The Alimony Reform Act: The Court Rules

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As many of you know, the Massachusetts Legislature amended the long standing alimony laws pursuant to the Massachusetts Alimony Reform Act of 2011, effective March 1, 2012 ("Alimony Reform Act"). Formerly known as the Massachusetts Alimony and Property Statute, M.G.L.Ch. 208§34 now addresses only the division of the marital estate. Separate statutes, pursuant to the Alimony Reform Act, M.G.L.Ch. 208§§48-55, address alimony.

Although many questions remain, the Massachusetts Supreme Judicial Court ("SJC") has made it clear that the Alimony Reform Act cannot be applied retroactively to cases determined prior to its enactment. What does that mean?

For example, the Alimony Reform Act states that general term alimony orders shall terminate upon the payor attaining the full retirement age, currently 66. M.G.L.Ch. 208§49(f). General term alimony, a term created by the Alimony Reform Act applies to marriages of 20 years or longer in duration. Many divorced parties were under the impression that upon reaching full retirement age, their alimony obligation would terminate. The SJC's recent decision in the *Doctor v. Doctor* (January 30, 2015) clarified that reaching full retirement age did not terminate an alimony obligation in those cases decided prior to March 1, 2012.

Specifically in *Doctor*, the husband sought to terminate his alimony obligation, which under the terms of his separation agreement would end upon the death or remarriage of his former wife. The husband argued because he was retired and past the age of full retirement, his alimony obligation terminated in accordance with the Alimony Reform Act. The SJC disagreed, stating the husband would have to establish a material change in circumstance since the date of the last alimony order in order to prevail. The husband's retirement or reaching full retirement age was not considered a material change in circumstance because it was not a consideration to terminate alimony at the time the parties entered into their separation agreement and it was expected that at some point the husband would retire.

The takeaway from the SJC's opinion is that any separation agreement entered into prior to the effective date of the Alimony Reform Act is not subject to the alimony reform, unless there is a conflict in the durational limits of the payment of alimony.

In cases determined prior to the effective date of the Alimony Reform Act, the only factor that will trigger a modification, absent a material change in circumstance, when there is a conflict in the durational limits of the payment of alimony. Included in the Alimony Reform Act were several uncodified sections. St. 2011, c.124§§4-6. These uncodified sections express the Legislature's intent that the Alimony Reform Act excludes durational limits based upon the length of the marriage, only.

Another example is cohabitation. The Alimony Reform Act specifically refers to the act of cohabitation as a trigger to terminate alimony. However, this is applicable only to cases post the Alimony Reform Act. Situations where former spouses are cohabitating with another, may be a trigger to terminate alimony only if the Plaintiff can show that the cohabitation has resulted in the recipient spouse's needs to be less than at the time of the alimony order, or there is specific language in the parties' separation agreement that refers to cohabitation as a factor for alimony to end. In many separation agreements, there are conditions or events that will cause alimony to end, such as the remarriage of the recipient.

Another takeaway is if there is a disparity in the amount of alimony paid from the alimony guidelines as enunciated in M.G.L.Ch. 208§53(b), that too will not trigger a modification. Should one want to bring a modification of any alimony related issues, unrelated to the duration of the alimony paid, and the alimony order predates the Alimony Reform Act, it must be done *the old fashion way*: a material change in circumstance since the entry of the last judgment.

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To Paraphrase the Grateful Dead's Casey Jones: "Trouble with You is the Trouble with Me…Got Two Good Ears but We Still Don't Listen!"

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Clients seek attorneys not only for their ability to win a lawsuit, negotiate a settlement, or draft a document, but also for their wisdom. But do attorneys really listen to their clients? All too frequently, the attorney formulates a response to the client before the client has even finished what he/she has tried to tell the attorney. Sometimes the attorney even jumps in midstream, interrupting.

Listening differs greatly from hearing. Listening means to be fully engaged and wholly present by making a conscious effort to interpret and analyze. Listening requires constantly being attentive as the client is speaking and nonverbally communicating. The key is to unearth what the client wants, not what the attorney thinks the client wants.

The skill to truly discern what the client's overriding priority is effectively occurs as early as the initial intake interview when there is critical information for the attorney to learn and understand about the client's goals and needs. The attorney earns the trust of the client, and the client comes for the attorney's opinion on what should be done. Don't hold back on giving advice to help the client take action on his/her problem; however, never forget the overriding principal: *"Listen to what the client wants, not what the attorney thinks the client wants!"*

When clients are listened to, they are engaged and feel understood. Effective listening is a skill that requires development, getting to a deeper level of understanding, rather than springing up with an immediate answer. This is the key to more effective problem solving. Listening in this manner assists the client to formulate their own solution or plan of action to fulfill their goals.

Asking questions of the client also gives the attorney the opportunity to distinguish what is truly transpiring with the client, not what the attorney thinks is transpiring. This is a crucial factor in delivering sound legal advice. Asking powerful questions may also deepen the awareness of the true problem: not only to help clients by giving them the answers the attorney thinks are appropriate; but also to wait to listen to what the client proposes. The originality of their answers is always a surprise.

Once the client has answered the attorney's questions, the attorney who has truly been listening to the client will share his or her observations clearly, but without judgment. I have found in my practice that this process helps the client to focus and feel part of our TEAM to collaborate on a solution to the problem at hand.

Be Prepared: Protect Your Estate from the High Cost of Nursing Home Care

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Odds are high that someone in your family will need a nursing home at some point. A majority of people over age 65 will require some type of long term care services during their lifetime, and for many, nursing home care is unavoidable. With the cost of private nursing home care now exceeding $100,000 per year, that's an expense very few of us can afford. But there are steps you can take with careful estate planning to protect your estate and minimize the financial burden.

Medicaid, known as MassHealth in Massachusetts, is a joint federal/state need-based health insurance program for those with low income. As such, qualifying for MassHealth benefits requires applicants to meet stringent income guidelines. Currently in 2015, a couple seeking MassHealth benefits for one spouse may have only $119,220 in assets and a single applicant is allowed only $2,000. Virtually all assets are counted against these limits except for the home and personal belongings. Estate plan clients often ask me how to qualify for Medicaid to cover the cost of a nursing home. With advance planning, there are several legal strategies that can be utilized to protect the family home and avoid losing your life's savings to qualify for MassHealth, while still having assets to pass on to loved ones.

One of these strategies is setting up an irrevocable trust. Irrevocable MassHealth trusts are generally recommended for people over the age of 60, who are primarily concerned about needing long term or nursing home care in the future. However, to be effective for MassHealth purposes, the irrevocable trust must be created and funded at least five years before such long term care is needed because MassHealth uses a five year look back period and will assess a disqualification period for any transfer to a trust within the five year period. When you apply for MassHealth, the state is entitled to review all of the financial transactions made during the previous five years to determine if a "disqualifying transfer" has been made. A disqualifying transfer occurs when an asset is transferred for an amount less than its fair market value, which includes transfers of assets into a trust and gifts.

The irrevocable trust is set up as an income-only trust, whereby the grantor, the person who creates the trust, receives only the income and has no access to the principal. In order to protect the trust assets from the cost of long term care, and to qualify for MassHealth, the trustee must be prohibited from distributing principal directly to the grantor. Without access to the trust principal, the assets in the trust should not be those needed for day to day living. For daily living expenses, it's better to rely on other assets such as retirement, and social security which cannot be transferred into an irrevocable MassHealth trust without adverse income tax consequences. A primary residence or vacation property can be transferred into the trust, as well as an investment portfolio, or at least a portion of it, without any adverse tax consequences.

For a single person, or a married couple with assets below $1 million, only one irrevocable trust is necessary but for a married couple with assets exceeding $1 million or that may exceed $1 million over their lifetime, two separate irrevocable trusts are recommended. Using two trusts enables a married couple to protect their assets from the cost of long term care and utilize both federal and state tax exemptions, to ultimately reduce their estate tax liability.

Planning for MassHealth eligibility not only requires an experienced practitioner to thoroughly review your estate and healthcare needs, but also to draft documents that conform to current and frequently changing laws. As a cautionary note, income-only irrevocable trusts have come under attack from MassHealth despite being permitted under state and federal law. Although such challenges are not always successful, they underscore the need for carefully drafted documents. You do not have to go broke or lose your home to qualify for MassHealth. Setting up an irrevocable trust well in advance of needing long term care can be an effective and relatively low cost estate planning strategy to protect your assets.

At Konowitz & Greenberg, we take pride in working collaboratively as a TEAM and with an extensive network of trusted advisors to provide comprehensive, yet cost-effective, creative solutions for our individual and business clients with the legal issues they face in the following areas: corporate transactions, advising small and medium private entities; all matters relating to divorce, post divorce, alimony, support, and custody issues; adoption, contested and complex adoptions; guardianship, conservatorships; estate planning, estate and trust administration; business, civil and personal injury litigation and appeals; and real estate transactions.

Tis But a Breach – Looking for the Unfairness to Support a 93A Claim

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I frequently represent small businesses and individuals in litigation. One of the first topics I bring up is the cost associated with litigation. For smaller cases, the unfortunate reality is that litigation costs can easily dwarf the amount in dispute. And while a properly designed budget and strategy for a case should always consider the amount in dispute, there is only so much you can do to limit costs. So the discussion inevitably turns to whether the client can recover any of those fees and costs from the other side. I love this question. I am always looking for ways that a client can potentially recover their attorney's fees and costs, not only so the client has the possibility of actually recovering those fees, but for the increased leverage a claim for fees can bring to a case. Just the possibility that a party will be able to recover their costs and fees can drastically change the dynamic of a case.

One of the more powerful tools you can use to potentially recover attorney's fees and costs is a claim under M.G.L. c. 93A, the Massachusetts Consumer Protection statute. But inexplicably, this claim is often not included in complaints or counterclaims, in particular in cases involving breaches of contract. A 93A claim must allege more than a mere breach of contract. But often, digging below the surface of the breach will reveal facts that can be used to construct a valid 93A claim. All you need to show is that there were some egregious circumstances surrounding the breach to provide the additional "unfair" or "deceptive" ingredient required under the statute. This could be as straightforward as demonstrating that the opposing party breached the contract in a deliberate attempt to obtain the benefits of the contract, and to avoid fulfilling their own obligations under the contract. Or it could be that the opposing party's actions unfairly "strung along" my client. There are any number of fact patterns that can support a viable 93A claim.

By looking at a set of facts through the lens of 93A, I am looking for the unfairness in what has happened to my client. This often guides not only the 93A claim, but how I frame the entire case going forward. As a trial attorney, I need to tell the story of why my client was wronged. The story of a client who was unfairly treated is much more compelling than the one about the gentleman's breach of a contract.

Meet Our New Office Manager

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My name is Audrey Pabian and I am the new Office Manager at *Konowitz & Greenberg*. It is an absolute thrill working here. I enjoy the clients who are walking through our door, the cases that are being handled and the stories that accompany them. The entire office has been so welcoming. This is a new type of job for me. To explain, many years ago I graduated Boston University with a Bachelor's Degree in Speech Pathology and then two years later with a Master's Degree in Special Needs Education. My combined expertise led me to working with children who had severe language impairments. After working in this field for quite a while, I dedicated myself to being a full-time mother to my three wonderful (now adult) children.

The time came to go back to working "outside of the house." I purchased a company that in conjunction with recreation departments, provided art classes for pre-school and school-age children. My job entailed planning, implementing, marketing and accounting. This was great fun, but I felt that after doing this for about twelve years, a change was due. I closed my company and started looking for something new to do. Something different. Something challenging. And here I am at *Konowitz & Greenberg*.

In the six months I have been here, I have observed that *K&G* works as a TEAM. People listen and offer suggestions to complicated situations. Everyone is available to and supportive of each other. This carries over to our clients as well. We are each other's advocates, as we are yours. It is like a family and I think that our clients sense and appreciate that. I am a proud member of the *K&G* TEAM.

I look forward to meeting all of you. If you are in the area, please stop by to say hello. I will show you pictures of two of the cutest little boys in the world—my grandsons!

If I can be of assistance to you in any way, please do not hesitate to contact me.