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ATTORNEYS AT LAW

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INTELLECTUAL PROPERTY + LABOR AND EMPLOYMENT + PERSONAL INJURY + PRODUCTS LIABILITY + REAL ESTATE + SECURITIES + TAX + TRANSPORTATION + TRUSTS & ESTATES

Preserving Electronically Stored Information ("ESI")

Living in the "digital age" has certainly changed the way most of us conduct business. Electronic mail or "e-mail" has become the communication method of choice for most businesses and individuals. As our use of electronic data increases, so do the challenges of storing and preserving our electronically stored information ("ESI"). This challenge is becoming increasingly important in the legal world. New case law requires a party to impose a "litigation hold," to preserve relevant information, including ESI, if there is a *reasonable anticipation* that litigation may ensue.

Determining if you are the target of potential litigation is not as challenging as it may seem. Case law has determined that the possibility of impending litigation must be "probable" -- more than just a possibility. For instance, receiving a Preservation of Evidence Letter, a Complaint, a Petition, or an inquiry from a governmental source can be considered as "probable cause" to initiate a "litigation hold." Additionally, internal circumstances such as personnel grievances filed with the Human Resources Department may trigger the need for a "litigation hold" to preserve relevant information, including ESI.

Courts have determined that the duty to preserve evidence becomes necessary when: 1) litigation is reasonably anticipated, i.e., based on a reasonable evaluation of the facts known at the time; and, 2) on the "potency of the claim," based on the evaluation of a potential party's experience and/or knowledge relevant to the litigation. Courts also require plaintiffs be responsible for implementing a "litigation hold" when they anticipate filing a lawsuit. This means once a plaintiff starts examining their own evidence or once a plaintiff forms a strategy and a time frame for filing a lawsuit, the "litigation hold" may take effect. Since a "litigation hold" is subjective, it is extremely important to maintain documentation about when and why the hold was implemented.

Once a "litigation hold" is in effect, the enforcement of the hold becomes the next vital step. Broad notification to all employees may be necessary. Requesting that each employee sign, date and return such notification provides a small layer of protection. Depending on a person's or company's use of ESI, involvement by IT departments and outside vendors may be necessary to identify all data needed to be withheld and preserved to avoid spoliation. When the relevant parties are identified for the "litigation hold," then additional and much more specific communications must be provided to those individuals detailing and describing the data that they are to preserve, the method of preservation they are to use, and the identification process they are to implement in order to locate all relevant data.

A proactive approach to implementing a "litigation hold," especially with the large amounts of ESI in our daily lives, can save you and your company much time and expense.

Sincerely,

Larry Friedman

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INSIDE

In The Spotlight: James S. Bell

Landlords Beware: Do Not Interfere With A Tenant's Possession of the Leased Premises

Recently, we won a jury trial on behalf of a commercial tenant against a hospital landlord for breaching the covenant of quiet enjoyment. Even though a lease contract between a landlord and a tenant may not by its terms expressly require the landlord to do anything, in at least two situations, the courts have implied landlord obligations stemming from the landlord-tenant relationship. Those two implied obligations are the implied covenant of quiet enjoyment and the implied warranty of suitability. This article only discusses the implied covenant of quiet enjoyment.

What is the covenant of quiet enjoyment? Or more importantly, what constitutes a breach of the covenant of quiet enjoyment? As a general rule, for there to be a breach of this covenant, there has to be an intention on the part of the landlord that the tenant shall no longer enjoy the premises; a material act by the landlord that substantially interferes with the use and enjoyment of the premises for the purpose for which they are let; and the act must deprive the tenant of the use and enjoyment of the premises. Further, the landlord is liable to the tenant for damages caused by a breach of the covenant.

Probably the most common suit for damages by a tenant results from breach of the covenant of quiet enjoyment. The cases in this area appear to offer primarily three different types of damages. In a few cases, the courts have made broad statements that a tenant, having been wrongfully evicted, is entitled to recover for any loss or injury which is a foreseeable consequence of the breach. Most courts will also allow a claim for special damages by a tenant who has been aggrieved, including lost profits, where such loss is shown to be the natural and probable consequence of the act or omission complained of, but not where such profits are dependent on uncertain and changing conditions. Other courts indicate that the proper measure of damages is the difference between market rental value of the leasehold for the unexpired term and the stipulated rentals set forth in the lease. So, landlords should be aware of the implied covenant of quiet enjoyment and be careful not to interfere with a tenant's possession of the leased premises.

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Characterization of Marital Property in Texas By Michael D. Donohue

In Texas, property possessed by either spouse during the marriage or on dissolution of marriage is presumed to be community property. *See* TEX. FAM. CODE § 3.003(a). A spouse's separate property consists of (1) property owned or claimed by the spouse before marriage; (2) property acquired by the spouse during marriage by gift, devise, or descent; and (3) recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage. TEX. FAM. CODE § 3.001.

All property, both real and personal, of a spouse owned or claimed before marriage is the separate property of that spouse. TEX. CONST. ART. 16 § 15; TEX. FAM. CODE § 3.001(1). All property, real and personal, of a spouse acquired during marriage by devise or descent is the separate property of that spouse. TEX. CONST. ART. 16 § 15; TEX. FAM. CODE § 3.001(2). To constitute a valid gift, there must be a gratuitous conveyance or delivery of the property given and an intention of the donor to vest the ownership of the property unconditionally and immediately in the donee. *Kiel v. Brinkman*, 668 S.W.2d 926, 930 (Tex.App.-Houston [14th Dist.] 1984, no writ.

The community property presumption may be rebutted by clear and convincing evidence. *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965). Clear and convincing evidence is the degree of proof needed to "produce in the mind of the trier of fact a firm belief or conviction about the allegations sought to be established." *Ganesan v. Vallabhaneni*, 96 S.W.3d 345, 354 (Tex. App.—Austin 2002, pet. denied). To overcome the community property presumption, the party asserting separate ownership must clearly trace the property to its separate property origin. *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975). Thus, the presumption that the property is community in character prevails if the separate and community property have been so commingled as to defy re-segregation and identification. *McKinley v. McKinley*, 296 S.W.2d 540, 543-44 (Tex. 1973).

The character of property as separate or community is determined under the inception of title rule, i.e., the time and circumstances of the acquisition of the property. *See Rusk v. Rusk*, 5 S.W.3d 299, 303 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Inception of title occurs when a spouse first has a right of claim to the property by virtue of which title is finally vested. *Sharma v. Routh*, 302 S.W.3d 355, 360 (Tex. App.—Houston [14th Dist.] 2009, no pet.). A spouse can prove the separate character of property held upon divorce by tracing its mutations in form back to property held prior to marriage. *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987). Tracing involves using evidence showing the time and means by which the spouse originally obtained possession of the property to establish the separate origin of the property and how the spouse claimed the asset. *Ganesan*, 96 S.W.3d at 354.

In the event you are contemplating or faced with dissolution of your marriage, Friedman & Feiger's experienced legal team will work with and assist you in protecting your rights in identifying the separate or community character of property in the marital estate.

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Spousal Maintenance in Texas?!?!

By Marla S. Pittman

The common perception of the general public is that Texas is a "no alimony" state, however, the Texas Family Code does have provisions for spousal maintenance (also called spousal support). The Texas Legislature recently made some sweeping changes to the spousal maintenance statute. Those changes became law on September 1, 2011, and apply to all divorces filed on or after that date. The most significant modifications to the spousal maintenance statute are to the eligibility for spousal maintenance and the factors that the Court looks at when determining how much and for how long a qualified recipient may receive spousal maintenance payments. The provision is gender neutral in that either spouse is eligible to receive payments if they meet the qualifications.

A Court may now only order maintenance if the spouse seeking maintenance will lack sufficient property (including that spouse's separate property) to provide for their minimum reasonable needs and meets one of the following criteria:

a. Has been a victim of domestic violence within the past 2 years of the filing date of the divorce or while the divorce is pending; OR,
b. Is unable to provide for his or her minimum reasonable needs because of an incapacitating physical or mental disability; OR,
c. Has been married for 10 years or longer and lacks the ability to earn sufficient income to meet his or her minimum reasonable needs; OR,
d. Is the custodian of a child of the marriage who is disabled and whose care prevents the spouse from earning sufficient income to provide for the spouse's minimum reasonable needs.

There is also now a "rebuttable presumption" against the provision of spousal maintenance. Therefore, the spouse seeking support must rebut the presumption against spousal maintenance by providing evidence that the requisite criteria listed above have been met.

The new law increased the maximum amount of the payments from $2,500.00 to $5,000.00 per month, or 20% of the paying spouse's average monthly gross income. The maximum potential duration of payments was also increased as shown below, with the duration of payments being linked to the length of the marriage.

- 5 years of payments if married at least 10 years but less than 20 years
- 7 years of payments if married between 20 and 30 years
- 10 years of payments if married over 30 years

(5 years of payments are also available if the spouse making the payments was convicted of domestic violence.)

It is important to understand that the payment amounts and duration are discretionary with the Court in that lower time periods and amounts can be ordered. The Court does not have discretion to lengthen the time periods or increase the payment amounts above the maximum amounts and times listed. In determining how much, if any, spousal support to award, the Court considers many factors including, but not limited to, excessive or abnormal expenditures by either spouse; the contribution of a spouse as homemaker; and, marital misconduct (including adultery) by either spouse during the marriage.

The obligation to pay previously ordered spousal maintenance payments terminates upon the death of either party or on the remarriage of the party receiving the payments. Under the new law, the Court may also order that the obligation for making payments terminates upon a showing that the party receiving the payments cohabitates with someone that he or she has a dating or romantic relationship with.

The bottom line is that spousal maintenance payments are available for longer periods of time and in higher amounts, but they are harder to qualify for—and the recipient's conduct during the marriage is more closely scrutinized in the determination of qualification. If you are contemplating divorce and have questions on how these newly revised provisions may apply to your personal situation, please contact me or any of the other well-qualified attorneys at Friedman & Feiger, LLP.

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Upcoming Events

Friedman & Feiger Calendar

May 28, 2012	Memorial Day (Observed)
June 17, 2012	Father's Day
July 4, 2012	Independence Day

The entire staff at Friedman & Feiger, LLP wish you a safe and happy summer!

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