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PIRACY IN MARYLAND

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As the Somali pirates make millions attacking oil tankers in the Gulf of Aden, thoughts turn to piracy closer to home and the year 1638 when the first and perhaps the only case on the subject arose in Maryland. The case arose out of the epic struggle for Kent Island, Maryland between Leonard Calvert, Lord Baltimore, Proprietor of Maryland, and William Claiborne. William Claiborne came to Kent Island in 1631 together with his fellow Virginia settlers, three years before the arrival of Lord Calvert and his settlers on the ARK and the DOVE in 1634. As early as 1628 William Claiborne of Virginia had established fur trading ties with natives in the upper Chesapeake who would come to Palmer Island at the mouth of the Susquehanna to trade furs for trinkets and other goods. To consolidate his trading operations, Claiborne and 100 Virginia settlers moved to Kent Island, Maryland in 1631. However, in 1632 Lord Calvert had obtained a patent from King Charles I which included Kent Island. Claiborne maintained that the patent only conveyed land *hacenus inculta* or "land hitherto uncultivated and planted." Claiborne claimed that since Kent Island had been settled by Virginians the year before, therefore Kent Island was excluded from the patent and remained his.

From the start things did not go well between Claiborne and Calvert. Shortly after Maryland settlers received a hostile reception from the Indians upon their arrival in 1634, it was reported to Calvert that Claiborne had started a rumor among the Indians that the Marylanders were Spaniards who had come to kill them. While Claiborne was exonerated of this charge, Calvert still required

recognition that Kent Island was his land and proposed a 10% tax on Claiborne's receipts from the Indian trade. But Claiborne had also obtained a Commission from the King which he claimed gave him freedom to trade without interference by Calvert. In any event, the battle had begun which would last for another 50 years.

On the strength of his commission Claiborne began to build a navy and to fortify Kent Island. He built Fort Kent on Kent Point at the south end of Kent Island and Crayford Fort near Craney Creek on the west side of Kent Island. He also built a pinnace, a rigged ship, named LONG TAYLE, to be commanded by Capt. Thomas Smith and 20 men. The LONG TAYLE was the first vessel built on the Eastern Shore.

In early spring 1635 Claiborne's Kent Island men were again trading with the Indians on Palmer's Island (later known as Garrett Is-

INSIDE THIS ISSUE

Gambling for Alimony Dollars.....3

WCS is proud to announce.....6

Maryland Authorizes Statutory Pet Trusts.....7

land) on the lower Susquehanna River when a Calvert vessel from the Marylanders' settlement at St. Mary's City appeared. The Kent Islanders struck first seizing the St. Mary's vessel, which was carrying goods for trading with the Indians. They kept its cargo and captured its crew and sent them as prisoners back at Kent Island. The St. Mary's men were thereafter released to send the message to Calvert not to interfere with the Kent Islanders' trading domain. This is the first documented act of piracy on the Chesapeake Bay.

On April 5, 1635, while Captain Thomas Smith and the LONG TAYLE were trading for corn with the Indians on the Patuxent, the St. Mary's men retaliated by seizing the Kent Islander's vessel. The Kent Island captain, Captain Tom Smith was asked to produce a license for trading from Lord Baltimore. Smith produced copies of the King's commission and a letter confirming it. Nonetheless the Marylanders' confiscated The LONG TAYLE vessel and its cargo, releasing Capt. Smith to find his way home. He borrowed an Indian canoe and paddled home to Kent Island.

On April 23, 1635 Claiborne sent out another vessel to seize any vessel belonging to St. Mary's. The COCKATRICE, under the command of Lt. Racliffe Warren, came upon a St. Mary's vessel, the SAINT HELEN, at the mouth of the Pocomoke River on the Eastern Shore. As it closed in on the SAINT HELEN, another St. Mary's vessel, the ST. MARGARETT appeared. Outnumbered, the Kent Islanders nonetheless attempted to board. In hand to hand fighting three Kent Islanders were killed, including the Captain of the COCKATRICE.

One St. Mary's man was also killed, and several others were wounded. According to one author, this was the first naval engagement between English speaking peoples in the new world.

Other skirmishes followed, but then an uneasy truce prevailed until 1637. In that year Lord Calvert first appointed the General Assembly of Maryland. Also, in 1637 while Claiborne was away in London, Calvert led an armed expeditionary force to Kent Island to capture and subdue the "rebels."

In March of 1638 the new General Assembly of Maryland passed bills bringing criminal charges of murder and piracy against Captain Thomas Smith and William Claiborne arising out of events occurring in the Spring of 1635. There were no courts of law or judges in Maryland so the General Assembly sat as judge and jury. Several of the men who sat in judgment had also fought against the Kent Islanders in the naval battle. No transcripts of the testimony or evidence exist. The record of the proceedings against Captain Smith from the Maryland Archives reads as follows:

...the Indictment being read, he pleaded not guilty. Then did the Attorney informe the house vpon the Indictment, & produced the depositions of John Jarbinson an Arthur Brooks; and the prisoner pleaded all he had to say in his defense & the Attorney replied to it. and when the prisoner had no more to allege for himselfe, he was demanded whether he would challenge any in the house that were to passe vpon him and he challenged none.

But Smith was promptly convicted with one dissenting vote. He was sentenced to be hanged. One commentator referred to the trial as a "travesty of justice."

As for Claiborne, he was tried at the same time *in absentia*, and also convicted of piracy. On March 24, 1638 the Maryland General Assembly then passed an Act of Attainder as to Claiborne. Claiborne's land and cattle on Kent Island were forfeited to the Lord Proprietor. Thereafter, Giles Brent, later a governor of Maryland, moved into Claiborne's house on Kent Island and for several generations title to the property remained in the Giles Brent family.

The Maryland summary version of these events as it appears today on the Maryland historic highway sign on Rt. 50 at Kent Island states as follows:

William Claiborne of Virginia established a trading post, settlement and fort at the Southern end of this island in 1631. Lord Baltimore's rights were resisted which led to serious controversy until taken by armed forces in 1637.

But that is not the whole story. Although Captain Smith was eventually hanged, William Claiborne lived to the ripe old age of 77. Despite his status as the only living pirate convicted under Maryland law, over the next 40 years Claiborne continued his efforts to regain his hold on Kent Island by legal maneuvering. After a long and distinguished career in Virginia, he died in 1677 without ever reclaiming Kent Island.

GAMBLING FOR ALIMONY DOLLARS

Frederick L. Kobb, Esq.

Attorneys often refer to going to court as “rolling the dice.” The gambling reference reflects the risk associated with allowing a judge or a jury to decide fate of the litigants. There are many reasons cases do not settle and must be brought before a court. In some instances there is a significant dispute in the evidence that needs to be resolved. In other cases, a novel legal issue must be decided before the outcome can be known. And then there are the cases in which the facts are not in serious dispute and the law is clear, but issues to be decided allow for a judge to have such wide discretion that attorneys abandon any real hope of accurately predicting the result. In such cases, litigants may well elect to roll the dice. Divorce cases where alimony is an issue tend to fall into this last category. The current law regarding alimony has been codified in Maryland since 1980. Despite the existence of longstanding rules that govern how judges are to decide cases involving alimony, attorneys remain cautious about making predictions as to how a judge will decide the issue because the law gives judges wide latitude in this area.

The New Alimony Act of 1980

In 1980 the Maryland legislature adopted a set of laws referred to as the New Alimony Act. This law was intended to modernize the concept of alimony. Historically, alimony was seen as a means of allowing a financially dependent spouse to maintain the same standard of living to which that spouse had become accustomed during the marriage. That philosophy resulted in alimony awards that were akin to a lifetime pension. The modern concept of alimony, which is embodied by the New Alimony Act, is based on the notion that alimony should be designed to support an economically dependent spouse to become self-supporting whenever possible. As one Maryland court noted, “The purpose of alimony is not to provide a lifetime pension, but where practicable, to ease the transition



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for the parties from the joint married state to their new status as single people living apart and independently.” Thus, alimony is no longer intended to guarantee that the economically dependent spouse will enjoy the same standard of living that he or she had during the marriage for the rest of his or her life. Today, the law is premised on the belief that the economically dependent spouse should be required to become self-supporting, even though that might result in a reduced standard of living.

Types of Alimony

In Maryland, there are three basic forms of alimony: (1) temporary (also know by the legal term, “*pendete lite*”) alimony; (2) rehabilitative alimony; and (3) indefinite alimony. Each form is designed to fulfill a particular purpose and is decided on different sets of factors. Temporary alimony is available to assure that a spouse’s financial needs are met during the litigation process, that is from the time a divorce case is filed to the time a court makes a final decision on the merits of the divorce, at which time rehabilitative or indefinite alimony may be awarded. Rehabilitative alimony is paid for a fixed term. Indefinite alimony is paid

until one of several terminating factors occurs: the remarriage or death of the recipient or the death of the payor. Rehabilitative alimony is the form of alimony favored by the New Alimony Act. An award of indefinite alimony is the exception, not the rule.

Temporary Alimony

The issue of temporary alimony arises relatively early in the course of a divorce case and may be the only relief a court grants until the case comes to court for a trial on the merits of a final divorce, which can take a year or more from when the case is first filed. Thus, while temporary alimony only lasts until the court makes a final decision in the case, that could be as much as a year, and sometimes more from the time temporary alimony is awarded. In deciding whether to grant temporary alimony a court considers only two factors: the need of the party seeking alimony and the ability of the other party to pay. It is often said that temporary alimony is designed to maintain the status quo of the parties’ financial circumstances while the divorce case is pending before the court. Often, a court will look at the claimed expenses of the party seeking temporary alimony, pare them down to the basic and essential expenses, look at the income of that party in order to determine the ability of that party to contribute to those expenses and award alimony to make up any difference. It should be noted that “fault” is not a factor in awarding temporary alimony. Need and ability to pay are the exclusive considerations. Thus, even a spouse who may have caused the divorce (adultery, abandonment) may qualify for temporary alimony if he or she needs financial support and the other spouse can afford to pay support.

Rehabilitative Alimony

At the time a court grants a divorce it will consider a host of factors in deciding

see **Gambling** page 4

whether and to what extent to award rehabilitative alimony. The list of factors is extensive, but is designed to consider both financial and equitable circumstances. Among the financial factors to be considered are: the ability of the party seeking alimony to support himself or herself; the standard of living the parties established during the marriage; the monetary contributions of each party to the marriage (who was the primary bread-winner, who paid for what); the financial needs and resources of each party (including the parties' income, assets and debts); each parties' entitlement to retirement benefits; and the ability of the party from whom alimony is sought to pay alimony. The equitable factors include: the duration of the marriage; the ages of the parties; the health of the parties; the non-monetary contributions of the parties to the marriage (these include caring for children, preparing meals, doing laundry, keeping a clean home); and the circumstances that contributed to the estrangement of the parties (i.e., who was at fault).

While some of the factors can be determined objectively (age of the parties, length of the marriage, the amount of a party's income, assets and liabilities), most require some subjective evaluation. For instance, for a spouse who has not pursued a career for 15 years or more because he or she chose to be a stay-at-home parent and take on the primary responsibility of caring for the parties' children, what is the likelihood that he or she will be able to resume a career in any substantial way? How do you assign a value to the standard of living established during the marriage? What value do you place on the non-monetary contributions of a party to the marriage? In a relationship as complicated as a marriage, can you truly attribute the failure of the marriage to one spouse? And after coming to some decisions about these factors, what weight do you assign to each of them? The subjective nature of most of the relevant factors gives

judges great discretion in awarding alimony. And the lack of any precise guidelines makes it very hard to predict the outcome of an alimony case.

Indefinite Alimony

The fundamental objective of Maryland's alimony laws is to encourage a dependent spouse to take reasonable steps toward becoming self-supporting. An award of rehabilitative alimony is the means by which a dependent spouse can expect to be supported while working to attain financial self-reliance. It is intended to ease the transition for the economically dependent spouse from the state of living in a joint married state to his or her new status as a single person living separately and apart from the other spouse. However, in those cases where the dependent spouse cannot reasonably be expected to become self-supporting, rehabilitative alimony—that is alimony for a limited period—may not be appropriate. In such circumstances, a court may award indefinite alimony to reflect the reality that the dependent spouse may be too old, too infirmed or otherwise incapable of becoming self-supporting. Indefinite alimony is the means by which a court can provide a level of support to a spouse who does not have the ability to become financially independent. An award of indefinite alimony will be paid during the lifetime of the economically dependent spouse, or until he or she remarries.

Indefinite alimony may also be awarded where the anticipated standards of living of the parties after the divorce will be "unconscionably disparate." Thus, even though the economically dependent spouse will be able to achieve a reasonable level of self-sufficiency, if the standard of living achievable by that spouse will be so much lower than the standard of living of the economically dominant spouse as to result in an unconscionable disparity, the economically de-

pendent spouse will be a candidate for indefinite alimony. Indefinite alimony is not intended to equalize the parties' standards of living after the divorce. It is sufficient that the amount of indefinite alimony payable will close the gap between the divorcing parties.

Despite the plain expression of the standards for an award of indefinite alimony, there is no clear gauge to predict when a court will award indefinite alimony. There are innumerable court rulings that have analyzed circumstances under which an award of indefinite alimony is or is not appropriate. However, no Maryland court has endorsed a rote mathematical formula for determining when the parties will experience an unconscionable disparity in their standards of living. Nor is there a universally accepted method of calculating the amount of alimony necessary to eliminate an unconscionable disparity. The analysis of an award of indefinite alimony is further complicated by the requirement that a court project into the future to determine respective standards of living of the parties at a point when the economically dependent spouse will attain maximum financial progress. In other words, when addressing whether there is unconscionable disparity in the parties' standards of living, a court first needs to ascertain the future potential income and financial circumstances of the parties. While such an assessment must be based on facts presented in evidence and not based on speculation, because the court is required to predict the future circumstances, the analysis will inevitably involve a degree of guesswork. All of these uncertainties contribute to the difficulty in predicting the outcome of a court's alimony decision. The odds of winning a hand of blackjack can be calculated with more precision.

see **Gambling page 5**

Alimony Guidelines

The unpredictability of the outcome of alimony adjudications has led to an effort to develop alimony guidelines to be used to decide the proper amount and duration of alimony in any particular situation. There is precedent for such guidelines in the child support context, where Maryland and most other states use an approved mathematical formula to calculate the amount of child support given certain variables, such as the parents' incomes, the cost of work-related daycare, the amount of a child's health care expenses and other financial obligations of the parents. Such guidelines are useful because they bring a degree of certainty to the issue of child support. As a result, child support issues are likely to be settled out of court. In addition, guidelines tend to achieve a level of uniformity among child support awards in cases with similar facts,

as well as consistency in the amount of child support awards made by the various courts around the state.

In the alimony context, guidelines are problematic primarily because several of the factors that the law requires courts to consider do not lend themselves to a mathematical formula. For instance, how would a guideline assign a value to the issue of fault, or the issue of non-monetary contributions each party has made to the marriage? And, how would the guidelines determine whether there was an unconscionable disparity in the parties' standards of living so as to recommend indefinite alimony? Nevertheless, there are a few alimony guideline programs that are available to attorneys, litigants, and judges. One in particular, sponsored by the Women's Law Center of Maryland, attempts to incorporate the al-

imony factors set forth in Maryland's alimony law. Those guidelines, known as the "Kaufman Alimony Guidelines," can be accessed on line at www.kaufmanalimonyguidelines.org. Perhaps in recognition of the lack of certainty in the area of alimony, after inputting the relevant information for a particular case, the Kaufman guidelines will produce a range of possible outcomes, rather than a set result. At the moment, the Kaufman guidelines are of limited value because they are not recognized, accepted or used by the courts. However they do allow for some common ground to discuss a resolution of the alimony issue in a divorce case. Regardless, until such guidelines are adopted, bringing the issue of alimony before a court will remain a crap shoot.

WRIGHT, CONSTABLE & SKEEN LLP

is proud to congratulate its lawyers who have been chosen to the
2009 SuperLawyers list



Front Row (l to r): Mollie G. Caplis, Michael I. Gordon, Mary Alice Smolarek, Robert W. Hesselbacher, Jr. and Meighan Griffin Burton.
Back Row (l to r): Louis J. Kozlakowski, Jr., Monte Fried, David W. Skeen, James W. Constable, Stephen F. White, and Eric T. Schline.

Wright, Constable & Skeen, LLP is Proud to Announce . . .

At the Annual Meeting of the Bar Association of Baltimore City (BABC), Young Lawyers' Division Council, and Baltimore Bar Foundation, Inc. held on June 3, 2009, the following Wright, Constable & Skeen attorneys were elected to new positions:



Mary Alice Smolarek, Esq.
Partner
President, BABC

Ms. Smolarek is a past President of the Baltimore Bar Foundation (2007-2008). Ms. Smolarek has also served as chair of the Legal Services to the Elderly Committee and of the Membership Committee of the BABC. Ms. Smolarek is a Life Fellow of the Baltimore Bar Foundation and a Life Fellow of the Maryland State Bar Foundation.

Mary Alice Smolarek was chosen for inclusion in "Maryland's Super Lawyers® 2009" for Estate Planning & Probate (also named in 2007 and 2008).. Ms. Smolarek's law practice concentrates in estate planning, estate administration and trust administration. In addition to serving as President of the Bar Association of Baltimore City, Ms. Smolarek is a member of the Estate and Trust Section Council for the Maryland State Bar Association. Ms. Smolarek can be reached by telephone: (410) 659-1318 or by e-mail: masmolarek@wcsllaw.com.



Meighan G. Burton, Esq.,
Associate
Chair, Young Lawyers'
Division Council, BABC

Mrs. Burton previously served as Chair-Elect of the Young Lawyers' Division and Co-Chair of the Public Service Committee.

Meighan Griffin Burton was named among "Maryland's Super Lawyers® Rising Stars" for General Litigation. Mrs. Burton can be reached by telephone: (410) 659-1324 or by e-mail: mburton@wcsllaw.com.



MARYLAND AUTHORIZES STATUTORY PET TRUSTS

Michael I. Gordon, Esq.

In our last newsletter, I covered the ways in which one might provide financially for the care of a loved pet following the death of the owner. In that article I bemoaned the fact that Maryland did not yet authorize statutory pet trusts.

On April 14th of this year, Governor O'Malley signed into law House Bill 149 which changed that. Following are some of the key features.

The animal to be cared for must be alive during the settlor's lifetime. The trust will end at the death of the last animal covered by the trust. Indeed, more than one animal can be covered but only if it is living at the time of the effective date of the trust. Thus, for many, it might be worthwhile to create the trust as part of a will, so that, if animals are acquired after the paperwork is done, they will still be covered since the effective date will only be on the death of the owner.

In creating a trust, it is possible to appoint someone to enforce the provisions for the benefit of the beneficiary animal. As the Maryland statute is worded, if the settlor fails to appoint someone to enforce the trust, a court has the power to appoint someone as enforcer. In addition, a person with an interest in the welfare of the animal can ask the court to appoint an enforcer or remove an enforcer who is not doing his or her job. Trust property is to be used only for the pet's benefit, unless a court finds the value of the trust property is excessive. If the settlor has not provided express directions, property provided, but found to be excessive, would be returned to the settlor, if he or she is still alive, or to the settlor's successor in interest (his trust beneficiaries or estate), if the settlor is dead.

The provisions of this law go into effect on October 1, 2009 and



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will apply to trusts created only after that date and, finally, the rule against perpetuities alluded to in the prior article will not be applicable to a pet trust.

Here is a quick summary of the benefits of the pet trust.

1. You can ensure that your pets will be cared for as you would if you were able.
2. Ensures that there are funds available and a system of care in place.
3. It can provide for a back-up caretaker in the event the initial person identified is unable to act.
4. You can appoint a trustee to make sure that the caretaker is doing his or her job.
5. Monies set aside are protected so that it will last for the time required to do the job.
6. Directions for health care, exercise, diet, identity of a veterinarian and disposition of your pet's remains can be covered.
7. It directs where funds left over will go – for instance to a charity or a family member.
8. It provides funding for a back-up caretaker in the event those you've identified are unavailable.
9. Monies placed in a pet trust are free from the claims of the caretaker's creditors, marital disputes, bankruptcy and the like.
10. It gives you the opportunity to identify who will care for your pet as opposed to some third person making that decision for you in your absence or upon your disability.
11. It gives you peace of mind to know that the pets will be cared for as you desire.

For detailed information or a discussion of implementation of the pet trust, contact your estate planning attorney at Wright, Constable & Skeen, LLP.

Congratulations to Michael I. Gordon

At the June 3rd Annual Meeting of the Bar Association of Baltimore City (BABC), Young Lawyers' Division Council, and Baltimore Bar Foundation, Inc., Michael I. Gordon was honored for fifty years of practicing law. Michael Gordon graduated from the University of Baltimore School of Law in 1959 and was admitted to practice in Maryland that same year.



2 0 0 6 C E N T E N N I A L Y E A R

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