

# FAMILY LAW

## Electronic Evidence Must Be Handled Carefully

FEUDING SPOUSES CAN GET THEMSELVES, AND THEIR ATTORNEYS, IN TROUBLE

By **MONIQUE M. FERRARO**

The tall redhead glides into your office, a cloud of smoke encircling her head. Sliding into the leather chair across from yours, she raises the half veil that shaded her eyes.

You see she's clearly distraught as she exclaims, "My husband has been looking at child porn." She hands you a disk which she says contains the damning evidence.

So, now what do you do? Do you look at it? Do you call the police? What?

Well, destroying the disk isn't a great idea.

You suggest calling the police. The client doesn't want the police involved. She'd rather use it to force a settlement in her divorce. So, the police are out.

If you look at the disk on your own computer, you'll get child pornography all over it, if there is any child pornography actually on the disk. This creates a true quandary.

At this juncture, you'll want to retain a digital forensics expert to look at the disk.

The expert can access the disk without getting any of the material on their own machine, because they use specialized tools to look at the media. If it looks like there is child pornography on the media—and most of the time when wives think pictures are child pornography, they are not—you will want to take some precautions.

Have the examiner look to see when the files were created and last accessed. Child pornography usually has different dates of creation and access if it's downloaded by someone actually looking at it.

If it's being planted, it may be downloaded at one day and time.

Also, have the examiner look to see what Google or other Internet searches were conducted. There are clues to look for in the searches

Interview the client and evaluate her veracity.

How many people use the computer? Is the computer secured by a password or other access-limiting method? Who owns the computer from which she downloaded the images? What was the 'chain of custody' of the disk?

All these issues are important in establishing whether the material is what the client says it is and came from a place that's kosher.

### Unlawful Access?

Tennis racquet in hand, Biff paces your beautifully maintained 1,000-year-old Persian rug as you furrow your brow wondering if the billable hour will ever make up for the wear and tear on the carpet.

"That WITCH has been e-mailing her boyfriend and transferring money from our account to her personal account!" Biff exclaims. "She's been meeting him with the kids and he's been going to their soccer games! You've got to do something about it."

"How do you know this, Biff?" you ask.

"I put a keylogger on her laptop! Do I look like an IDIOT to you?"

Oh, boy.

It is a very common occurrence for a spouse to install software, known as a keylogger, that records keystrokes or creates a video or slideshow of the user's activity. Usually, this software operates undetected.

The scenario above, without the tennis gear, happens too often to recount. What's an ethical lawyer to do?

Start with a bit more information. Again, if it's a shared computer, your client is on firmer ground.

If it's his wife's own computer, secured by a password, the situation is less secure.

General Statutes 53-251(b)). Second, there's a civil cause of action (C.G.S. 52-570(b)). Third, it might be unethical for you to use the evidence that you knew was obtained by your client unlawfully (Rules of Professional Conduct 3(3)(b)).



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### Security Is Best Policy

Although it should seem like common sense, it's important to be clear with clients to ensure that they aren't their own worst enemies.

One of the first things counsel should advise a client in a dissolution case is to change all passwords on their financial accounts as well as their social networking accounts and e-mail. Clients are vulnerable and the Internet offers a connection to emotional and oth-

er support. It is also a convenient way to bank and manage money.

It is extremely common, during periods of tension, for spouses to access the other's computer for inappropriate or illegal purposes.

For example, a spouse may rummage through the other's e-mail, send e-mail to the person's friends and co-workers with inappropriate content or assume the person's identity and post inappropriate, harassing or otherwise disparaging material on the person's Facebook page. Or the spouse could use the information gained from accessing the other person's e-mail to stalk him or her.

The implications of online access to financial accounts are, of course, obvious. An angry spouse with online access can transfer the money immediately to another account, make a large purchase or completely withdraw the funds with just a click of a mouse.

Advise your clients to keep their computers physically secure.

However, when it comes to the keylogging software, changing passwords is useless, because the other party will discover it when he or she reviews the report generated of computer activity. ■

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that will tell whether the person was purposely seeking out child pornography.

A computer can be 'mousetrapped,' in which the browser jumps unwillingly from one web site to another, downloading images that the user has no control over.

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If your client is retrieving his wife's personal communications after she has changed the passwords on her accounts and she has made it clear to him that she does not want him accessing them, your client has probably crossed the line from obnoxious to unlawful.

If the material did not come from a computer the client had lawful access to, there are implications both for the client and you. First, there is the possibility of a computer crime charge for unauthorized access (Connecticut

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## Should You Invite Your Attorney To Your Next Wedding?

NORWALK PROBATE CASE HIGHLIGHTS IMPORTANCE OF UPDATING WILLS

By RICHARD J. POBER

Before 1996, if an individual obtained a divorce and then remarried and did not create a new will, the prior will was automatically revoked. The fact that this undermined the testator's intent and left family members unprovided for was irrelevant.

When the Connecticut General Assembly enacted Section 45a-257a in 1996 to address this issue, a question left largely unanswered was what would occur with a will if an individual remarried after a divorce but did not identify the new spouse in his or her will.

Must an attorney be invited to the wedding to change and update the premarital will to reflect that the client is now remarried? Or can an attorney create a will a month before a contemplated wedding to set forth the client's intention to marry?

And, if in fact the client does get married without updating the will, how does one ensure that the new spouse cannot challenge the will and seek one-half of the estate by claiming that because he or she was not listed as the decedent's spouse, he or she should receive an intestate share of the estate?

The 1996 legislation did not address whether the decedent needed to have contemplated his or her marriage at the time the last will was executed in order to provide for his spouse.

Imagine if your client was living with his or her significant other, who is listed as a friend under the premarital will. Some years later the client marries and does not update the will to state that the friend is now the spouse, and dies without amending the will.

Did the client intend to keep all the terms of the premarital will in effect when the client got married? Did the client forget to provide for the spouse, or was the client planning to update the will in the future?

These and other related issues were considered in the Norwalk Probate Court by Judge Anthony DePanfilis, in a case concerning a decedent who died after his second marriage, without amending his will or executing a new will that provided for his new wife. (*Editor's note: The author represented the beneficiary of the decedent's estate in this case.*)

In this case, the decedent named his girlfriend in his will five years before his death – and before he contemplated their marriage. He later married her and did not update his will, then died shortly thereafter.

His surviving spouse claimed that she was entitled to one half of the decedent's estate on the theory that because she was not listed as his spouse and he had not contemplated marrying her when he executed his last will, his estate should be considered intestate.

Connecticut law has not addressed whether a decedent must have contemplated marriage when he listed his current spouse as a "friend" under his will. Judge DePanfilis ruled on April 1, 2010, that because the decedent made provision for her outside of his will, his surviving

spouse will not receive an intestate share.

### Omitted Spouse

Connecticut General Statutes Section 45a-257 addresses the failure of a testator to provide for a surviving spouse who married the testator after his or her will was executed. The Norwalk case is significant because the issue of an omitted spouse has been addressed by the Uniform Probate Code, and Connecticut amended its law to distinguish between an "omitted" spouse and a "surviving" spouse.

Under Section 2-301 of the Uniform Probate Code, the issue of a spouse not provided for in a will is addressed. The Connecticut legislature did not adopt the language of Section 2-301 of the Uniform Probate Code but instead stated that Section 45a-257 would address providing for a "surviving spouse."

Connecticut General Statutes Section 45a-257a does provide two exceptions against a surviving spouse receiving an intestate share: The representative of the testator might show that the testator provided for the spouse by a transfer outside of the will with the intent that the transfer be in lieu of a testator provision. The other exception is if the will clearly showed that the decedent purposely omitted the spouse.

The issue is a very subtle and complicated matter that will continue to come up in many



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other cases. Most people are unaware of the problems that can arise after a second marriage if they have not discussed their estate planning wishes with an attorney. The difficulty is proving the intent of the decedent.

The question that the Norwalk Probate Court addressed was this: If the will was created at a time that the testator had no contemplation of marriage, should his spouse be allowed to claim that she was not provided for "as a spouse" and thus obtain an intestate share?

In the case at hand, the decedent provided for his girlfriend, who eventually became his wife. The decedent created a trust for her during a time that she and the decedent did not contemplate marriage. The court found that the decedent had provided for the new spouse. The court, considering all the evidence, found that the decedent was providing for his spouse during her lifetime and therefore found that a statutory interpretation requiring a "contemplation of marriage" is not reasonable under Section 45a-257a.

An attorney need not require a client to execute a new will or codicil when the client gets married as long as it can be shown that the client has provided for his new spouse, either outside the will, or as a friend provided for in the estate documents.

Judge DePanfilis' decision protects the intent of the decedent.

That being said, it is always a good idea that a person update their estate plan after remarriage or when a first child is born, to address tax planning, new powers of attorney and to update beneficiary designation. ■

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## Different Standards Used In Divorce Cases

VALUATION STRATEGIES IMPACT OUTCOME OF LITIGATION

By JOHN M. DELGREGO

Connecticut's Appellate Court in *Hannon v. Redler* (117 Conn. App. 403(2009)) emphasized the vast discretion trial courts have in valuing assets. Given that discretion, an understanding of the various standards of value is critical to all attorneys looking to value a business or business interest.

Many states' courts, including Connecticut, apply the fair market value when appraising the value of a closely held business or business interest in a divorce case.

But what exactly is meant by the phrase "standard of value"? Simply stated, the standard of value is the type of value to be used in a specific valuation engagement.

The standard of value defines exactly what is meant by the term "value."

Believe it or not, the value of a business interest for a divorce case could be completely different from the value of that same interest calcu-

lated for a shareholder dispute.

Three common standards of value are as follows:

- Fair market value
- Fair value
- Strategic or investment value

Fair market value and fair value are often used in litigation matters, but the terms are not synonymous.

Fair market value, as defined by the Internal Revenue Service in Revenue Ruling 59-60, is an assumed price, in cash, that a hypothetical buyer would pay to a hypothetical seller for a business or business interest if it were sold on an open market.

It also assumes that neither party is under compulsion to buy or sell, and that both parties have reasonable knowledge of the relevant facts.

Under the fair market value standard, consideration is given to the marketability of the

shares, or lack thereof, and the control inherent in those shares. The assumed price is without consideration of any special motivations by the buyer or seller that are not characteristic of a typical buyer or seller.

The fair market value standard is often used in Connecticut divorce matters, most recently by the Appellate Court in *Brooks v. Brooks*, (Connecticut Appellate Court, AC



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30140, released June 3, 2010) and by Superior Court Judge Lynda B. Munro in *Gaary v. Gillis*.

In *Brooks*, the defendant claimed that the trial court ignored three critical factors when valuing his interests in various real estate partnerships, namely: the lack of a ready market for interests; the interest's inability to control the business entities; and the restrictions on the transfer of the shares, all elements considered under the fair market value standard.

The Appellate Court agreed with the defendant, stating, "An assessment of fair market value requires the fact finder to determine the price that would probably result from fair negotiations between a willing seller and a willing buyer..."

In *Gaary v. Gillis*, the defendant husband's expert used a fair value standard in valuing the wife's

fair value is to first determine the value of the corporation as a whole and then allocate that value to the petitioning shareholder in proportion to the shareholder's ownership percentage, without consideration of discounts for lack of control or lack of marketability.

The court's ruling in *DeVivo* was supported in *Conway v. Carpenter*.

It is generally believed that fair market value

differs from fair value with regards to the discounts for lack of marketability and lack of control. Under the fair value standard, these discounts are usually not applied.

Strategic value is the value to a particular investor, unlike fair market value and fair value, which consider only hypothetical buyers and sellers. Under the strategic value standard, the special motivations of the buyer or seller are considered.

Determining the appropriate standard of value to apply in the valuation of a business or business interest is critical, as the application of these standards can lead to different value conclusions.

The appropriate standard for any valuation engagement will ultimately depend on the specific facts and circumstances of the case, as well as relevant state statutes and case law. ■

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minority interest in a medical practice, which differs from the fair market value standard that I applied as the expert in this case for the wife. The fair market value standard was accepted by the trial court, pursuant to *Brooks v. Brooks*.

#### Value Differences

Fair value is a bit vague in its definition and will have different meanings depending on the context of its use, whether in real estate appraisals, financial reporting, or litigation.

Rarely, however, does fair value equate to fair market value.

Many states, including Connecticut, refer to fair value as the statutory standard of value applicable in cases of dissenting shareholders. Connecticut General Statutes § 33-900 states that, in lieu of dissolution, a corporation or shareholder may elect to purchase shares owned by a petitioning shareholder at the fair value of the shares.

Unfortunately, the statutes do not actually define fair value.

In the Connecticut case, *DeVivo v. DeVivo*, the court attempted to define fair value, as it is referenced under Sec. 33-900. The court concluded that the proper method to determine the

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