

# Legal NEWSLETTER

## *This Issue*

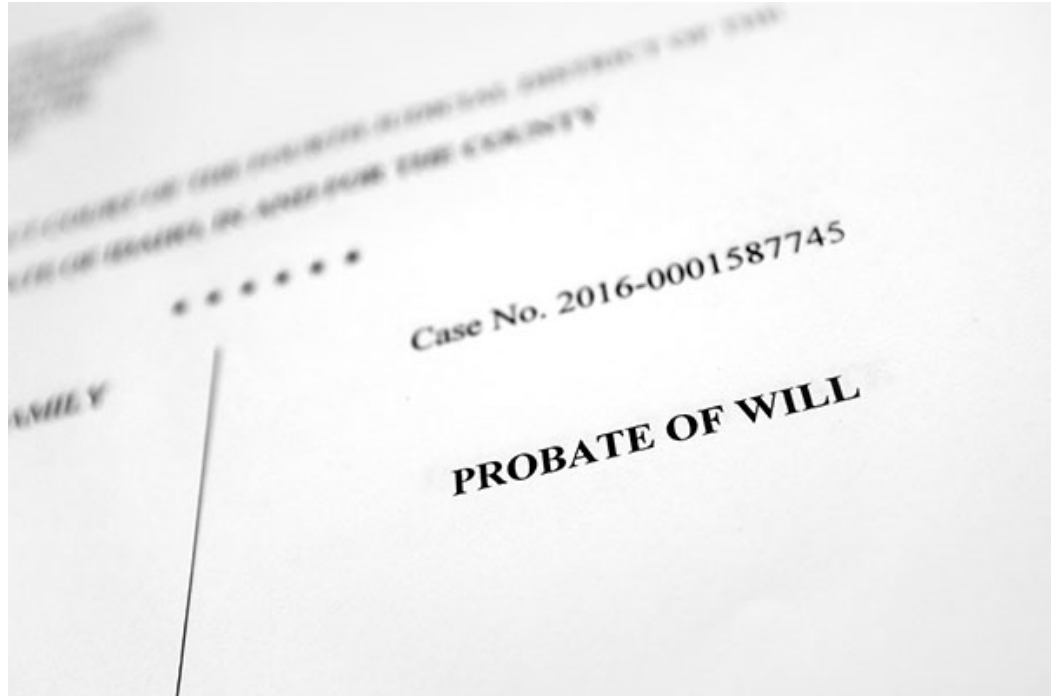
### WHAT IS PROBATE?

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### KEEPING CONFIDENTIALITY, WHOSE EMAIL SERVER ARE YOU USING WHEN EMAILING YOUR LAWYER?

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### COMMON DIVORCE MYTHS DEBUNKED



## WHAT IS PROBATE?

*By Attorney Amy J. Eddy*

Probate is an often a misunderstood but frequently heard term in relation to the death of a loved one. Perhaps in completing your estate planning you have been advised to “avoid probate.” But what is probate and why is to it be avoided?

Probate is the name of the legal process that takes place after someone dies for the purpose of the following:

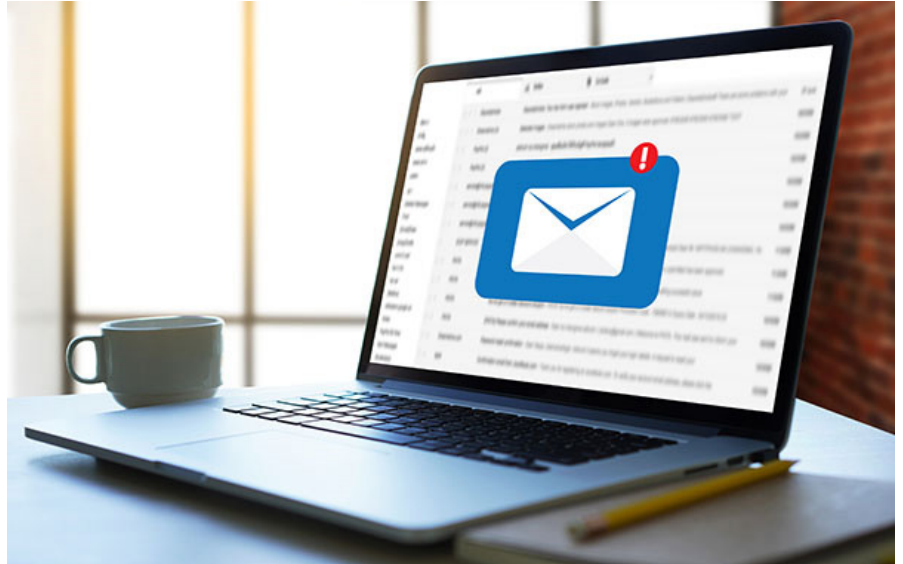
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ANDERSON O'BRIEN

# KEEPING CONFIDENTIALITY, WHOSE EMAIL SERVER ARE YOU USING WHEN EMAILING YOUR LAWYER?

*By Attorney Brian G. Formella*

One of the most significant benefits of seeking advice from your lawyer are the ethical rules that generally require that the communications with your lawyer are confidential. This means that, except in some limited circumstances, information that a business or individual client conveys to the business's or the individual's attorney remains confidential. One such exception to this general rule is if an employee uses the employer's email domain to communicate with employee's lawyer. Confidentiality may be lost in that instance.



Consider this example: If Emily, an employee, wants to communicate with her lawyer about her employer, ACME, Inc., regarding her concerns about sexual harassment in the workplace, she ordinarily may do so with every confidence that the communication will not lose its confidential nature. However, one way that the private, confidential nature of Emily's communication to her lawyer may be lost is if she and/or her lawyer uses the ACME email domain/server to communicate. This is particularly true in instances where the employer has made it clear in its handbook that employees have no expectation of privacy in communications made over the company's email server.

If an employee uses an employer's email domain to communicate with his or her lawyer, there is a significant risk that the communications may lose the protection of confidentiality. This was the case in a recent Florida case, where the court said that the

information sent between client and attorney over the employer's email domain and server was not protected by rules of confidentiality and the attorney client privilege.

As such, an employee is well-advised to use an email other than one that is provided by the employer when communicating with their lawyer. The employer is well-advised to specify as part of its policies in its employee handbook that employees should not expect privacy or confidentiality for matters that are shared over the employer's email domain. In other words, employers should consider drafting a well-written policy that there is no expectation of privacy if the employee uses the employer's server or email domain for personal purposes. Finally, although it may be inconvenient, a person or business that communicates with an attorney should take care to use a method of communication that maintains confidentiality, one of the greatest benefits of seeking legal advice from an attorney. ♦

**Lawyers where you live.**

# COMMON DIVORCE MYTHS DEBUNKED

*By Attorney Jeffrey T. Raymond*

Many people have heard a number of myths concerning divorce. This can lead to misaligned expectations of divorce proceedings. Below are five common myths debunked with an explanation to the reality of the situation.

## **1. Divorces are always messy.**

While divorce is one of the most difficult and stressful periods during an individual's life, it does not have to be fraught with accusation and conflict. In fact, the majority of divorce cases end in a settlement; meaning that both parties came to an agreement on all issues. Most divorcing couples prefer to reach a resolution as quickly and cleanly as possible.

A related myth is that attorneys increase the level of conflict in any given divorce. In reality, most attorneys set reasonable expectations for their clients and discourage clients from engaging in acrimonious behavior.

## **2. Children decide who they live with.**

If the divorcing parents are in agreement, arrangements for the custody and placement of the minor children is completely up to their discretion. When parents do not agree on custody and placement issues, the Court will appoint another attorney as a Guardian ad Litem to represent the children's best interests. After investigating the case, the Guardian ad Litem will make a recommendation to the parties and the Court. While the Court is not obligated to adopt the recommendation, the Guardian ad Litem's position is often given significant weight by the Court. Although the Guardian ad Litem is required to inform the Court of the children's wishes, when the



children want their wishes to be communicated to the Court, the Guardian ad Litem's recommendation does not have to align with the children's wishes. It is commonly expressed that "children have a voice; not a choice." This is a consequence of the fact that the Guardian ad Litem represents the children's best interest, not the children themselves.

## **3. Visitation can be denied to a parent who fails to pay child support.**

The failure of one parent to pay child support is never a reason for the other parent to withhold the child from the nonpaying parent. Withholding a child is only appropriate in the most extreme circumstances when the child's safety is legitimately at risk. In fact, it can be a felony for a parent to withhold a child from the other parent. However, when one parent fails to pay child support when so ordered, the other parent is not without recourse. He or she can file a motion with the Court, asking it to enforce the child  
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- 1.) Proving that a deceased person's Last Will & Testament is valid, if there is one.
- 2.) Determining and giving notice of the proceedings to the deceased person's heirs, any beneficiaries named in the Will, and the deceased person's creditors.
- 3.) Identifying, inventorying and valuing what the deceased person owned when they died.
- 4.) Determining who will receive the deceased person's property (heirs, beneficiaries, creditors, etc..)
- 5.) Distributing the remaining assets as the Will directs (or to the heirs identified by state statutes if no Will exists.)

The process itself involves filing documents in the local probate court to have the Will admitted and to request that a Personal Representative (sometimes called, Executor) be appointed. The Personal Representative is thereafter required to continue to provide information to the Court and the other interested parties, until the assets and expenses are fully accounted for, and then will ultimately need to obtain approval to distribute the assets to those who are entitled.

Clients often want to avoid this process because it can take a great deal of time and requires legal paperwork and potential court appearances. It is often misunderstood that having a Will is necessary to avoid probate. There are numerous ways to avoid probate, but preparing a Will is not one of them. Whether or not probate is needed will be driven by the value and type of assets owned by the deceased person. An estate planning attorney can discuss the ways to avoid probate and what might be most suitable in your situation. ♦

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support order. At this point, the Court can award fees and costs to the parent bringing the motion and may find the nonpaying parent in contempt of Court if he or she still fails to make payments.

#### **4. The Court can consider infidelity when deciding a case.**

Wisconsin is a no-fault divorce state. This means that Wisconsin courts will not hear evidence relating to the cause or causes of a divorce. Accordingly, accusations of infidelity, no matter how well-founded, are usually irrelevant to a divorce proceeding. With that said, evidence related to an affair may be relevant when a spouse makes a claim of marital waste. A claim for marital waste can be made when one spouse "wasted" marital funds or assets during the marriage on things like gambling, illicit drugs or funding an affair. A successful marital waste claim will result in the Court crediting a spouse with the value of the "wasted" marital funds or assets during the Court's property division determination. Accordingly, if a spouse uses marital funds to finance an affair, such evidence may be relevant to a marital waste claim.

#### **5. Divorces are either "won" or "lost."**

Family courts are courts of equity, meaning that they endeavor to resolve divorces as fair and just as possible. A divorce is simply the process of separating spouses' financial and parenting lives. While spouses may win or lose on certain contested issues in a divorce proceeding, the overall outcome is usually fair to everyone involved. Looking at a divorce in terms of winning and losing can have negative consequences. Taking such an approach will almost always result in a longer more expensive divorce. In addition, if the spouses have minor children together, it can make post-divorce co-parenting more difficult than it would be otherwise. ♦



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