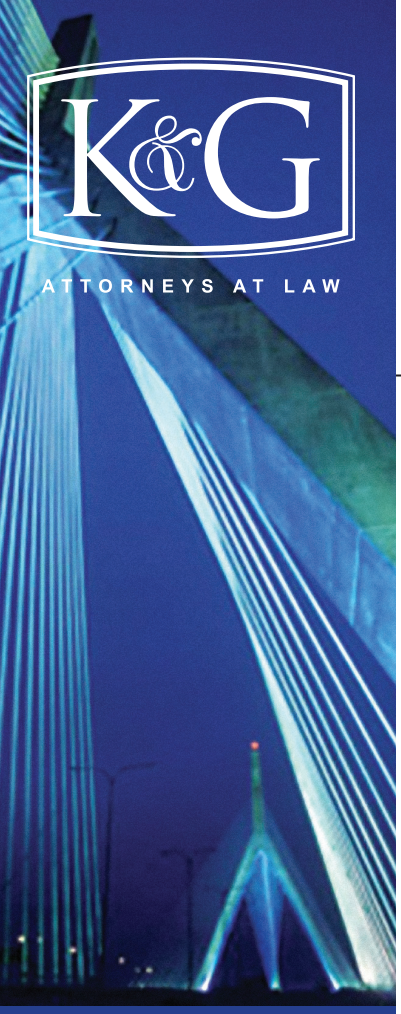

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THE BRIEF

of konowitz & greenberg

Helping our clients navigate difficult waters...

Fall 2012

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Gestational Carriers: The Wild Frontier

I recently represented a married couple who wanted to adopt a child soon to be born to a gestational carrier, and who stepped in when the relationship between the carrier and the intended parents of the child drastically went wrong. The gestational carrier had been implanted with an egg fertilized with the intended father's sperm, but that was not from the intended mother; a fact that was not initially disclosed and was not revealed until well into the pregnancy.

Neither party was represented by attorneys when they entered into their contract; a contract they had pulled off of the internet. The contract contained numerous problematic provisions, and was rife with unrealistic and questionable terms. The intended parents were from a state that did not allow gestational carrier contracts, so the contract called for the law of a state that does recognize such contracts to apply ("choice of law state"). It also recited that that state was where the contract was executed. However, the gestational carrier was not from that state either, meaning that, when push came to shove, the courts may have been hesitant to accept the contract's choice of law provision.

The central issue in the case, however, was that the contract provided that the gestational carrier would abort the pregnancy if the treating physician determined her life was in danger, or if the fetus had severe abnormalities. The contract also provided that, upon birth, regardless of the child's condition, the intended parents would take custody of the child, assume all parental rights, and assume the exclusive responsibility to care for the child.

During the pregnancy, it was discovered that the fetus had severe abnormalities and the intended parents demanded that the gestational carrier abort the fetus. The gestational carrier refused. In response, the intended parents refused to honor other terms of the agreement, leaving the gestational carrier without health insurance, and funds for medical costs and living expenses. The intended parents also said that they would not parent the child, but instead would turn the child over to the state. The gestational carrier relocated to a state that does not recognize gestational carrier agreements ("relocation state") and found a family with success adopting other "special needs" children, and who were eager to adopt the expected child.

Petitions were filed in both the choice of law state and in the relocation state. The choice of law state was asked to declare the intended parents the legal parents and issue a pre-birth order to that effect. Ultimately, no court orders were necessary. The intended parents eventually conceded that the best interests of the child would be served by allowing the family who wanted this child, to adopt.

An important lesson to be learned here: if you are considering being a gestational carrier, or building your family with this approach, be careful, consult a reputable agency that screens and qualifies the carriers and the intended parent, and talk to competent counsel, including fellows of the American Academy of Assisted Reproductive Technology Attorneys (www.aaarta.org).

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If I Ignore It, Will It Just Go Away?

It is a natural tendency to ignore problems or put off the unpleasant in the hope that, with time, it will just go away. A recent decision from the Vermont Supreme Court affirmed a trial court victory for our client, but illustrates that simply ignoring a problem, even for decades, will not necessarily make the problem go away and, ultimately, may leave a mess that everyone else will have to deal with.

In the Vermont case, our client was a widow sued by her deceased husband's ex-wife. The ex-wife asserted that, under the terms of her separation agreement, she was entitled to the proceeds from a sale of stock by her ex-husband, which proceeds were allegedly to be left to her upon his death. The ex-wife sought to have a constructive trust imposed for her benefit on the home and all of the savings of our client.

What is unusual about the case is that the divorce had taken place in the mid-1970s; the husband paid alimony to his former wife for more than thirty years, until his death in 2007, and the stock in question had been sold in 1985. Over the decades, the two had exchanged letters and conversations contesting the ex-wife's right to the funds, but neither had ever taken any definitive step to resolve the dispute, leaving the door open to the ex-wife to file suit against our client seeking those funds after her husband's death.

Following a trial in the Vermont Superior Court, the judge found that the ex-wife was aware of the sale of stock in 1985 and had been on notice that her ex-husband may be spending those proceeds for living expenses and to pay alimony since at least the early 1990s. The Court concluded that, as a result, the ex-wife's claims were barred by the statute of limitation and laches. The Court also found, among other things, that the ex-wife had failed to satisfy her burden of tracing the proceeds to her ex-husband's widow, our client, and so could not prove that any of our client's assets were derived from the 1985 stock sale. Based on these findings, the judge ruled in favor of our client on all counts.

The ex-wife then appealed to the Vermont Supreme Court, arguing that the trial court had not applied the correct law to the case, and that it was not necessary to trace the proceeds from the stock sale to her ex-husband's widow, since all of the assets had been jointly held. After briefing by each party and oral argument, the Court affirmed the decision in favor of our client.

While addressing each of the trial court's conclusions, the Vermont Supreme Court focused its decision on the plaintiff's inability to prove that any assets from the husband's sale of stock in 1985 were traceable to the assets held by his widow in 2007. The Court found that it was impossible to determine from the evidence at trial whether any money from the sale had gone to pay for the house. With respect to our client's savings, the court noted that those funds had been held as joint accounts prior to the husband's death, meaning it was "highly likely" that some of those funds came from the stock sale, but that "we do not believe that likelihood is sufficient for plaintiff to meet her burden of proof."

Of course, it is always satisfying to deliver a victory for a client. However, it would have been far better to have squarely addressed the issue in the 1980s, 1990s or even the early 2000s, while the husband was still alive, than to simply ignore the problem in the hope that it would go away, and ultimately to leave the headache of dealing with the problem to loved ones.

As with this case, many disputes and disagreements can fester for years without a definitive resolution. Should you ever find yourself dealing with such a situation, rather than pretend the problem does not exist, you would be well advised to develop and follow a course of action that resolves the matter once and for all.

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Don't Wait Until It's Too Late to Hire an Attorney

People often hire an attorney when they are faced with a lawsuit. I can't count the number of times I have received the phone call where the stressed out person on the other end of the phone is saying, "Help. I got served with papers and I don't know what to do." Let's be clear people, if you are already being served with court papers, you waited too long to call an attorney, and your lawyer is going to have to do some racing around to catch up. Could this situation be costly? Most likely. Could this have been avoided? Almost certainly.

As my fellow associate, Rosalind Kabrhel, stated in an article published in our last newsletter, the role of the attorney is to act as a counselor to individuals who are not trained in the practice of the law. It costs less in terms of money, time, and personal stress to meet with an attorney before you sign a contract, negotiate a deal, sell a company, or draft a will, than it does to deal with a lawsuit. An attorney can advise you as to whether you are making choices that are in your best interests, and can assist you in fully understanding documents you have been asked to sign. So, don't wait until you are faced with a court date to hire an attorney. Like in medicine, preventative care is less costly than a visit to the emergency room.

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Highlights of the Newly Enacted Uniform Trust Code

On July 8, 2012, Massachusetts enacted the Uniform Trust Code (UTC), which codifies the existing laws pertaining to trusts, but also clarifies, simplifies and modernizes the rules governing the administration of trusts. Massachusetts joins more than twenty states in adopting the UTC with the intent of providing trustees with greater flexibility in the administration of trusts, reducing the need for and frequency of court intervention to resolve disputes, and clarifying the rights and powers of trustees and beneficiaries. With a few exceptions, the UTC applies to all trust instruments whenever created, and generally replaces and expands upon the trust law provisions of the Massachusetts Probate Code, which took effect on March 31, 2012. Highlights of the UTC are as follows:

1. Trusts created after the enactment of the UTC are now presumed revocable, unless the trust includes express language to the contrary. This is a reversal of the longstanding Massachusetts default rule that presumed trusts were irrevocable.

2. The rules for modifying and terminating a trust have been relaxed. For example, if the settlor and beneficiaries agree, a court may approve the modification or termination of a non-charitable trust even if it is inconsistent with the original purpose of the trust.

3. The duties and powers of trustees are outlined in detail.

4. A trustee now has the duty to keep certain beneficiaries informed of the trust administration, including notifying the beneficiaries within thirty days of being appointed trustee, or the date on which the trust becomes irrevocable, of the trust name and address, and to provide annual statements of account to current beneficiaries.

5. Interested parties may now enter into binding, non judicial, settlement agreements to resolve disputes regarding trust interpretation, approval of accounts, directions to trustees, trustee liability and trustee powers.

6. A trustee and beneficiaries may now enter into compromise agreements to resolve questions.

7. A trustee may now be removed without cause, where removal is in the best interests of the beneficiaries and is not inconsistent with the trust purpose.

8. Trustees may now act by majority decision, unless the trust provides otherwise, reversing prior law which required trustees to act unanimously.

9. Allows for the establishment of "pet trusts" to facilitate and provide care for one or more animals.

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The Final Word by Steven Konowitz

Advisory Boards, Who Needs Them?

A company's success depends on people—and not just those who work for it. In a typical corporate situation, the shareholders elect a Board of Directors who hire the officers who actually run the company. But if you are a small closely held company, should you also have an Advisory Board?

After working with many companies, and talking with business owners about the challenges they face in running their business, I firmly believe that no business is too small to benefit from having an Advisory Board. Basically, an Advisory Board is composed of individuals chosen to help grow and develop the business. Unlike a formal Board of Directors, Advisory Board members serve at the pleasure of the business owner and offer advice; they do not dictate instructions or directions. Boards of Directors have certain fiduciary obligations to the company and its owner/investors. In contrast, members of an Advisory Board have no such legal obligations or responsibilities. This allows members to focus on their service to the executive regardless of the politics of management's relationship with the company's owners.

To set up your Advisory Board, look for individuals whose business acumen you admire. Include members with a variety of areas of expertise, both in general business and specific to your industry. Establish a term of office and make your expectations clear—when and for how much time do you want them available, and what are you offering in return? A position on your Advisory Board shouldn't necessarily mean a lifetime commitment; stagger two- and three-year terms to keep the board fresh.

Limit the number of Advisory Board members to five or fewer. This ensures efficiency and limits the cost of establishing and maintaining an Advisory Board. Members should be compensated for their attendance at each meeting, and while the fee need not be excessive, it should be fair. They will be expected to meet with you (usually on a quarterly basis) to discuss and advise.

You will also need to prepare for each meeting of your Advisory Board by preparing an agenda which you'll need to distribute ahead of time. Perhaps more difficult, you need to be prepared to be completely open and frank with your Advisory Board, sharing both your hopes and your fears. They won't be able to advise you properly or well if you hold back.

Finally, keep your Advisory Board informed of your company's activities between meetings. The fact that they've agreed to be on your board means they care about your company, and keeping up-to-date will help them be of greater value to you.

Putting together a strong Advisory Board, and using it well, can mean the difference between success and failure. Companies seeking an opportunity to build on growth and success, or trying to negotiate tricky times should be able turn to a special group of individuals to benefit from their insights and talents. Your Advisory Board should be composed of people with a genuine interest in your business and a desire to see it do well. They will be on your side; people with no axe to grind who want to listen to you and advise you. Above all, they will want to contribute to your company's well-being, dealing with issues of operation, growth, financing, conflicts of interest, investment strategy options and human resources.