

## Helping our clients navigate difficult waters...



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### Growing Use of “Independent Contractor” Label Creates Dangers for Businesses

As the economy continues to struggle, many businesses are relying more and more on independent contractors, and avoiding hiring new employees. Economically, the use of independent contractors offers a number of advantages over hiring traditional employees. Among other things, businesses can avoid paying overtime, payroll taxes, employment and worker’s compensation insurance and Social Security.

While the use of independent contractors certainly has its advantages, it also can create legal hazards, particularly if the designation is misused by classifying as independent contractors workers that the law says are really employees. While there are undoubtedly many cases where employers have intentionally misclassified workers, more often misclassification is the result of an honest mistake or genuine confusion about the law. Unfortunately, it is not always easy to determine whether or not an individual qualifies as an independent contractor.

In Massachusetts, whether an individual is an employee or independent contractor is determined by statute. Massachusetts General Laws Chapter 149, Section 148B provides that an individual providing any service to another “shall be considered an employee” unless (1) the individual is “free from control and direction” in performing the work, (2) the services being provided are “outside the usual course of the business of the employer,” and (3) the individual is customarily engaged in a trade, occupation or business “of the same nature as that involved in the service performed.” Though the definition is fairly clear, it still leaves significant

questions in the application of the definition to each particular case.

For example, was the work that was performed “free from control or direction?” Obviously, a business must be able to give a worker some direction as to the basic work that is to be done, so what amount of direction is too much? Similarly, if the work being performed must be “outside the usual course of business” of the employer, just how far outside must it be? Rarely will the answers to these questions result in 100% certainty that the classification of a worker as an independent contractor is correct.

Moreover, the penalties for a mistake can be severe. The misuse of the independent contractor label can result in IRS fines and state law penalties for each misclassified worker. In addition, an employee misclassified as an independent contractor may assert claims under state wage and hour laws. In Massachusetts, that means that a misclassified employee may be entitled to recover unpaid wages and benefits, and may also recover attorney’s fees and treble damages.

One result of the growing use of independent contractors is that both state and federal law enforcement agencies have increased their scrutiny of these practices, with the IRS, Department of Labor and Massachusetts Attorney General’s office increasing audits and investigations of companies for the misuse of the independent contractor designation. If you are an employer, employee or an independent contractor with questions or concerns about this area of law, please feel free to contact our office to speak with someone today.

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## Breaking Up is Hard to Do: Plan for the Successful End of a Business Partnership

People form business relationships with the best of intentions. However, when forming a new business, often they are more excited about getting into the business and doing “it” than anything else. Of course, the last thing they think about are the legal details. That can be a real danger. Left ignored, details that seem tiresome or unimportant at the outset lead to big problems later—and can even destroy a business. The stress of battling a partner over details and issues no one considered ahead of time is enormous. It is better to plan ahead.

First, when selecting a business partner, think carefully and choose wisely. Do you even need a partner? Maybe not. If you do, that person should bring something substantial to the table—like deep pockets or industry connections. Before entering into any partnership, do some due diligence. It might be awkward, but even if you get along fine, ask for financial statements and a resume that includes the names and phone numbers of past investment partners.

Be sure to select someone who complements, rather than mirrors, your own skills. However, while complementary skills and a shared vision are a good starting point, you should never underestimate the importance of actually liking your partner.

Then, get down to the nitty-gritty: hire a lawyer and form a legal entity. The legal process forces partners to face tough issues right at the outset. Legal documents will clearly define the specific roles each partner is expected to play, as well as address other issues; like how to bring in another partner or drum up additional financing. Divide business roles according to each individual’s strengths. It may seem logical and fair to split ownership into equal 50% shares, but this ownership structure can impair decision-making in the future. Instead of having decisions stalemated by a disagreement, consider a 49% - 51% split.

Discuss possible exit strategies. It seems counterintuitive, but the best time to begin exploring how to end a business partnership is at the outset. Of course, in a perfect world, all partnerships would last until all of the parties involved are ready to sell, merge or otherwise move on to new things. It is seldom that simple. The more likely scenario is that one partner will end up buying out the other, so it’s wise to put a buy-sell agreement in writing by which partners agree in advance that should a dispute arise later on, one partner can buy out the other.

For a partnership to be successful, all parties involved must agree on the same strategic direction of the company. A winning business partnership capitalizes on the strengths and skills of each partner. A strong business partnership is built on an open, communicative relationship. Meet on a monthly basis to share grievances, review roles and provide constructive criticism.



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## Meet Christine Kahvejian

As I enrolled the last of my three young children into full-time school, I began to ponder the possibility of once again joining the work force. A new career at age 35? The idea seemed both appealing and extremely frightening. What would I do? Where would I start? Having been a stay-at-home-mom since 2004, albeit with a brief stint as a Pilates studio manager, I was intent on finding work that inspired me and made full use of my unique strengths and talents. But what were they? I quickly started to draft a list of some key pre- and post-baby experiences.

**Education:** BA Industrial Relations; *Cordon Bleu Paris* Pastry and French Cuisine Degree

**Career:** Fashion Merchandising and Sales; Importing

**Hobbies and Volunteering:** Cake Decorating; Charity Fundraising

What skills had I acquired from these experiences? Mostly, I considered myself to be a good communicator, a real “people” person and effective negotiator, artistic, imaginative and passionate. Great!

But don’t many people possess these skills? Aren’t there younger, more educated people with these talents? What made me different? Perhaps motherhood had changed me? I definitely felt more patient, sensitive and mature. But how would I present myself to prospective employers and more importantly, what kind of work was I looking for? I asked these questions to myself, my family and my friends for months-on-end. Finally, the answer came; loudly and unexpectedly. Whilst on a lunch date with my good friend, Mia Rosenblatt Tinkjian, she announced: “*K&G* is in search of a legal assistant and you would be perfect for the role.”

The rest, as they say, is history. Soon after that day, I met with Steven Konowitz, who both surprised and impressed me in his ability to think outside of the box. What I lacked in job-specific education, I made up for in personality and willingness to learn. The rest of the team turned out to be a talented and refreshingly witty bunch. Thanks to *K&G*, the past 4 months have been a rollercoaster ride full of intellectual challenges, emotional rewards, educational experiences and lasting friendships.

As the latest recruit of *Konowitz & Greenberg*, I look forward to working with you in the near future.



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## Massachusetts Alimony Reform: A Long Awaited and Welcomed Change

The Massachusetts Senate and House of Representatives have passed the Alimony Reform Bill, and it is expected to be signed by Governor Deval Patrick. Once signed, the new Alimony Reform Act will become effective on March 1, 2012. The bill, having been passed at the recommendation of a special task force appointed in 2009, marks the first time in two decades that the Legislature has updated the Commonwealth’s alimony laws.

In Massachusetts, alimony is governed by Massachusetts General Law, Chapter 208, Section 34, but the existing statute is very vague, giving the court broad discretion and a minimum amount of guidance in awarding alimony. For most attorneys and litigants, trying to figure out alimony payments and duration has been a nightmare because they have had no clear formula to use, unlike child support calculations.

In contrast, the new statute will provide clear directives regarding the calculation of alimony payments, expressly dictating amount and duration. While there is still some discretion for the courts, there is now much greater certainty. Having clear and certain numbers helps both the courts and attorneys to negotiate a proper and fair settlement for parties in a divorce.

The new alimony law provides for 4 different types of alimony: General Alimony, Rehabilitative Alimony, Reimbursement Alimony and Transitional Alimony.

### General Alimony

General Alimony refers to what we traditionally think of as alimony. It is the periodic payment of support to a recipient spouse who is economically dependent on his or her former spouse. Under the new statute, the length that General Alimony payments may last depends on the length of the marriage:

- If marriage is 5 years or less, then alimony payments are for no more than half the length of the marriage
- If marriage is more than 5 years but less than 10 years, then alimony is no more than 60% of the length of the marriage
- If marriage is more than 10 years but less than 15, then alimony is no more than 70% of the length of the marriage
- If marriage is more than 15 years but less than 20, then alimony is no more than 80% of the length of the marriage
- If the marriage is more than 20 years, alimony payments can be lifetime.

General Alimony is terminated upon death, remarriage of the recipient spouse, or cohabitation of the recipient spouse. General Alimony cannot be reinstated by a modification following the remarriage of the recipient spouse, but can be reinstated following the breakup of the cohabitation. General alimony will terminate upon the payor reaching retirement age.

### Rehabilitative Alimony

Rehabilitative Alimony is the periodic payment of support to a recipient spouse who is expected to become economically self-sufficient with a certain period of time. Under the new law, Rehabilitative Alimony may be ordered for no more than 5 years initially, but may be extended by order of the court.

### Reimbursement Alimony

Reimbursement Alimony is the periodic or one-time payment of support after a marriage of not more than 5 years to compensate the recipient spouse for economic or non-economic contribution to the financial resources of the payor spouse. These payments are terminated upon death or on a specific date, but cannot be modified and are not calculated based on income.

### Transitional Alimony

Transitional Alimony refers to the periodic or one-time payment of support after a marriage of not more than 5 years to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce. Transitional Alimony may be ordered for no more than 3 years and cannot be modified. The amount of alimony will be 30-35% of the difference between the parties’ gross income.

This reform is long overdue since the Massachusetts alimony statute is outdated and lags behind the reform of most other states. If you have any questions on how the Alimony Reform Bill affects your existing alimony payments, please contact our office.

## LATEST NEWS

On November 9, 2011, Arlene Kasarjian and Karen Greenberg will be presenting topics during the National Business Institute’s seminar, “Adoption Law: Start to Finish.” The seminar will take place at the Newton Marriott.

For more information, please visit [www.nbi-sems.com](http://www.nbi-sems.com).

Konowitz & Greenberg is a proud supporter of the **Lily Konowitz Foundation for Women’s Safety**, an organization whose mission is to empower women through self-defense education. This will be accomplished in several parts: by donating equipment to organizations teaching self-defense and rape prevention classes; offering grants to allow women to attend self-defense classes and through educational material to provide information on rape prevention and self-defense.

[WWW.LILYKONOWITZFOUNDATION.ORG](http://WWW.LILYKONOWITZFOUNDATION.ORG)





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## News from the Estate Planning Department

You may or may not be aware that the *Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010* contains several changes that favorably impact estate planning and taxes through 2012. These laws, however, will expire on December 31, 2012, and without further action

by Congress, will revert to the laws in effect in 2001, which are much less favorable.

### Highlights for 2011 and 2012 are as follows:

1. The exemption amount increases to \$5 million per person for federal gift, estate and generation skipping transfer taxes (\$10 million for a married couple);
2. The top marginal federal gift, estate and generation-skipping transfer tax is reduced from 45% to 35%, and a full "step-up" in basis rule applies for all assets included in a decedent's gross estate;
3. "Portability" of unused estate tax exemption in the estate of the first spouse to die, thereby allowing the surviving spouse's estate

to take advantage not only of his or her own exemption but also any unused portion of the exemption of his or her spouse.

Since this Act is only good for 2011 and 2012, if Congress fails to act to extend this law then, on January 1, 2013, the federal gift, estate and generation skipping transfer tax exemptions revert back to \$1 million and the top tax rate of 55% returns. Because the Act is only temporary, it is a good idea to review your current estate planning documents to make sure they still accomplish your desired goals. While no changes may be needed for some, for others there may be planning opportunities to take advantage of. If you do not have an estate plan or have not reviewed your current estate plan in at least 5 years, I urge you make an appointment to come to our office for a no-fee consultation.

Whether or not your estate may be subject estate taxes, do not miss out on the opportunity to plan for how and when your assets are distributed upon your death, avoid probate, limit claims of creditors and minimize disputes among family members.



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## Contested Adoptions Are Not Child's Play, Particularly in the Appeals Court

Every year, thousands of adoptions make their way through the courts without a single blip. However, there are times when problems arise, and an adoption case can quickly become very complex and even completely unravel. Over

the years, *Konowitz & Greenberg* has been involved in several such cases, and has worked hard to obtain the best possible outcome for its clients.

In the spring edition of *The Brief*, I shared a case where, on behalf of the adoption agency, I prevailed in terminating the rights of a birth father who came forward to "claim" his child. Given the particular facts and circumstances of the case, the Probate and Family Court found the birth father unfit to parent the child. The father filed an appeal in the Appeals Court, claiming that the judge abused her discretion, that she misapplied the law, and that the Plaintiff adoption agency failed to prove by clear and convincing evidence that the father was not fit.

The birth father then filed a motion to Stay the Judgment of the Probate Court, claiming that if the adoption were to go forward, prior to his appeal being heard, he would be irreparably harmed. After the motion was denied by the Probate Court, the request was repeated in the Appeal Court, with the birth father arguing that the stay was an automatic right, in accordance with the Rules of Civil Procedure.

Oddly, there is no case on point that specifically states whether the Rules of Civil Procedure or the Massachusetts Rules of Domestic Relations Procedure govern adoptions. If the Rules of Civil Procedure apply, an appellant is entitled to an automatic stay, except in equity actions. If the Massachusetts Rules of Domestic Relations Procedure apply, there is no automatic stay pending the appeal of a court decision.

Here, the pivotal question with respect to the right to a stay was whether the termination of parental rights was considered a custody matter, which is governed by the Massachusetts Rules of Domestic Relations Procedure. Arguing that the termination of parental rights was a denial of custody to a parent, and that the law should favor speedy resolution of custody issues, we prevailed on appeal and the motion for a stay was again denied.

At this point, you may be thinking, isn't it obvious that the termination of parental rights is a custody issue? In a strictly logical world, yes. However, one cannot rely on assumptions (or even logic at times) in determining legal rights or when applying court rules. Hence, the Appeals Court functions not only to determine whether there was an abuse of discretion, or whether the law was misapplied, but also plays a key role in clarifying ambiguities and the law's intent. Here, while the procedural minutiae can prove frustrating to many, there was an upside: a young boy was finally adopted by the family that had raised him since he was an infant. If you, or anyone you know, find themselves in a situation where an adoption has gone awry and need specialized assistance, please give me a call.