



# MILLER, GRIFFIN & MARKS, PSC

Lexington, Kentucky

## LEGAL NOTES

Spring 2000 Edition

### Dear Friends:

This edition of the Miller, Griffin & Marks newsletter is devoted to the area of domestic relations and family law. Many larger firms have elected not to practice in the domestic relations arena, because family law issues are often contentious and intense. Miller, Griffin & Marks has been engaged in such cases since the founding of the firm, and fully expects to continue that involvement for the benefit of its clients.

The reality is that a domestic relations practice actually touches upon many other areas, including constitutional, criminal, contract, real estate, tax, estate planning, immigration, and many other facets of the law. This newsletter thus includes articles exploring the emerging questions of grandparent visitation, the application of wiretapping proscriptions to inter-spousal recordings, estate planning, and family-related immigration policies. We hope that these pieces will acquaint you both with the breadth of what is euphemistically referred to as "family law" and with some of the other areas of practice handled by our firm.

We conclude this newsletter with snippets as to the activities of our firm and its attorneys. Miller, Griffin & Marks encourages attorneys to become involved in community, professional, charitable, and civic activities, and it is obvious that our folks have been busy both in and out of the office.

Catesby Woodford

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### When Should You Consider an Estate Plan or Revising your Existing Plan?

*By: Jennifer Acklen*

When life-changing events occur, often the last thing on people's minds is the need to review their estate plans. However, divorce, marriage or remarriage, death of a relative or birth of a child are

the events which should cause you to re-evaluate your Will, Trusts or other estate planning documents. If you do not have a Will, you need to consider the implications of Kentucky's law of intestate descent and distribution, which dictates how your property will pass in the event you do not have a Will.

If you die leaving no Will and you are married, your spouse is generally only entitled to one-half of the real and personal property that you own. The remainder of your property is distributed first to any children you have, and if none, then to your parents. If your parents are not living, then to your siblings and if none, then the remainder will go to your spouse. This descent continues to grandparents, aunts and uncles, etc. If you are not married, the disposition is similar, except that all of your property will pass equally to your children. If you have no children, your property will pass to your parents, then to your siblings.

Another important consideration in planning your estate involves your minor children. If you do not have a Will which appoints a guardian, the court will appoint the person (or persons) it deems appropriate to act as guardian. This may not be the person or persons you would select.

If you have a Will, Trust or other estate planning documents, you should review them periodically. This need to re-evaluate often occurs when you experience "life changing" events, such as those listed previously. The birth of a child is one of the biggest reasons people decide they need to revise their existing Will or have a Will drafted. Besides leaving property to your children, you may also want to consider having that property held in trust until your children reach a particular age.

The death of a relative or other individual, particularly if they are named in your Will, is another event that may cause you to need to review your Will. If you have made a bequest to someone or named them Executor and they

have since passed away, you will need to change your Will. Another situation to consider is if someone dies and leaves you property, you may need to revise your Will to dictate the disposition of that inherited property. Inheritances will often increase the size of your estate. They may not only prompt changes in your Will on how to dispose of this newly acquired property, but inheritances may also make estate taxes an issue that needs to be addressed in your Will and/or Trust.

Under the current Kentucky statute, if you divorce after making a Will, the divorce (or annulment) revokes any disposition or appointment of property made by the Will to the former spouse. Further, it revokes any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as Executor, Trustee, Conservator or Guardian, unless the Will expressly provides otherwise. Property which is prevented from passing to a former spouse by reason of divorce or annulment passes as if your former spouse had failed to survive you. However, your will may not have any provisions as to what happens to your property in the event your former spouse predeceases you. Additionally, if you have children who will receive your property under your Will and those children are minors, it is possible that your former spouse would be made Trustee of that property until your children reach the age of majority. You may not feel comfortable having your former spouse in charge of your assets until your children are old enough to receive them. In such a case you would want to make sure you have appointed a Trustee to hold and administer your assets until your children reach a designated age.

Marriage is another event which should cause a reevaluation of your current estate plan. A Will is not revoked by the marriage of the person who made the Will. This means that if you get married, the Will you made prior to that marriage is still valid. In Kentucky, spouses are entitled to half of the property of their spouse, so your new spouse would be entitled to elect against your will and receive up to one-half of your property.

Second marriages when both parties have children also need special attention when it comes to estate planning. Since parents will be combining many of their assets, they may want to make sure that all of the children are treated equally. Conversely, there may be certain family assets that you want to make sure pass to certain children.

Periodically reviewing your existing Will or estate plan and being aware that certain changes in

your life may affect how you wish to dispose of your assets can assure that your estate will be handled according to your wishes.

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## Current Issues In Family Immigration

By: *Judith K. Jones*

Immigration to the U.S. is a highly regulated and tightly controlled system that serves our interest. Through our immigration system, U.S. citizens and lawful permanent residents may unite with close family members.

A legal immigrant is a foreign-born individual who has been admitted to reside permanently in the United States as a *lawful permanent resident* (LPR). LPR's are issued alien registration cards, commonly referred to as "*green cards.*" *Non-immigrants* are foreign-born individuals who are permitted to enter the United States temporarily for a specific purpose. Examples of non-immigrants are students, tourists, temporary workers, business executives and diplomats.

Through family-based immigration, a U.S. citizen or an LPR can sponsor his or her close family members for permanent residence. A *U.S. citizen* can sponsor his or her spouse, parent (if the sponsor is over 21), children, and brothers and sisters. An *LPR* can sponsor his or her spouse, minor children, and adult unmarried children. U.S. citizens or LPR's wishing to petition for a family member must have an income at least 125% of the federal poverty level and sign a legally enforceable affidavit to support his or her family member.

By law, Congress has placed a limit on the number of foreign-born individuals who are admitted to the United States annually as immigrants or refugees. Family-based immigration is limited by statute to 480,000 persons every year. Family-based immigration is governed by a formula that imposes a cap on every family-based immigration category, with the exception of "*immediate relatives*" (spouses, minor unmarried children, and parents of U.S. citizens). The formula allows unused immigration visas in one year to be added to the cap the next year. This formula means that there are slight variations from year to year in family-based immigration. Because of the numerical cap, there are long waiting periods to

obtain a visa in the family-based immigrant categories outside the immediate relative category.

There is no numerical cap on the number of *immediate relatives* (spouses, minor unmarried children and parents of U.S. citizens) admitted annually to the U.S. as immigrants. However, the number of immediate relatives is subtracted from the 480,000 cap on family-based immigration to determine the numbers of other family-based immigrants to be admitted in the following year.

Historically, family reunification has been an important policy underpinning U.S. immigration law. Family-based immigration allows for close relatives of U.S. citizens and Legal Permanent Residents (LPR) to rejoin their families here in America. Relative to that important goal, section 245(i) of the Immigration Naturalization Act (INA) was a vital provision of U.S. immigration law, allowing immigrants on the brink of becoming permanent residents to apply for their green cards in the United States, rather than returning to their home countries to apply. Congress allowed Section 245(i) to expire in November 1997, while providing limited relief for some immigrants already in the United States. That provision covers only those immigrants who were eligible for permanent resident status under Section 245(i), and who already had filed preliminary paperwork with U.S. Immigration & Naturalization Service (INS) and/or the Department of Labor before January 14, 1998. One of the reasons Congress should fully restore Section 245(i) is because it is pro-family.

Section 245(i) was available to immigrants sponsored by close family members residing in the U.S., or employers who could not find necessary U.S. workers. Immigrants applying for permanent residence under Section 245(i) were eligible for their green cards, but were unable to obtain them in the U.S. because they were not in legal non-immigrant status. (This can happen due to a technical visa problem, or because of INS delays. It can happen without the immigrant's knowledge.) People applying under Section 245(i) are screened for criminal offenses, health problems, the potential of becoming a public charge, fraud, misrepresentation, and all other grounds of inadmissibility. At issue is not whether these individuals are eligible to become permanent residents - they are, for the privilege of remaining in the U.S. to process, thereby generating tremendous revenue for the INS - at no cost to taxpayers.

For many immigrants who were out of status, the expiration of Section 245(i) means that they have had to leave behind their families and jobs and

spend years outside of the United States. Without Section 245(i), people fully eligible to become green card holders can be barred from returning to the U.S. for three to ten years. Since the expiration of Section 245(i), INS has suffered major deficits in its adjudication funding, resulting in backlogs in all types of applications, including naturalization and immigrant visa petitions. The State Department (whose consular posts have to process these cases in the absence of Section 245(i) already are understaffed and under funded for this task.

Proposed legislation introduced by Representatives Luis Guterrez (D-IL) and Connie Morella (R-MD), would fully restore Section 245(i) - thereby allowing immigrants on the brink of becoming permanent residents to remain in the U.S. while the INS processes their applications. Applicants must still demonstrate that they are eligible for a green card based on a family relationship or a sponsoring employer.

Immigrants on the brink of becoming permanent legal residents should be able to file their green card applications from within the United States, rather than having to travel back to their home countries and possibly face draconian consequences that would prevent them from returning to America for years. Restoring Section 245(i) is pro-family, pro-business, fiscally prudent, and a matter of common sense. Section 245(i) allows immigrants with close family members here in the United States to remain with their families while applying for legal permanent residence. Section 245(i) also allows businesses to retain valuable employers and provides the INS with millions in annual revenue, at no cost to taxpayers.

**Information courtesy of  
American Immigration Lawyers Association.**

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## **Grandparent Visitation**

*By: Carl Devine*

Grandparents and grandchildren normally have a special bond which is strengthened by the opportunity for visits and frequent personal contact. Perhaps the greatest thrill to the grandparent is the freedom to return the child

to the discipline and more controlled environment of her parents!

Unfortunately, the increasing divorce rate has produced an unfortunate predicament which has begun to interfere with some grandparents' rights to visit with their grandchildren. Perhaps an even greater tragedy occurs when a parent dies and the survivor is antagonistic with the deceased parent's relatives.

Kentucky law has attempted to protect the visitation of grandparents through KRS 405.021. This statute permits an action for visitation rights in the circuit court of the county in which the grandchild resides and empowers reasonable visitation rights to either the paternal or maternal grandparents, in the event it is determined to be in the best interest of the child.

To be sure, Kentucky law does not grant grandparents the absolute right to visitation, but rather provides the right to petition for a hearing addressing the best interest of the child. A finding that grandparent-grandchild visitation should occur is then coupled with language defining a specific visitation schedule.

Visitation cannot be prohibited based simply upon the mere opposition of the parents or custodial parent. Rather, the entitlement is based strictly upon a finding that contact is in the best interest of the child -- not the parent or grandparent. Animosity alone between the custodial parents and the grandparents is not sufficient for the court to deny a proper request.

Under present law, grandparents' rights to visitation are lost where the parent's custodial rights are terminated and where the child is adopted by someone other than the grandparents. Adoption is intended to provide finality and to prevent connection to the biological parent whose rights have been terminated. Termination of parental rights and a subsequent adoption thus have the unfortunate effect of ending the rights of grandparents as well.

Grandparent visitation rights continue to be a "hot topic" in the domestic law area. There are new developments almost on a daily basis which serve to modify the current law in Kentucky on the issue. The existence of a problem in this area therefore requires the latest legal research as well as recent experience in the field.

## Current Law on Intercepting Telephone Conversations

*By: Susan Y.W. Chun*

Most people assume that their telephone conversations will be private. However, in this era of rapidly advancing technology, that expectation can be foiled. The widespread use of both cellular and cordless telephones allows telephone conversations from locations that were previously inaccessible. This freedom and mobility endangers the privacy of telephone communications.

The most obvious loss of privacy occurs in public places, such as shopping centers. In addition to allowing casual listeners to listen in on a conversation merely by standing nearby, a more subtle problem arises from the fact that cellular and cordless phone use public radio waves to transmit the conversation. An interloper with a proper scanner can thus simply intercept a cellular or cordless conversation, and need not have to physically tap into a phone line as with a traditional telephone. This enhanced ability to intercept calls begs the question of what sort of legal protection an individual has against eavesdroppers to private conversations. Both federal and Kentucky law provides some protection from unwanted interception.

Under federal law, it is legal for a person to intercept telephone conversations so long as he either is a participant to the conversation, or has the consent of one of the parties to the conversation. With the 1994 amendment to the Federal Wiretap Act, electronic, oral or wire communications are now protected against unlawful eavesdropping. As a result, traditional, cellular, and cordless phone conversations are now all protected from unauthorized interception. One can be prosecuted both criminally and civilly for violation of the federal law. The punishment for a criminal violation can be either up to five years of imprisonment or up to \$10,000 fine, or both. Damages for a civil violation range from \$50 for a first violation to \$10,000. A civil claim must be commenced within two years following the first date the claimant had reasonable opportunity to discover the violation.

There are currently twelve states with laws that prohibit the taping of phone conversations without the consent of all parties to the

conversation: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington. Kentucky provides no statutory protection, but does follow both federal law and the majority of state laws in allowing the taping of a phone conversation with the consent of one of the parties.

Kentucky is also less protective than federal law because it protects only from eavesdropping of oral or wire communications. However, the doctrine of federal preemption provides that a state may enact a more (but not less) restrictive statute than what has been enacted by the federal government. Therefore, the Kentucky law would probably be interpreted to protect electronic communications as well, and would thus include cellular and cordless phone communications. Although there is no case law directly to support it, a Kentucky Attorney General's opinion states that the recording of a wireless phone conversation without consent violates the eavesdropping statute.

Violation of the Kentucky wiretap statutes is a criminal act, resulting in imprisonment or fines for both the unauthorized eavesdropping and divulging the contents of a conversation. The punishment for unauthorized disclosure of the contents of conversation is between 90 days and twelve months imprisonment and up to a \$500 fine.

It is worth recalling that even the former Speaker of the House of Representatives has been the victim of electronic eavesdropping. The fact that the perpetrators were punished do not prevent the dissemination of sensitive, private matters. Although both the government and private persons are legally prohibited from unauthorized eavesdropping in on conversations, prudence dictates that sensitive subjects not be discussed while using cellular and cordless phones.

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### ***MGM on the Inside .....***

Mike Meuser is Chair-Elect of the Equine Section of the Kentucky Bar Association. Mike was recently appointed by Mayor Pam Miller to the Housing Task Force for the Downtown Revitalization Project. Congratulations to Mike and Erica Meuser on the birth of Ashlin William Meuser in December.

Jennifer Acklen has been admitted to practice before the United States Tax Court. Jennifer will compete in her second marathon in Cincinnati, Ohio on May 14<sup>th</sup>. Good Luck Jennifer!

Trip Redford is currently Vice-Chair of the Young Lawyer Section for the Kentucky Bar Association and effective June 15, 2000, will become Chair of the section for 2000-2001. As a result, he will have a seat on the Board of Governors of the KBA. Trip was recently named Young Lawyer of the Year by the Fayette Co. Bar Association. Best wishes to Trip and Paula Pollard on their upcoming wedding in July.

Carl Devine has been elected Secretary of the Young Lawyer Section of the Fayette County Bar Association. Carl just completed his fourth year of coaching an 8-10 year old basketball team where his team finished the season with a 7-3 record.

Jonathan Miller, formerly of counsel with Miller, Griffin & Marks has left to take office as the Kentucky State Treasurer. His Prepaid College Tuition Program passed both houses of the General Assembly unanimously, and was signed into law by Governor Patton in March.

Michael J. Cox has been elected as a Director with Miller, Griffin & Marks. Michael, a Lexington native, concentrates in civil and criminal litigation in federal and state court. He graduated in 1988 from the University of Kentucky College of Law, where he served on the staff of the Kentucky Law Journal. Following law school, Michael served three years as a law clerk for a federal judge in the Eastern District of Kentucky. Michael is Past-President of the Young Lawyers Section of the Fayette County Bar Association and is currently an officer of the Kentucky Bar Association Young Lawyers Section. He lectures at workshops for insurance claims personnel regarding Kentucky legal issues.

David Faughn has been elected as a Director with Miller, Griffin & Marks. Graduating with honors from the University of Kentucky College of Law in 1993, David was an Associate Editor of the Kentucky Law Journal and a member of Order of the Coif. Prior to joining our firm, David served as staff attorney for Fayette Circuit Judge Mary Noble and as a law clerk for Judge Jennifer Coffman of the U.S. District Court for the Eastern and Western Districts of Kentucky. David concentrates his practice in the area of civil litigation.