Civil Unions Are Civil Unions The Same As Same-Sex Marriage In Disguise?

By: Dennis S. Nudo

The answer to the above question is simply stated: No! While civil unions have many of the same legal characteristics (rights and obligations), the civil union relationship is not recognized under federal law. This is particularly significant in the context of estate planning. That is, the deductions and credits for federal estate tax that are available to married couples are not available to participants in civil unions.

Procedurally, there are some similarities between entering into a civil union as compared to entering into a marriage. In both instances the participants must obtain a license from the County Clerk’s office. The application requests basic information about the parties such as their names, sex, occupation, address, Social Security number, dates of birth and places of birth, as well as the names and addresses of the parents or guardians of the participants. The participants must also state whether or not they are related to each other and, if so, how are they related. Participants cannot enter into a civil union if their relationship is that of parent, grandparent, uncle, aunt, niece, nephew, first cousin, brother, sister, child or grandchild—whether by full-blood, half-blood or adoption. In every other respect this relationship is available to parties of the same-sex as well as parties of the opposite sex.

Participants in a civil union must be at least 18 years of age or if they are 16 or 17 years old they can only obtain a license with parental consent. If either of the parties has been previously married they must present proof that the marriage is dissolved. In order to obtain a license both parties must appear before the County Clerk and have sufficient identification such as a driver’s license.

Business Divorce - What Is It And How Do I Get One?

By: Riccardo A. DiMonte

All businesses have owners. Without owners, a business would not exist. The owner starts the business. The owner has success. The owner makes mistakes. The mistakes cost money. The owner learns from her mistakes. So long as a single business owner remains single, she can make any business decision she wants without consulting anyone. She, alone, will enjoy the benefits or suffer the consequences of her business decisions.

Compare the sole owner to the joint business enterprise. For strategic reasons (additional capital, talent, or both), the single owner joins forces with one or more co-owners. They may decide to operate as a partnership, a corporation, or a limited liability company. Once the sole owner joins forces with a co-owner, business decisions must be made jointly. And the types of business decisions that may cause controversy within the organization are many. For example: (a) Should we perform (or decline) this project? (b) Should we hire (or fire) this employee? (c) Should we buy (or sell) this equipment? (d) Should we distribute (or retain) these profits? (e) Should we raise or contribute capital to cover losses? (f) Should we incur (or defer) these expenses? etc., etc., etc.

Every business owner knows there are many business decisions to make every day, every week, every month, and every year. Each owner has passionate feelings and philosophies which may support a particular position or decision. And, each owner’s decision making ability and style may make the decision-making process easier or more difficult. As we all know, there are both advantages and disadvantages to co-ownership of a business.

Many co-owners divide responsibilities. For example, one partner takes the office and the other takes the shop. One does the bidding and the other supervises the projects. One performs a sales function and the other performs a service function. Some owners delegate their decision making power to the other partners. Other owners want to be involved in every decision, no matter how small or petty. (My favorite example is the argument about the type of soda pop in the company vending machine). In short, there are many and varied things upon which business owners may disagree.

As you can imagine, the number of owners, the size of the business, and the legal entity used, can multiply the complexity of the organizational structure. The more complex the organizational structure, the more difficult it becomes to navigate and untangle once disputes develop. As an example, the simplest business organization is the two-owner partnership. At common law, one partner could dissolve the partnership by simply declaring it to be ended. The dissolution would automatically follow and both partners were free to settle the joint affairs of the business and go their separate ways to pursue their own separate and independent businesses. Upon dissolution of the partnership, the fiduciary duty owed to one another and the partnership would evaporate and the only lasting legal obligation was to wind up the financial and business affairs of the partnership. After dissolution, each partner was free to go their separate ways and pursue the same or a different line of business.

Compare the simple common law partnership with the modern day corporation or limited liability company—multiple owners, sometimes thousands of shareholders, eternal life, limited liability, by-laws, operating agreements, resolutions, annual shareholders and directors meetings, fiduciary duties and director and officer liability—it hardly compares! But modern day business requires a modern day business organization. And, when owners disagree on how to stay in business together, the modern business organization needs to be sold, dissolved, reorganized or sometimes simply liquidated.

The business divorce.

Whether owners have used a partnership, limited partnership, corporation, or limited liability company to operate the business, the term business divorce generally means
It is not uncommon for a plaintiff to obtain a judgment against a corporation but not be able to collect on the judgment because the corporation goes out of business. Typically, the debtor corporation genuinely failed because it could not generate sufficient revenue to satisfy its liabilities. However, in some instances, shifty debtor corporations attempt to exploit legal loopholes and prevent a creditor from using the corporation’s assets to satisfy the judgment. DiMonte & Lizak, LLC recently represented a creditor against a corporate debtor who attempted to employ this strategy.

In Mamacita, Inc. v. Colborne Acquisition Company, LLC, et al., Case No. 10-CV-6861, a creditor obtained a judgment against a corporation. In an attempt to avoid satisfying the judgment, the shareholders of the debtor corporation convinced their friends to form a new corporation that would purchase the old corporation’s assets. Pursuant to the scheme, the old corporation’s shareholders agreed to own new corporate, but the old corporation’s shareholders would manage the new corporation and otherwise enjoy the benefits of owning the business.

The old corporation’s lender, who was complicit in the scheme, initiated an unnecessary Uniform Commercial Code (UCC) sale of the old corporation’s assets and then financed the new corporation’s purchase of the old corporation’s assets.

The new corporation reaffirmed the old corporation’s obligations to the lender. In effect, no money changed hands, but the old corporation shed itself of liability to the creditor and the shareholders of the old corporation continued to enjoy using the corporate assets for their personal benefit.

After discovering the debtor corporation’s actions, the creditor hired DiMonte & Lizak to file a lawsuit, asserting a claim against the new corporation for successor liability. The new corporations filed a motion to dismiss, arguing that it was not liable for the obligations of the old corporation. In Illinois, a purchaser corporation is generally not liable for the debts of the seller corporation. However, there are four exceptions: 1) an express or implied agreement of assumption; 2) a merger of the purchaser and seller corporations; 3) the purchaser is a mere continuation of the seller; and 4) the transaction is for a fraudulent purpose. These exceptions are known as the doctrine of successor liability.

In response to the motion to dismiss, the creditor argued that the first exception applied because the old corporation expressly assumed the new corporation’s debt to its lender, and therefore, the old corporation impliedly assumed the new corporation’s debts to its other creditors. The creditor also argued that the second and third exceptions applied because nearly every aspect of the new corporation was a continuation of the old corporation’s business. Finally, the creditor argued that the fourth exception applied because the old corporation orchestrated the collusive UCC sale of its assets to avoid satisfaction of the creditor’s judgment.

With respect to the first exception, the court held that a purchaser corporations does not impliedly assume all of a seller corporation’s liabilities by expressly assuming one or more of the seller’s liabilities. The court also rejected the second and third exceptions because the owners of the new corporation were different than the owners of the old corporation. Despite rejecting the first three exceptions, the court found that the fourth exception applied. The court ruled that the creditor’s allegations of the old corporation’s and its shareholders’ fraudulent conduct was sufficient to state a claim for successor liability against the new corporation. Accordingly, the judge denied the new corporation’s motion to dismiss and allowed the creditor to proceed with its claim for successor liability against the new corporation, seeking to hold the new corporation liable for its judgment against the old corporation.

This real life example shows: 1) the lengths that a corporate debtor may go to in order to avoid satisfying a judgment; 2) the ability of a judgment creditor to pursue its judgment against a successor corporation; and 3) that courts tend to find a way to make the claim stick if a debtor participates in fraudulent conduct to avoid satisfying a judgment. If you obtain a judgment against a corporation and the corporation appears to have gone out of business by selling all of its assets, you should consult an attorney to determine whether you have a claim against the purchasing entity for successor liability.

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serious disagreement between owners about the way to run the business. In other words, is the disagreement so fundamental that the parties should split up and go their separate ways or would one or more like to buyout the other(s)?

Our business divorce cases take many forms. We have partnership dissolution and accounting, corporate dissolution and shareholder derivative actions, and limited liability company lawsuits. In each of these situations, the owners cannot agree on terms of separation, resolving the disagreement, or mutual buy/sell terms. We encourage negotiation before litigation. Negotiation can be difficult in business divorce situations especially since the personalities of the individuals involved may be difficult, stubborn, or eccentric. Like the dissolution of a marriage, many of these owners have been together for 10, 25, or even 50 years! They involve families, spouses, children, grandchildren, uncles, nephews and cousins. Some family businesses pick and choose between which children can be involved. Others mistakenly include all children much to the detriment of company management. I often observe companies that are started by the father, grown by his son, and squandered by the grandson. Sharing a surname is not necessarily a recipe for success.

Moreover, each case is different and carries its own unique set of circumstances. Getting prompt, practical business and legal advice is essential. Unfortunately, many business divorce cases result in the unnecessary expenditure of corporate assets to fund the litigation between owners in disagreement. As they say, an ounce of prevention is worth a pound of cure. Once disagreements between co-owners reach the level of irreconcilable differences, good practical, legal advice can prevent financial ruin caused by ego-driven litigation.

In a perfect world, business owners would resolve their problems internally, without lawyers or litigation. However, if that becomes impossible, prompt and practical legal consulting, with the creation of an exit strategy and dispute resolution plan, may prevent years of time-consuming and expensive litigation.
A number of changes to the Illinois Power of Attorney Act became effective on July 1, 2011. The changes are designed to provide greater protection to the elderly, incapacitated, and disabled persons from their agents serving under powers of attorney (POAs). There are now new statutory form POAs for property and health care, but all POAs which were validly executed prior to July 1, 2011 will remain effective.

Some notable changes are as follows:

• There are additional duties and a higher standard of care applied to the agent under a POA for property, particularly as it relates to record-keeping.
• When signed, the new statutory form POAs for property and health care automatically revoke all prior POAs for property and health care, respectively.
• The new statutory form POA for property includes a notice to the agent explaining the agent’s responsibilities.
• Definitions from the Health Care Surrogate Act are incorporated into the POA for health care.
• New court procedures and remedies are provided to protect principals from agents that breach their fiduciary duties under a POA.

DiMonte & Lizak estate planning attorneys have been incorporating the updated POAs into our estate plans in the months leading up to the effective date. If you are interested in learning more about the specifics about the changes to the Illinois Powers of Attorney Act, or any estate planning need please contact a DiMonte & Lizak estate planning attorney and we can provide you with further information.

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In Kasten v. Saint-Gobain Performance Plastics Corp. (March 2011), the U.S. Supreme Court found that an employees oral complaint about time-keeping practices may constitute protected activity under the Fair Labor Standards Acts anti-retaliation provision, and that employee complaints need not be written to enjoy FLSA protection. Lesson learned: Before taking adverse action against an employee, check whether the employee has engaged in protected activity within the last twelve or so months. Employers should add to the checklist of protected conduct oral complaints about payroll practices.

On May 9, 2011, the U.S. Department of Labor launched its first application (app) for smartphones, described as a timesheet to help employees independently track the hours they work and determine the wages they are owed. Users can track regular work hours, break time, and any overtime hours they work for one or more employers, according to the DOL press release. The free app is compatible with iPhone and iPod Touch and is available in English and Spanish.

The app highlights an employer’s need to maintain accurate time records for its non-exempt employees. Courts in wage and hour litigation have given significant weight to employer time systems which reasonably track employee hours worked. If the employee uses the DOL app, the employee theoretically has a reliable record which challenges the employer’s records. Employers may want to create a workplace policy requiring employees to immediately report any disparity between their time records and their pay stubs and to provide the app records to the employer in order to ensure accurate straight time and overtime payments.
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