K&G
ATTORNEYS AT LAW

THE BRIEF
of konowitz & greenberg

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We're ready to expand our TEAM! {See page 3 for details}

Rosalind E. W. Kabrhel
rek@kongreen.com
ext.234

Avoid a Slippery Situation:

Take the Right Steps to Prevent Falls on Snow and Ice

In the K&G Spring newsletter, I wrote about a pending decision in the Supreme Judicial Court that could impact a property or business owner's liability with regard to snow related injuries. In Papadopoulos v. Target Corp. et. al., the Court re-evaluated the long-standing legal standard for determining liability in snow and ice cases. For over a century, Massachusetts courts have distinguished between natural and unnatural accumulations of snow and ice, and held that property owners could not be liable for failing to remove natural accumulations. The Papadopoulos decision, rendered on July 26, 2010, abolishes that distinction. It holds that property owners have a duty to ensure that their property is kept "reasonably safe"—including from hazards created from naturally accumulated snow and/or ice.

The Papadopoulos case involved a man who broke his pelvis after slipping on ice in front of a Target store. While the lot had been cleared of snow, a pile had been plowed onto a median strip, and was the origin of the ice that caused his fall. A lower court judge dismissed Papadopoulos's suit, stating that it did not matter whether the ice had fallen from the pile, or had melted and refrozen; either way, it was a natural accumulation for which the property owner could not be held liable.

In reversing the lower court's dismissal, the SJC applied the same rule to snow and ice cases as exists for other property hazards—the duty to "act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk." The Court remanded the case for reconsideration under the new standard, and said that the new standard will apply retroactively to pending lawsuits.

Both the plaintiff and defense bars agree that there will be an increase in litigation against property owners as a result of this new standard. Plaintiffs will now be able to pursue claims against property owners who did not reasonably clear their property of snow and ice, and property owners (generally through their insurer) will have to defend their actions to a jury, instead of getting cases involving natural accumulations dismissed early in litigation. This will undoubtedly translate to higher insurance premiums for property owners. The ultimate question of how a "reasonable" person would have responded to an accumulation of snow and ice on their property is one that will have to be developed over time, by juries, as the cases arise.

If you are a property owner, it is essential that you take steps to ensure prompt and thorough plowing or snow removal on your premises, and inspect the property regularly for maintenance. If you contract with a snow removal company, make sure that company is insured and keeps a record of when and how they remove snow and/or ice from your property. Finally, if there are areas of your property that are difficult or impossible to maintain in a safe condition, place warnings signs in the area to put visitors on notice of the hazards.

K&G's team of friendly, accessible and capable professionals is here to help individuals and businesses with the issues they face today: managing privately-held businesses, estate planning, trust administration, adoptions, divorces, real estate transactions, and business and civil litigation. We offer high-quality, efficient "service, service, service" at a reasonable cost. Responsiveness to our clients is our priority.

Konowitz & Greenberg
Attorneys at Law

20 William Street, Suite 320
Wellesley Office Park
Wellesley Hills, MA 02481

tel 781-237-0033
fax 781-235-2755

www.kongreen.com

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Our Bodies, Ourselves

Steven S. Konowitz
ssk@kongreen.com
ext.236

Recently two very different events caused me to ask a very simple question: Whose body is it? The first event involved a man who allegedly killed his wife, but wanted to be in charge of the arrangements for her funeral. The second event was the death of my mother. While standing in the hospital room, I found myself wondering: "what happens now?"

Does a person have a right to direct the disposition of their body, for example by will? Under early English law, a decedent had no property rights in their body and could not control the disposition of their body after their death. This has now changed, and a legally competent person can direct how his body will be disposed of by written instrument.

However, this rule raises a few interesting issues. For example, if the only written instruction is in a Will, by the time the Will has been probated and an executor appointed, the body may already have been disposed of.

This result is especially likely since, in Massachusetts, the right to possession of the body and the responsibility for its disposition rests not with the executor of the deceased's estate, but with the surviving spouse or, if there is none, with the next of kin. The spouse or next of kin generally is entitled to dispose of it according to his or her wishes, not necessarily the decedent's, leaving open the possibility that the decedent's wishes may be disregarded.

To safeguard against this unfortunate set of events, multiple copies of the will should be made, and multiple people should be informed of the decedent's wishes prior to death. The idea that the wishes of the decedent should be respected, when known, is part of the unwavering trust that is imparted to those who agree to bear the responsibility of dealing with the logistics of a loved one's death.

Estate Planning for Disabled Children

Arlene L. Kasarjian
alk@kongreen.com
ext.228

If your family includes a disabled child or grandchild, there are special considerations when making an estate plan. A primary concern is to assure that that the disabled child (minor and adult) is provided for financially, so that he or she has an adequate quality of life and standard of living. There are two types of trusts that can be used to assist families in reaching this goal.

The first is a Supplemental Needs Trust, the purpose of which is to enhance the disabled child's standard of living and quality of life without jeopardizing the disabled child's eligibility for public benefits in the present or in the future. The trust is funded and controlled by a third party, such as a parent or grandparent, not the disabled child. By means of a lifetime gift into the trust or a gift into the trust upon the death of a parent or grandparent, this trust can be funded with any type of asset, including life insurance, bank accounts, investment accounts, real estate, stocks, bonds or other securities.

Funds in a Supplemental Needs Trusts are used literally to supplement the daily essential needs of the disabled child, and therefore cannot be used for the necessities of life such as food, utilities, clothing or shelter. However, the funds may be used to provide "nonessential" items such as medical or therapeutic care not covered by public benefits, vehicles and related expenses, expenses for travel, educational or vocational training, educational camps, vacations, computers and cell phones.

The second type of trust is a Special Needs Trust which his designed to preserve a disabled child's public benefits, protect funds that have come into the child's name and provide a trust fund which can be used to enhance the child's standard of living or quality of life. The Special Needs Trust differs from the Supplemental Needs Trust in that a Special Needs Trust contains assets already owned by the child, whereas in a Supplemental Needs Trust assets are never owned by the child because they are retained and managed in the trust at the outset.

Funds for a Special Needs Trust can come from inheritance or gifts in the name of the child or settlement proceeds from a personal injury or medical malpractice lawsuit. The funds are used substantially in the same way as the Supplemental Needs Trust as outlined above but there are more restrictions. In addition, upon the death of the child the trust must use any remaining funds to reimburse or "payback" the state for public benefits provided to the child during his or her life.

If you would like more information about these trusts or estate planning for disabled children please contact me.

The Many Costs of Divorce...

Karen K. Greenberg
kkg@kongreen.com
ext.235

In our last newsletter, I promised to address the many costs of divorce, and started with the most obvious: legal fees. Dissipation of assets is another cost of divorce, whether contested or not. There are many assets that comprise the marital estate, but monetary assets pale in value to the truly irreplaceable assets of marriage: children. Regrettably, the cost to children of divorcing parents, often undetected at the time, can quickly become significant if unchecked. Whether the children of a marriage are minors or emancipated, divorce can still impose a major cost on them. In order to reduce the cost of divorce on their children, divorcing parents must be mindful to follow a few basic principles.

1. Complete the required mandatory parenting class in the very early stages of your divorce.[1] In so doing, you will quickly learn how toxic it is for children to feel any responsibility for any aspect of the divorce. This also means children are never to be relegated to the role of messenger.

2. All children need someone other than their parents with whom they can discuss their thoughts, concerns, and fears during this difficult and sensitive time. When age appropriate, each child should be given the opportunity, in a safe environment, for counseling with a qualified professional.

3. Each parent should also be in counseling. As painful and costly as divorce may be, if viewed as a life cycle event from which one may learn and grow, each member of the family can ultimately benefit, either directly, or indirectly.

4. Above all, children need to hear from both parents that the divorce has nothing to do with them, and that they will always be loved unconditionally.

If you have any concerns about child or custody issues related to the breakdown of your marriage, or relationship with a significant other, please consider giving me a call. Here's to cherishing and respecting your most valued asset: your children.

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[1]The Massachusetts Probate and Family Court requires each divorcing parent with minor children of the marriage to complete a two session parenting class. Although no case may be scheduled for a Pre-Trial Conference without the completion of the parenting class, many parents do not accomplish that simple task until the eve of the divorce hearing, or, disappointingly, are given a "pass" to fulfill the requirement by a date certain after the divorce hearing.

K&G ATTORNEYS AT LAW

WE'RE LOOKING FOR A NEW TEAM MEMBER!

As much as we prefer to be the ones giving help, we're fortunate to be in a position where we'd like to ask you to help us. Konowitz & Greenberg is looking to add another attorney to the mix, and are hoping you might know someone who'd fit in. You know our personalities and drive for excellence, so if you also know a solo practitioner who's thinking about the advantages of being part of a team, or a "downtown" lawyer who'd like to work at a firm where internal politics and competition are considered unproductive and unpleasant, please send them our way.

Konowitz & Greenberg:

- Active in the practice of business law, litigation, family law and trusts & estates
- Driven to be known for what we do best—client service and teamwork
- Passionate about delivering outstanding results
- Obsessed with preparation ("When you think that you are prepared, then you can start to prepare.")
- Committed to desirable work-life balance and an upbeat and spirited workplace
- A comfortable, suburban firm with a street-fighter attitude

Konowitz & Greenberg is looking for an attorney who is…

- Intelligent
- Outgoing and caring
- Expert in a particular area of the law and interested in supporting other areas
- Bringing a book of business and interest in developing more
- Attentive to detail
- A true team player

Konowitz & Greenberg solves problems for our clients. We educate our clients to have realistic expectations. We expect to do a thorough job assuring that every aspect of every project has been properly addressed in a clear and concise manner. We are fanatical about great work, attentiveness to client needs, and a family-friendly and flexible environment.

If you know of someone who is ready to think in terms of WE, please contact our Office Manager, Ellen O'Hare, at 781-237-0033 x237. WE need to meet them!

Mia Rosenblatt Tinkjian
mrt@kongreen.com
ext.226

Checking Up on Your Charitable Donation?

If you are like me, you receive phone calls on an almost daily basis from various organizations seeking a donation. How do you know if the organization is a legitimate charity, or if you are about to be scammed? Massachusetts law requires all public charities operating in Massachusetts to register and file annual reports with the Attorney General's Office Non-Profit Organizations/Public Charities Division. In addition, any company that is hired by a charity to perform solicitations on its behalf must also register with the Attorney General. Professional solicitors and commercial co-venturers are required to register charitable campaigns by filing Form 10A (solicitors) or Form 10B (co-venturers), and to submit annual financial reports for each campaign (Form 11A or 11B).

The Attorney General's Office has created a publicly accessible website, so that members of the public can confirm the identity and validity of a charitable organization before making a donation. These forms are now available to the public via the annual filing document search website, which can be accessed through the Attorney General's website, www.charities.ago.state.ma.us.

Before you open your checkbook, verify the name, address, and telephone number of the charity, and ask them to send you a written description about the organization and how the funds will be used. Get the full contact information for the professional fundraiser, if one is used. Find out if your donation is tax deductible, and keep receipts and canceled checks, in case you have a complaint later, and for when you file your tax returns. Never pay cash. Instead, use a check so that you can keep a record of the transaction. If you have questions or concerns, contact the Attorney General's Office to find out if the charity is registered to operate in the Commonwealth, and whether it is in good standing.

Donating to a charity is a wonderful gift, just be sure you do so wisely.

Brad A. Compston
bac@kongreen.com
ext.225

Using Arbitration Agreements Wisely

Arbitration is an increasingly popular way for many businesses to resolve their disputes, with arbitration agreements appearing in ever more forums; from supply agreements and other business contracts, to employment contracts, to consumer contracts. The advantages of arbitration, when compared to litigation in court, are often numerous. These include greater predictability of litigation costs, reduced litigation costs, and faster resolution of disputes.

Both federal and state law strongly favor the enforcement of agreements to arbitrate. The Federal Arbitration Act, 9 U.S.C. § 1, et seq., creates "a body of federal substantive law of arbitrability" and represents "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation or waiver, delay, or a like defense to arbitrability." Id. "[A court] may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" Mehler v. Terminex Int'l Co. L.P., 205 F.3d 44, 49 (2d Cir. 2000).

Though many states have similar laws, even those that do not generally must enforce arbitration agreements since the federal act preempts contrary state law. The preemption is broad; any state arbitration act that treats contracts to arbitrate specially or differently from contracts generally is pre-empted if, as applied, such law is inconsistent with the federal law. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996).

However, while arbitration agreements generally will be enforced, they are not necessarily appropriate in all types of cases. Cases that raise difficult or complex questions of law, for example, may be better suited to the courts, where the possibility of appeal exists if legal errors are made. Generally, an arbitrator's decision is not appealable, even if the arbitrator applies the wrong legal standard to a case. Conversely, where the law unambiguously favors one party, for example where a company obtained a release of liability from a consumer as a condition of the provision of a good or service, the courts may be preferable to arbitration since the company may be able to obtain a quick dismissal of a claim against it through a motion to dismiss or for summary judgment.

Given the potential benefits, an agreement to arbitrate will often be a smart choice when entering into a contract. However, such an agreement should not be automatic, and you should always consider the circumstances and the types of disputes that may arise with respect to a contract before demanding or agreeing to arbitrate future disputes.