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Restraining Orders... to Do, or Not to Do

Massachusetts General Laws Chapter 209A, $1 provides that a person who believes he/she is a victim of abuse may seek a restraining order—in the Superior, District, Probate or Municipal Courts—which prohibits the alleged abuser from coming into contact with the victim. A violation of the restraining order can be grounds for arrest and incarceration.

In order to obtain a restraining order, certain requirements must be satisfied. First, the victim must have or have had a relationship with the alleged abuser, such as residence in the same household, relationship by blood or marriage; a child in common; or a substantive dating or engagement relationship.

If the relationship requirement is satisfied, the victim must demonstrate that the other person attempted to cause or caused physical harm, placed the other person in fear of imminent serious physical harm, or caused him/her to engage involuntarily in sexual relations by force, threat or duress. The standard is a high one and proof can often be difficult. For example, not all victims can prove they were physically harmed or in fear of imminent serious physical harm. Moreover, abuse is easily disguised, such as extreme verbal abuse aimed at humiliation.

Another problem with seeking a restraining order is the understandable fear that many victims fear of consequences in the event the request for a restraining order. This worry often overpowers many victims of abuse, causing them not to seek an order at all.

Practically speaking, what's a victim to do? Simply put, by one means or another, the person must find a way to feel secure and confident enough to get out of the abusive relationship. There are many possible ways to accomplish that goal, besides a protective order. For example, the victim may contact the local police and learn whether he/she may qualify for a license to carry mace. Applying for a license to carry mace is similar to applying for a license to carry a firearm. The standard, however, is not as high.

If you, or someone you know, is caught in this living nightmare, please encourage them to contact an attorney or other professional experienced with handling these types of situations.

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Informal Probate is Coming to Massachusetts

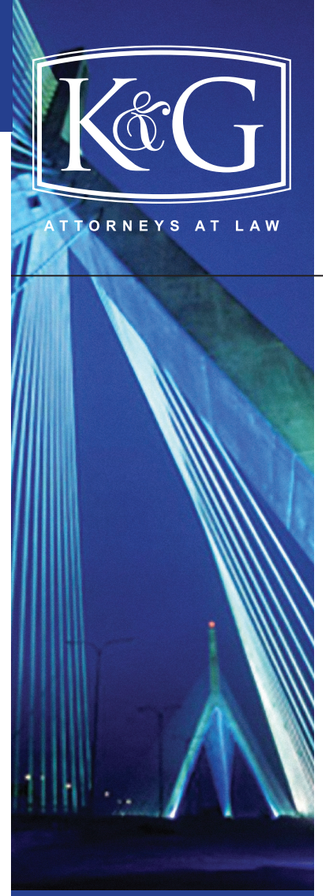
The laws in Massachusetts affecting the probate of Wills, dying without a Will (intestate), and the administration of estates have undergone a complete transformation. Effective on July 1, 2011, the Massachusetts Probate Code (the "Code") repeals the majority of the existing chapters and statutes on probate law in an effort to simplify, streamline and clarify the process of settling a person's affairs in a manner consistent with his or her intent. One of the most significant changes is the introduction of informal probate.

In order to provide for the transfer of property or the nomination of a personal representative of the estate, a Will must be declared valid by the Probate Court. In Massachusetts, 96% of all estates that are probated are uncontested and yet must be formally probated; a costly and time consuming process that is overseen by a judge. Formal probate requires the issuance of a citation, service of process and publication, which can easily delay the appointment of an executor or administrator to manage the assets of the estate for up to six months. Furthermore, the Court must approve interim and final accountings of the assets of the estate before the estate can be closed.

In contrast, under the new Code, estates that are relatively routine and involve no controversy will be administered through an informal probate procedure overseen by a court magistrate.

Under the new rules, a person seeking informal probate and appointment as a personal representative of the estate must give at least seven days notice of the petition to probate the Will to all interested parties. If the petition is satisfactory, and there are no objections, the court magistrate will grant the petition and appoint the personal representative to manage the affairs of the estate, effective immediately. After the appointment, the personal representative will administer the estate virtually free of court supervision. Rather than file accountings with the court for approval, the estate can be closed once the personal representative files a sworn statement with the court that debts, expenses and taxes have been paid and distributions have been made to the persons entitled to them. The Code still provides for formal probate proceedings in the event an objection is made by an interested person to the Will or to the proposed personal representative.

For those dying without a Will, the Code, among other improvements, gives the surviving spouse a larger share than is provided for under current Massachusetts law. In addition, the Code imposes time limits on the administration of informal and formal probate proceedings to provide closure to estates, rather than allowing them to linger on unresolved. There is no question that the changes in probate procedures under the Code will save the vast majority of estates substantial amounts of time, money and frustration.



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THE BRIEF

of konowitz & greenberg

SPRING 2010

Helping our clients navigate difficult waters...

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Dad Law:

I Cannot Believe They Are Adults (Part 2)!

With my older daughter now a second semester freshman, I never thought that there would be a second part to "legally she is an adult." I am confident that, as an adult and as a college student, she is prepared to understand and appreciate what is asked of her. Of course, I also can say with confidence that I hope she will only need to apply such capacities in a different context than what follows!

The Massachusetts Appeals Court recently ruled that Boston College police officers acted legally when they searched student dormitory rooms without a warrant. The search, prompted by reports that the students had weapons, found weapons—which were legal, but violated college rules—and also drugs. In the case, a resident director called campus police to say that she had received reports that a student living in the dormitory had been bullying students and waving a knife. Police officers and campus officials then went to the room in question, knocked, and eventually entered when the students living there opened the door.

While the students first denied having any weapons, they eventually admitted to having plastic replicas. At that point, the police officers asked to search the room for more weapons. The students signed waivers indicating that they had received Miranda warnings and consented to the search.

The subsequent search turned up a large amount of drugs, and the students were arrested and indicted on charges of trafficking and possession of illegal drugs with intent to distribute.

The Appeals Court found that the search was legitimate. Among the highlights of its ruling:

- Since Boston College's policies clearly banned the weapons, and the police officers were acting on a legitimate report about weapons and had every right to enforce the college's rules.
- The Court rejected the students' argument that the college, by not telling them that they didn't have to consent to a search, at that moment, made them think they had no choice.
- The Court noted that the students were given —and signed—a waiver. "The defendants were college students whose age and level of education equipped them to understand what was being asked of them and that they had an option to refuse…A person of average intelligence would necessarily comprehend that refusal was an option."

Going to college does not mean leaving your common sense at home with your parents! Hopefully that is a concept that all of our children—adult or not—can appreciate.

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.

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Intend What You *"Will..."*

Konowitz & Greenberg recently represented the Executrix of an Estate in a Will contest filed by the adult children of the decedent, and successfully obtained summary judgment in favor of the Executrix, striking the objections to the Will. While the Court ultimately upheld the validity of the Will, the challenge created considerable expenses for the Estate, and the case highlights the importance of keeping your Will up to date and of making your wishes upon your death clear and unambiguous. Where your wishes are not clear, it will be left to the courts to try to determine your intentions and what you would have wanted.

In the case, Karen Greenberg, who was named Executrix by the decedent's Will, asked the Probate Court to approve the Will, which had been prepared and signed in 1990. The Will left the bulk of the decedent's multi-million dollar estate to several charities. The decedent's children objected to the Will, arguing that the decedent had revoked her Will prior to her death and that the decedent should be found to have died intestate, or without a Will. Under the intestacy rules, the Estate would then have passed to the children.

In support of their claims, the children asserted that the decedent had told them on various occasions that she had revoked her Will, that she was planning to make a new Will, and that she had made a new Will. While no new Will was ever found, the original 1990 Will had "X" marks written in pencil through numerous paragraphs in the Will, including the paragraphs leaving the majority of the Estate to the charities. In addition, a post-it note was found by one of the children which read: "This Will is null and void. It is too old and no longer applies." The child, however, could not recall where or when she found the note, or if it was with the Will.

The law in Massachusetts is very clear on the ways a Will may be cancelled or revoked. "Revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation." Worcester Bank & Trust Co. v. Ellis, 292 Mass. 88, 91 (1935). Specifically, revocation of a Will may be accomplished "by burning, tearing, cancelling or obliterating it with the intention of revoking it, by the testator himself or by a person in his presence and by his direction." Id. Thus, two elements must be proved by the party challenging a Will's validity: (1) an appropriate outward act by the testator, and (2) a simultaneous intent to revoke.

In asking the Court to grant a summary judgment dismissing the challenges to the Will, Konowitz & Greenberg argued that, even assuming the "X" marks were made by the Decedent and that the Decedent had written the post-it note, there was no evidence when the marks and note were written, why they were written or what the decedent's intention was in making the writings. The Decedent had conversations with her attorneys over the years, including in 2001 and 2004, in which they had discussed the Will and the Decedent had expressly stated that she did not wish to make any changes to it. Given these facts, Konowitz & Greenberg argued that the children could not satisfy their burden at trial of proving that either the marks on the Will or the note were made by the Decedent with the intent of revoking her Will, or that the Decedent would have wanted to die intestate.

The Probate Court agreed, and entered summary judgment in favor of the Executrix, striking the objections to the Will filed by the decedent's children, and finding that the provisions of the Will would be enforced.

The case is now on appeal. Stay tuned.

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When Taking Pen to Paper

You: An artist or creative person who was just offered the opportunity to show or publish your work. (Good Job!) You are overwhelmed with excitement and you are as nervous as can be.

The Scene: An office, studio or gallery where you have just been handed a contract by the gallery owner or publisher.

The Question: What do you do?

Initially, you, like many artists who have worked for years for such an opportunity, might want to shout out "Where is my pen? I am ready willing and able to sign!" However, in this instance it is best to keep those impulses under control, take the contract home, and take time to review it carefully. If you have questions or concerns about the meaning of any terms of the contract, it is a good idea to consult an attorney.

It is fundamental contract law that some basic information needs to be spelled out in any valid contract, including the parties, the subject matter, consideration, and mutual assent. But what does that mean? Most simply it means that there must be an agreement between the parties and that something of value be given in exchange for the goods. Often times artists forget that the contract is an offer, and that the offer does not require immediate acceptance. Typically, there can be some room for negotiation. Don't sign the first deal you are offered, unless you are certain it is the best deal you will get, and certainly not without carefully reviewing and understanding the terms of the contract.

If you would like to discuss these issues, please feel free to contact Mia Rosenblatt Tinkjian, mrt@kongreen.com. Mia received her MFA from the School of the Museum of Fine Arts, Boston, and her law degree from Boston College Law School. She recently participated in *Miller Street Open Studios* in Somerville and in a group show at *The Little Gallery Under the Stairs* in Lynn.

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Snow and Ice Liability

Are Changes Afoot?

Winter presents challenges to property and business owners regarding the removal of snow and ice from their premises, and making the premises safe for invitees. It is important for property owners and businesses to understand the law in this area and to be aware of the potential changes in the law that affect a property owner's exposure to liability in the event someone is injured on your property due to a fall on ice or snow.

The rule in Massachusetts to determine liability in cases where there has been a slip and fall on snow and ice has not changed in over one hundred years. The central question asked by the courts is whether the fall occurred due to a natural or unnatural accumulation of snow or ice. If the fall was caused by an unnatural accumulation, liability may exist. But while the rule appears straightforward, the large body of case law that exists on this topic shows that how the courts answer this question is somewhat unpredictable and confusing—Was the snow shoveled in a reasonable manner given the location and traffic around the premises? Did the ice form due to water dripping from a gutter or roof overhang? Should the owner have salted in addition to shoveling?

However, the Supreme Judicial Court recently heard arguments on a case that may alter the way these cases are evaluated. In accepting the case of Papadopoulos v. Target Corp., the Court specifically asked the parties to address the issue of whether the distinction between a natural versus unnatural accumulation of snow and ice should continue to be a factor in determining the negligence of the property owner. In Papadopoulos, the plaintiff fell on ice covered with dirt and sand when exiting a Target store in Danvers. He fractured his hip in the fall, and subsequently sued Target and the snow removal company that had cleared the parking lot that day.

The trial court granted summary judgment to the Defendants, stating that the ice either had fallen from a pile of plowed snow, or had melted and refroze. In either case the Court said that the plaintiff fell on a natural accumulation. In accepting this case for review, the SJC has struck fear in the hearts of some property owners that a change in the law may increase their exposure to liability.

Indeed, if the natural versus unnatural accumulation rule is abandoned, Massachusetts could adopt a "reasonable care" standard, as advocated by the Massachusetts Academy of Trial Attorneys in an amicus brief filed in this case. This analysis would place a greater burden on property owners to continuously inspect their property and to ensure employees or agents regularly address any accumulation of ice or snow. While, of course, safety is a goal everyone should strive for, such a burden would be complicated, subjective, and expensive, particularly in this part of the United States. Such a rule would also expose such property owners to much greater liability. The defendants in this case rightfully argue that adoption of a "reasonable care" standard in snow and ice cases would impose an unreasonable maintenance burden on many property owners. The Defendants cite the example of a plowed strip mall parking lot—the snow must go somewhere, and asking property owners to monitor the freezing, melting and refreezing of snow piles, the change in their shape due to tumbling or third party interference, is unreasonable.

How the Court rules in this case may impact your obligations with respect to the maintenance of your property. Whether you are a business person, a landlord, or simply a homeowner, this decision is one to watch.

K&G ATTORNEYS AT LAW

LATEST HEADLINE

Karen K. Greenberg, currently the Immediate Past President of the American Academy of Adoption Attorneys is presently drafting amendments to the Academy's present Policies and Procedures Manual to incorporate its newly adopted specialty division The American Academy of Assisted Reproductive Attorneys.

SPEAKING ENGAGEMENTS

Arlene Kasarjian will be presenting a workshop on "Estate Planning for Adoptive Families" at the annual conference of the Adoption Community of New England, Inc. (ACONE) on April 17, 2010 at Bellingham High School in Bellingham, Massachusetts. For more information, please call Arlene Kasarjian or go to www.adoptioncommunityofne.org.

In February 2010, Arlene spoke at Boston College Law School, in a program sponsored by the Career Services Office, to second and third year law students about working in a small firm.

Michael Leary, Paralegal, continues to speak each semester to the "Introduction to Paralegal Studies" class at Mass Bay Community College.