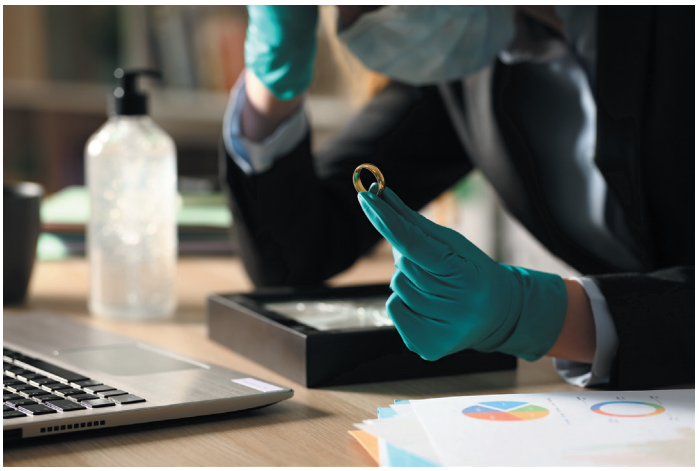
Legal Matters®

Family Law
winter 2021

COVID-era divorce solutions could outlive pandemic

The Covid-19 crisis has impacted every aspect of life, including divorce. With courthouses closed to the public, divorcing couples have had to contend with technology solutions like Zoom for hearings and trials. This has made what's already a challenging process even harder as participants deal with bad connectivity and sound, background distractions and getting documents to a judge that can usually be handed over in person.

Nonetheless, Zoom and similar tech solutions have improved the process in certain ways that may outlive the virus.



©PheelingsMedia

Depending on a court's efficiency in scheduling Zoom calls there may be a lot less waiting around for your hearing.

For example, remote conferences and hearings enable divorcing spouses to avoid each other's physical presence. That can be helpful in a contentious case.

Additionally, depending on a court's efficiency in scheduling Zoom calls there may be a lot less waiting around for your hearing, and if you do have to wait online in a "virtual waiting room" at least you're waiting at home and not in a courtroom. Meanwhile, you don't have to travel to court and pay for parking or wait in security lines. Your attorney and experts don't have to do that either, which can cut down considerably on costs.

Videoconferencing can also be useful if kids are involved and you have concerns about whether the other parent's home is fit for visitation. Zoom can enable the judge to see where the child lives, sleeps, plays and eats firsthand. Similarly if the other parent claims your home is an inappropriate place for a child, a Zoom tour may help discredit such claims.

In terms of the case itself, judges may be able to better determine the credibility of a witness who is projected on a large screen in the

continued on page 2

Arnold & Smith PLLC
ATTORNEYS AT LAW

The Historic John Price Carr House • 200 North McDowell Street • Charlotte, North Carolina 28204
(704) 370-2828 • www.CharlotteDivorceLawyerBlog.com

Court OK's prenup-turned-post-nup

Prenuptial agreements are a useful way for a soon-to-be-married couple to protect assets they are bringing into a marriage. Essentially, these are contracts that lay out exactly what each spouse is entitled to (and obligated to) in the event of a divorce. If you and your soon-to-be-spouse are considering such an agreement, be sure to work with an attorney who can make sure it's properly executed. Otherwise it may not be enforced, as nearly happened in a recent Michigan case.

In that case, Carla Skaates and her husband Nathan Kayser lived together before getting married. Skaates had a dental practice purchased with her own assets. Kayser, who worked there as a business manager, also had a business of his own. The couple owned a third business together.

When they decided to get married, they spent 16 months negotiating a prenup. According to its terms, if they divorced the dental practice would go entirely to Skaates, Kayser's business would be solely his and the third business would be divided equally, with Skaates having an option to buy out Kayser's share. Everything else was separate property not subject to division.

The agreement also included a "cooling off" provision mandating that either party wait four months before filing for divorce while participating in at least three marital counseling sessions.

Even though the agreement was styled as a prenup, the couple executed it just over a month *after* they got married.

Less than four years later, Skaates filed for divorce with no cooling-off period.

When a local judge enforced the agreement, Kayser appealed. He argued that it did not qualify as a prenup and was unenforceable as a "post-nup" because it left Skaates better off financially. He also argued it was void because Skaates breached it and because, like many post-nups, it violated public policy by encouraging divorce.

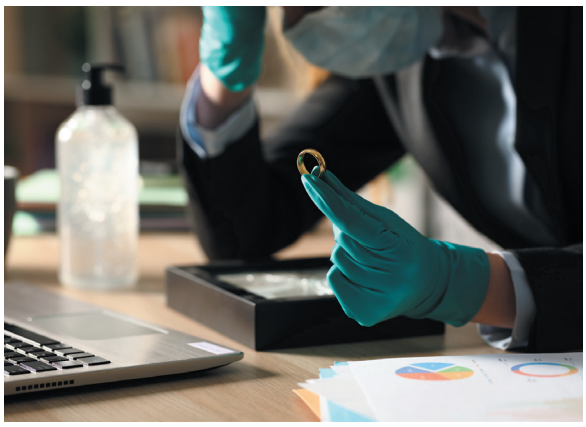
The Michigan Court of Appeals agreed with Kayser's overall points about the enforceability of post-nups but disagreed that they applied in this case. The court also observed that the couple attended marital counseling before Skaates filed for divorce and it was unsuccessful. It then ruled the agreement enforceable as a valid postnuptial agreement.

Some of the court's language indicated that this decision easily could have gone the other way, however. So if you are negotiating a prenup, your best bet is to execute it before the marriage.

COVID-era divorce solutions could outlive pandemic

continued from page 1

courtroom than they can when the witness is present in person but at more of a distance.



©PheelingsMedia

Zoom does present some issues. For example, family court hearings are open to the public in many states. This could mean a Zoom hearing is open to the public too, either on YouTube or with a link provided to those who request it. This means nosy neighbors, bosses and others who wouldn't otherwise take the time to watch your divorce proceeding in person now may be find it more convenient to log in. Your kids might also be able to watch, exposing them to information you'd rather they not hear.

There may be security concerns for publicly viewable hearings on Zoom when documents with sensitive personal or financial information are introduced into evidence. If they're introduced by screen-sharing, there's the risk this information could be seen on the internet where such proceedings are available to the public.

If this is a risk, it may be possible to convince the court not to broadcast your particular case. It's only fair for a judge to consider the balance between the public's right to view a public proceeding and the privacy rights of the participants.

Even after months of the pandemic, this remains a strange, new landscape that we're all still trying to figure out, and the experience can differ from place to place. If you're thinking of getting divorced and feeling anxious about it happening remotely, talk to a family law attorney who can help address your concerns.

Ex-wife can 'claw back' millions in hidden assets


©stillfx

When marriages go bad, feelings can be raw, making it tempting to want to hide assets to punish your soon-to-be ex. But if you get caught, the consequences can be severe, as a recent case shows us.

The couple in the case, Robert and Janet Foisie, decided to divorce in 2010. They went to mediation, where they agreed to fully disclose and equally divide their assets. Robert also allegedly told Janet during mediation that he had no "offshore assets."

A year later, after both spouses had allegedly fully disclosed their assets in a Connecticut family court, they executed a divorce settlement leaving each of them with $20 million in securities and real estate.

After the divorce, however, Janet learned Robert did not disclose another $4.5 million in securities and millions more in promissory notes stashed away in a Swiss trust. Meanwhile, he had donated an estimated $39 million to his alma mater, Worcester Polytechnic Institute, which apparently left him insolvent when he died in 2018.

Janet sued WPI in federal court in Massachusetts, claiming the donation was a "fraudulent conveyance" that it shouldn't have received and that she should be able to "claw" it back.

WPI argued that under Massachusetts law, a divorce proceeding must be "imminent" in order for a spouse to be considered a creditor entitled to pursue assets that were fraudulently transferred to a third party in order to thwart property division or alimony.

A trial court sided with WPI, but a federal appeals court reversed, ruling that under the state law in question — which was based on the Uniform Fraudulent Transfers Act — a creditor is simply "a person who has a claim." This meant Janet was not barred from being a creditor just because the divorce already happened.

Now Janet will have the opportunity to seek the assets she's apparently entitled to. While Robert did not benefit materially from the donation to his alma mater (except perhaps with an extremely large tax deduction), others hide assets in a variety of ways. This case shows that doing so is very unwise. The better approach is to talk to your family law attorney about how to get the fairest property division you can within the bounds of the law.

Both spouses can share in gift from husband's family

A recent South Dakota case makes clear that a gift to a married couple from one spouse's family will count as a gift to both of them in the event of a divorce, even if the benefactor later claims he or she intended otherwise

The case revolved around South Dakota land that had been in Dennis Ryland's family since 1878, when his great-grandfather homesteaded it. Ryland had only one child, who had moved away from South Dakota and had no interest in coming back to farm the land.

In 2006, when the farm was worth nearly $2 million, Ryland decided to give another relative, Matt Field, and his wife Aren, an option to purchase the farm for $300,000 to keep it in the family. This was such a generous price that it was essentially a gift.

The Fields exercised the option four years later and signed a note promising to pay back the $300,000 in annual $15,000 payments at five percent interest. They took title to the land in both of their names.

In 2014, Aren quit her job to raise the kids and help run the farm. Matt continued to manage the farm while holding down an outside job. But in 2016, Aren took the children, moved out and filed for divorce.

Division of the farm quickly became an issue, with Matt arguing that Aren's share should include the $300,000 purchase price and payments already made on the note, but the rest of the farm's value should go to him because it was really a gift meant for him only.

Dennis testified that while he knew he was technically making a gift to the couple, his intent was to benefit Matt.

A judge agreed and gave Aren half the purchase price but nothing else.

The South Dakota Supreme Court reversed, ruling that the nature of a gift is judged at the time of the gift, not by later changes, and that whatever Dennis said at the trial, the gift was to both Matt and Aren. Further, the court noted, the couple took title jointly.

We welcome your referrals.

We value all of our clients. While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!

Arnold & Smith PLLC
ATTORNEYS AT LAW

The Historic John Price Carr House
200 North McDowell Street
Charlotte, North Carolina 28204
(704) 370-2828
www.CharlotteDivorceLawyerBlog.com

Mom can't move kids away without court consent


©IgorVetushko

A mother who wanted to move her kids 90 minutes from their father, who shared joint custody, couldn't do so without the court reviewing the children's best interests, a South Carolina appeals court recently ruled.

The couple divorced in June 2014 and had joint legal custody and joint week-to-week physical custody of their two children. Neither parent paid child support, although the mother, who apparently earned more money, provided medical insurance and childcare costs. The order also barred either parent from having their children overnight in the presence of members of the opposite sex.

A year after the divorce the mother moved to Columbia, S.C., with the children and got a temporary court order granting her physical custody, finding that the move was for legitimate purposes and that she would be able to make more money in a new job there.

But the Court of Appeals reversed, finding that the move constituted a "substantial change in circumstances" that required the court to first determine if the move was in the children's best interests.

As the court pointed out, both parents had loving relationships with the children and while the move was supposed to financially benefit the children, this ultimately didn't occur when the mother didn't return to her new job after a medical leave. Additionally, a court-appointed representative noted out that the mother had overnight visits with her boyfriend in the kids' presence, counter to the initial order, which called into question whether the move was actually in their best interests. Further, relocation made compliance with the original order impossible, the court said.

The law may differ from state to state. If relocation is an issue between you and your ex-spouse, talk to an attorney near you.