

PROPERTY DIVISION

As the Law Changes

By K. Dean Kantaras



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THE LAW EVOLVES SLOWLY, and usually in response to a need for the change or modification of existing laws that come about over time. Most often, the changes are the result of a legislative enactment. This past session of the Florida legislative session was typical in that some significant changes were made to family law. These changes in the law can be interpreted in various ways so they are not always easily understood until they are discussed by an appellate court.

Two important areas of family law were impacted this year. They affect property division, or equitable distribution, and custody. The changes to the custody statute appear to be ones of terminology only, while the amended equitable distribution statute may prove to be a dramatic change.

This new statute took effect on July 1, 2008, and it requires: (1) that the proof required to overcome the presumption of a marital gift is to be by "clear and convincing" evidence; (2) that it is now possible to have the court order an interim equitable distribution of assets; and (3) it abolishes claims for special equity.

With regard to the presumption of a marital gift, previously, the law was that if real estate was transferred to the joint names of the spouses during the marriage, the law presumed that a gift was intended from the former owner spouse to the other. That presumption could have been overcome, but the appellate courts did not agree about the burden of proof that may have been required to do so. Some of the courts required only "the greater weight if the evidence," which is the

burden used in civil cases - tipping the balance of the scales ever so slightly in favor of one party or the other. Under the new statute, the spouse who wants the court to find no gift was intended is required to prove by "clear and convincing" evidence what their intent is. That is somewhere between the greater weight of the evidence and the criminal test of beyond a reasonable doubt. There are cases that give us guidance about the term "clear and convincing evidence." Therefore, lawyers must be prepared to present the requisite amount of evidence if they are to prevail.

With regard to interim equitable distribution, the trial courts were not previously permitted to divide assets prior to entering a final judgment. That has changed. The spouse who asks for an interim property distribution can now

prove that "good cause" exists to divide assets prior to a final judgment. The term "good cause" is defined by the statute to mean "extraordinary circumstances" exists. The statute makes it clear that an interim distribution can be ordered any time following the filing of the Petition for dissolution of marriage. Therefore, the motion seeking an interim distribution must be sworn to and allege the reasons that exist to establish good cause.

With regard to special equity, it is gone. All claims for special equity and special equity calculations have now been abolished. However, a spouse, who would have otherwise claimed and been entitled to a special equity may achieve the same results by requesting an unequal distribution of assets. It may be just semantics, only the courts will be able to decipher what the legislature has said. So, we'll just have to wait and see. ■■■

EDITOR'S NOTE: K. Dean Kantaras is an attorney limiting his practice to family law matters, including custody, related appeals and immigration. He is a member of the bar of the Supreme Court of the United States, The Florida Bar, and Clearwater Bar Association Family Law Section. Mr. Kantaras is Board Certified by The Florida Bar in Marital and Family Law. His offices are located at 3531 Palm Harbor Boulevard in Palm Harbor, 1014 U.S. Highway 19 North, Suite 110 in Holiday and 1930 East Bay Drive in Largo. He can be reached at (727) 781-0000, fax: (727) 938-3939, and emailed at kdk@kalawgroup.com.