. The addition of "Bosco" was an important event for us. It brought new ideas and vigor to our firm, and it has contributed to our growth and success since the mid-1990s.

Our lawyers and staff are invaluable assets of our firm. Their backgrounds and experiences are varied, but they have a common goal to serve our clients. They are not afraid to be challenged on how we do things, including to find a better way.

We could not have succeeded without our clients. We are proud to represent such a high quality and diverse client base that ranges from individuals and families to conglomerates, both private and public. Many have been with us for decades.

Our 100-plus employees, including 28 lawyers, look forward to an enjoyable and successful future with our clients.

NEW FACES

Prominent Eminent Domain Lawyer Joins Tiffany & Bosco

ROBERT V. KERRICK joins the firm as head of the real estate valuation department. Bob Kerrick's primary focus is real estate valuation litigation, with an emphasis on condemnation (eminent domain), land use, and zoning.

Mr. Kerrick has represented numerous homebuilders and land owners in connection with condemnation actions opposite such entities as the Arizona Department of Transportation, the City of Phoenix, and the City of Scottsdale. Bob is a past member of the Phoenix Board of Adjustment and past chairman of the City of Phoenix Planning Commission.

Mr. Kerrick has been listed as one of "The Best Lawyers in America." He has been a member of the adjunct faculty at Arizona State University's College of Law. Beyond the academic arena, Bob Kerrick lectures, both locally and nationally, on condemnation issues and procedures before professional and right-of-way organizations. And, Bob is the principal author of *Eminent Domain in Arizona*, published by the State Bar of Arizona.

Mr. Kerrick received his accounting degree in 1963 and his law degree in 1966, both from the University of Arizona.

LEARN MORE

For additional information on our newest shareholders and associates, please see the firm's Web site at www.tblaw.com.

LEGAL REVIEW

PAY DISCRIMINATION
– It Hurts More Than Just Employees

BY PAMELA L. KINGSLEY

Lilly, a female supervisor at a Goodyear Tire and Rubber plant in Alabama from 1979 to 1998, held a position typically held by men. See Ledbetter v. The Goodyear Tire & Rubber Co., Inc., 550 U.S. __, __, 127 S.Ct. 2162, 2178 (2007). Although at first her salary was in line with theirs, her pay later slipped in comparison — significantly.

Lilly complained, initially arguing before the EEOC that Goodyear had underpaid her because she was female. See 42 U.S.C. § 2000e-(a)(1) — it is unlawful for an employer "to discriminate against any individual with respect to [her] compensation ... because of such individual's ... sex." Then, a jury found for Lilly, and the trial court awarded her back pay, damages, counsel fees, and costs. The Eleventh Circuit Court of Appeals reversed, finding that Lilly had not been timely in making her claim. See Title VII, which provides that a charge of discrimination "shall be filed within [180] days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e)(1). It held the district court should have ruled for Goodyear as a matter of law. The U.S. Supreme Court accepted review, and ultimately agreed with the Court of Appeals in favor of Goodyear.

Pamela L. Kingsley

Noting that it had previously held the time for filing an EEOC charge of employment discrimination begins with the "[d]iscrete ac[t]" of discrimination, the Court went on to apply that concept to pay-setting decisions. Each year, when Lilly received her salary increase at substantially less than her male counterparts, it was "incumbent on [her] to file her charges." Because she had not, she lost — in a 5-4 decision, with one vote making the difference.

The case is fact specific; as all are by the time they make it up the administrative and judicial ladders. The purpose of this article is to alert you to certain issues, so you can avoid the consequences even "winners" like Goodyear endure.

First, Title VII addresses unlawful employment practices. There are two categories for the actions.

There are "discrete acts" that are easy to identify as discriminatory. They include "termination, failure to promote, denial of transfer, or refusal to hire." These occur the day of the act.

The second category, unlawful employment practices alleged in hostile work environment claims, is for recurring individual acts that are cumulative in impact. They involve repeated conduct over days or perhaps years. The persistence of the discriminatory conduct indicates management should have known of its existence and produces a cognizable harm.

The treatment of the two categories can, as in Lilly's case, make all the difference. Claims for discrete acts must be filed with the EEOC within 180 days of occurrence. Claims falling under hostile work environment, category two, do not.

Lilly argued, and the dissenting four justices agreed, that she could assert a compensable claim for illegal pay discrimination as disparate pay had been received during the statutory limitations period as the result of intentionally discriminatory pay decisions that had occurred outside the limitations period. Because earlier decisions regarding pay ultimately meant she received less compensation (Goodyear had not made up the disparity, even when it started to apply like-kind increases), the continued impact on the amount of her pay placed her in the second category; not the first. Each paycheck implemented a prior decision.

Lilly argued that a Circuit Court had adopted a "paycheck accrual rule": each paycheck, even if not accompanied by discriminatory intent, triggered a new EEOC charging period, no matter how long ago the discrimination had occurred.

The five prevailing justices drew a distinction and stuck to it:

> [A] new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is "facially nondiscriminatory and neutrally applied." (Citation omitted) The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period. Ledbetter, 550 U.S. at __, 127 S.Ct. at 2174.

One lesson derives from the fact the other four justices would have ruled differently. And, with slightly different facts, Goodyear would have being paying damages, attorneys fees, and costs. As it was, it likely paid hundreds of thousands of dollars for its own fees and costs.

Title VII provides just one of the avenues employees can pursue for pay discrimination. Lily might have prevailed under one of the others. Consider that fact together with the lessons taught here should your company treat employees differently based on sex or any other statutorily protected class.

Can This Marriage Be Saved?

LEARN MORE

In an upcoming issue, we will explore what happens when business owners decide their marriage cannot be saved, and work through the process of divorcing themselves from each other and, perhaps, the business. For more information please visit www.tblaw.com/PracticeAreas/Business-Divorce.htm

IN FOCUS

BY ROB ROYAL

Like marital partners, business partners can have irreconcilable differences that require their separation. As in a marriage, such separation requires the splitting of assets and liabilities of the relationship. Business divorce is an area of the law that assists clients in the splitting of assets of the business or the business itself. It arises when business owners are in conflict and seek a change of ownership or dissolution of the business altogether but cannot agree on how it should be done. Business divorce involves separating the conflicting business owners and concluding the dispute — usually through negotiation, agreement, or if necessary, litigation.

Business divorce can happen for a number of reasons. Although there may be irreconcilable differences that lead to a recognition that one person cannot do business with the other person, in some cases one faction of ownership is incapable of conducting business for the good of the company with the other faction. These challenges may arise either in a pure business context, or may surface in family businesses, where family issues interfere with the business operations. Business divorce occurs where the owners of a business discover they have a different management philosophy preventing their disagreements from being resolved. Conflict between business owners arises when one person or one group takes advantage of another person or group. Such advantage can come from management decisions, economic decisions, or decisions that directly affect the pocketbook of a person or faction.

Rob Royal

However, at times the irreconcilable differences arise from more innocent conduct. A business owner may decide that because of circumstances outside the business, a new opportunity, or a family decision, that he or she should move on. People often decide they need a different direction in their lives for various reasons, which often leads to their resignation and the need to consider what to do with the departing owner's interest.

When businesses acquire a new partner, or new capital with cash terms and conditions, such action may not be in the favor of an owner. Just the need for capital resulting from a different change of business philosophy may trigger a separation. Any other change in structure, including a merger or sale of all or substantially all of the assets of a company can represent a significant event in corporate history leading to a major disagreement. The structural decisions are usually difficult subjects for owners, which increases tensions leading to conflict.

Conflict usually arises from a series of events that culminate in a separation with common themes leading to business divorce. First and foremost is the lack of disclosure of important information, usually financial information, between or among the owners. This creates an element of distrust, particularly when an owner discovers that his or her partners are not appropriately using corporate funds. This is called self-dealing, using corporate funds in your own self-interest and against the best interests of the corporation and the other owners of the corporation. Self-dealing is present in most business divorces.

A diverse compensation arrangement between owners is a source for conflict — particularly when bonuses or other distributions are made in what is perceived to be an unfair manner. Coupled closely with this concept is the idea that certain persons already may be receiving excessive salary, benefits, and other perks that are not available to other owners of the business. Such perks may be in the form of favorable loans, travel and entertainment expenses, and even, a preferred parking space.

At times, events occur that forces the separation of business owners. This may begin simply by the failure to consult with business owners on management decisions and/or effectively removing them from the day-to-day management. Conflict often occurs when one faction decides to terminate the employment of a business owner, cutting off that person's salary and distributions and removing him or her from the business premises. This is usually coupled with the termination of a directorship, officership or other management position in the company. By the time these events occur, the parties are well on their way to separation.

Utilizing business opportunities for one's self rather than giving the corporation the opportunity to participate in a transaction also creates hostilities and potential liability. This is another form of self-dealing.

The dilution of a stock interest by those in control is a source of conflict leading to business divorce. The value of one's stock can be reduced in a number of ways, such as issuing more stock, selling stock to one without the financial ability to pay for it as opposed to offering it to the other business owners, issuance of stock for compensation unfairly, and changing the structure of the stock or member interest.

Some or all of these events often lead to a business separation. We can assist in making the transition, a topic which will be explored in an upcoming issue.

LEGAL REVIEW

DIVORCE

Divorce In A Tough Lender's Market

Ten Simple Steps Toward Financing a Home

BY ALEX POULOS

When the love is gone and divorce proceedings are on, your future begins in the present economy. Financing a home purchase is a major concern.

Cautious lenders require detailed financial statements, proof of steady incomes, and sizeable down payments. You must plan your marital property division to pass lender scrutiny and convince your spouse or a judge to accept your plan.

Alex Poulos

Arizona law states that community, joint, or commonly held property must be divided equitably, though not necessarily in-kind. This language requires a substantially equal split. Above all, it mandates fairness. A property division is unfair if your spouse walks away with all of the cash and you cannot finance a home.

Ten easy steps will help you plan your home financing:

1 **Step One.** Identify your marital liquid assets, like cash in bank accounts and tax refunds.

2 **Step Two.** Identify and give a value estimate of your marital cash-convertible assets, like net home equity, mutual funds, term-life insurance policies, and possibly, major corporate stock and real estate investments.

3 **Step Three.** Identify and give a value estimate of your marital assets that you cannot or do not want to cash out. These may include cars (valued through Kelley Blue Book website at www.kbb.com), personal property (furniture, furnishings, jewelry, paintings, tools), retirement funds (pensions, 401ks, IRAs, and deferred compensation), self-employment businesses, time shares, closely-held corporate stock, and limited liability company and partnership interests.

4 **Step Four.** Identify your marital debts, like credit card balances, tax liabilities, and home mortgage balances. Remember that the mortgage goes away if your home sells. If you keep the marital home, expect to refinance to remove your spouse from the mortgage and pay his or her share of the equity.

5 **Step Five.** List the marital assets and debts between you and your spouse. Allocate one-half of each of the liquid assets, the cash-convertible assets, and the debts. Allocate the marital assets that you cannot or do not want to cash out in an equal or substantially equal split. You can split retirement funds in any amount without taxes or penalties if you withdraw no money. Make sure you give yourself at least one-half of the liquid assets. If your spouse has greater earning power, you might take more cash.

6 **Step Six.** List your current income or income capacity and any separate property, income, and debts. This includes real estate, disability benefits, and student loans. Spousal and child support should be factored in as well. Lender financial statements demand support information.

7 **Step Seven.** Calculate mortgage amortization schedules on the Internet to see what monthly payment you can afford.

8 **Step Eight.** Contact lenders to see if you pre-qualify for a loan. There are numerous available lenders with Internet access.

9 **Step Nine.** Search for where you want and can afford to live. Your plan more likely will succeed if you can identify the home you want to buy. The U.S. Department of Housing and Urban Development (HUD) website at www.hud.gov is a helpful resource for home buyers.

10 **Step Ten.** Consult with a divorce attorney for advice on your proposed property allocation. Asset waste or other issues, like tax rates and regulations, may suggest an adjustment. Your lawyer can give you projected child support and spousal maintenance amounts. He or she can refer you to a home or business appraiser, forensic accountant, or certified divorce planner to address property division, business, income, and tax issues. You cannot finance a home if no one agrees you should receive your share of the cash. Your lawyer will advocate your point.

These ten simple steps will help you finance your home purchase, reduce your anxiety over the lender's market, and show your spouse and a judge why your property division plan is fair.

LEGAL REVIEW

MARITAL AGREEMENTS

Consulting With An Attorney Before Marriage

BY LEONARD J. MARK

Often people ask whether they should consult with an attorney before marriage. The answer is that, while not necessary, it is appropriate.

Leonard J. Mark

Aside from the emotional components of a marital relationship, there are financial consequences each party should be aware of prior to the marriage. As a consequence, each of the parties should consult with an attorney of his or her choice — independent of the other — before marrying.

After the parties marry, there exist three legal entities. The separate estate of the husband; the separate estate of the wife; and the community estate of the husband and the wife.

A.R.S. § 25-211 sets forth what will be considered the community property of the parties. Essentially, it provides that all property acquired by either the husband or the wife during the marriage is community property except property acquired by gift, devise, or descent.

A.R.S. § 25-213 sets forth what will be considered the separate property of the parties. Essentially, it provides that a spouse's real and personal property owned by the spouse before marriage is that spouse's separate property and any property acquired by that spouse during marriage by gift, devise, or descent, and the increase, rent issues, and profits of that property, is the separate property of that spouse. Also, property acquired by a spouse after service of a petition for dissolution of marriage is the separate property of that spouse.

All of this becomes very important when the marriage dissolves. Then, the court, under A.R.S. § 25-318, must confirm to each party his or her sole and separate property and equitably divide their community, joint, and common property.

Therefore, before entering into a marriage, the parties should understand what is going to be considered separate property and what is going to be considered community property. They also should be informed how they can avoid problems concerning the issues that could result in their losing an interest in what otherwise would have been separate property.

During the interview with the attorney prior to marriage, the use of a prenuptial agreement can be explored. A.R.S. § 25-203 provides that the parties, prior to marriage, can enter into a written agreement that addresses the rights and obligations of each of the parties and the right to manage and control property. That agreement also provides the opportunity for the parties to modify or even eliminate spousal maintenance.

In summary, because marital law can be somewhat confusing and complicated, and because substantial amounts of money and property are often involved, it is prudent on the part of each of the parties to consult with an attorney prior to marrying.

WE'RE HERE TO HELP
For additional information on recent family law changes, contact us at (602) 255-6000 or online at www.tblaw.com.

ATTORNEY DIRECTORY

Tiffany & Bosco, P.A. has provided a wide range of legal services to the business community since 1967. The firm's experienced attorneys represent domestic and foreign clients on a local, national and international basis. Tiffany & Bosco, P.A. is the Arizona law firm member of MSI, a worldwide network of independent legal and accounting firms. Tiffany & Bosco, P.A. is also a member of the USFN, and the FNMA and FHLMC designated counsel programs.

This newsletter is published as a service to clients and friends. It is intended to give general information only and not to provide advice on specific legal issues. For information, change of address, or copies, please contact our Editors, Pamela L. Kingsley or Robert A. Royal at (602) 255-6000.

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