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SUMMER 2010

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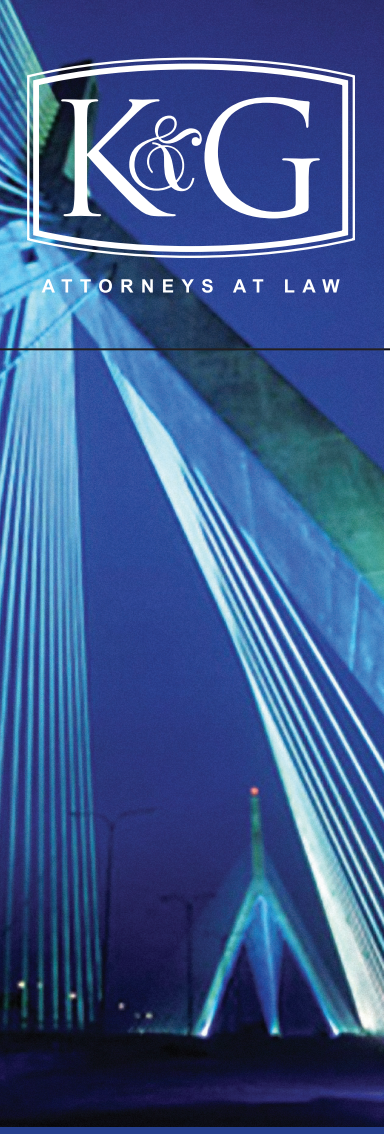

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The Many Costs of Divorce

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This article is the first of several which will address the many costs of a divorce. The first cost to come to mind for most people is probably legal fees. Legal fees can add up quickly and are often problematic for many litigants who may already be emotionally distraught from their own circumstances.

Fees vary from attorney to attorney, and from firm to firm. When hiring an attorney to represent you in a divorce, the following fee issues should be addressed and confirmed:

1. The attorney's hourly rate;
2. Whether other members of the firm may be working on the case; and if so, their respective rates;
3. Whether a retainer is required;
4. The amount of the retainer required;
5. Whether a minimum on-going retainer is required at all times;
6. As realistic as possible range of legal fees which may be incurred;
7. The office's policy on incurring other costs, other than time billed for legal work; and
8. How often an *itemized* invoice is provided, documenting the legal work done on your behalf.

It is also important to be aware of Supreme Judicial Court Rules Rule 3:07 Massachusetts Rules of Professional Conduct—Rule 1.5(d) Fees, which prohibits an attorney from entering in to a fee arrangement in a domestic relations matter where the payment or the amount of the fee is contingent upon the securing of a divorce or the amount of alimony or support or property settlement.

Courts do have the discretion to award attorneys fees relating to a divorce. Attorney's fees may be requested at any time to allow the party to litigate or defend the action. The party must demonstrate that they intend in good faith to defend or prosecute the action. The court has the discretion to allow attorney's fees in accordance with M.G.L.ch 208, § 38 under the following circumstances:

1. To enforce court orders and judgments;
2. Where legal fees and costs are incurred as a result of misrepresentations or the concealment of assets by the other party;
3. For defending a baseless claim;
4. Where one party is found to be in a superior financial position to the other; and
5. For obstructionist conduct which prolonged the proceedings and caused the other party to incur additional legal fees.

Any time attorney's fees are requested, the most important documents, and only means to determine whether funds are available to satisfy the request, are the parties' financial statements. Rule 401 of the Supplemental Probate Court rules provides that upon request, and on ten days notice, the other party must furnish a signed, current financial statement to the court with a copy to the requesting party.

Should you wish to discuss any aspect of this article concerning legal fees anticipated in a domestic relations matter, which include not only divorce, but also children born out of wedlock, modification, custody, child support and contempts, please give me a call.

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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Kid's Law
(Part 1)

Having written twice about "Dad's Law" as it relates to my college-age daughter, I am now taking on a bit of a role reversal. As parents age, the process of starting to take over certain tasks and responsibilities for our parents can be one of the most distressing experiences of a lifetime. After a lifetime of looking to our parents for guidance, there comes a point when our parents begin to look to us for guidance.

For some elderly people, caring for their home has become more than they can handle financially or physically. Too much work needs to be done to maintain the home and keep it clean and livable, or the costs of repairs and maintenance may be too great. Others do not feel safe in their homes when they are alone, nor are they able to make quick decisions or movements. They may fear falling or other injuries occurring with no one nearby to help them. Still others find themselves unable to manage their finances.

Many of us promised in good faith, back when our parents were healthy, that we would never put them in a nursing home. That would be abandoning them, we thought, and pledged to care for them ourselves until they died. Admirable thinking. However, as years go by and care needs mount, we find ourselves faced with the fact that we simply cannot raise our children, work at our jobs and take care of our parents.

In all of these cases, as our roles in our parents' lives grow, difficult decisions must be made either with or on behalf of our parents. As you prepare to take on this role, remember how important it is that parents have a will, a durable power of attorney and a health care proxy. With these documents, a family member or caregiver can handle a parent's financial and legal affairs, and make health-related decisions should that parent become incapacitated. Without these documents, a family is limited in assisting an ailing parent.

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The De Facto Parent

Non-traditional family arrangements are more common than ever. Single individuals are seeking to become the legal parent of a child outside of a marriage or committed relationship, whether biologically or through adoption. Often, the child's legal parent enters into a relationship with someone who assumes caretaking functions for that child, and develops, over time, a significant bond with the child. When the relationship between the adults ends, it can present many emotional and legal difficulties with regards to the caretaker's continued relationship with the child. This situation has been especially prevalent in the gay and lesbian community.

Massachusetts Courts have recognized the de facto parent doctrine to help address this situation. A *de facto* parent is literally a parent *in fact,* though not *at law,* and might have the right to establish visitation with the child if it is found to be in the child's best interest.[1] In order to establish de facto parentage, it must be proven that the adult lived with the child and participated in the child's family with the consent and encouragement of the legal parent, performed caretaking functions *at least* as great as the legal parent, shaped the child's daily routine and addressed his or her developmental needs, disciplined the child, provided for education and care, and served as a moral guide.

Once a party is found to be a de facto parent, then visitation may be sought; but the Court must still be convinced that such visitation is in the child's best interest and that the child will suffer psychological harm if visitation is not permitted. Also, a de facto parent does not possess the same rights as a parent who possesses legal custody, such as the right to make important life decisions for the child or consent to medical treatment.

The burden of establishing de facto parentage and visitation is extremely high, and for good reason. An otherwise fit legal parent is afforded constitutional protections and extreme deference in determining what is in his/her child's best interests, and may have compelling reasons for terminating a child's relationship with an adult caretaker—reasons that may also have marked an end to the adults' relationship.

If you have questions regarding the de facto parent doctrine or your rights as a parent, please contact us for a consultation.

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[1]A de facto parent is never someone paid to provide caretaking functions.

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Tax Free Gifting

You may be aware that the federal estate tax, which was repealed for 2010, resumes in 2011 on estates with assets exceeding $1 million dollars. The Massachusetts estate tax remains in effect and also taxes estate assets over $1 million. In addition to worrying about estate taxes, the law also requires you to pay a gift tax, currently at 35%, if you gift more than $1 million during your lifetime. However, there are several simple, low cost strategies you can use now to transfer your wealth to family members without incurring significant legal fees or taxes.

1. The IRS permits you to give $13,000 in cash or other assets per year to each of as many individuals as you want without having to worry about the gift tax. Spouses can combine this annual exclusion to jointly give $26,000 to each of as many people as they like, tax-free. For example, a couple with an adult child who is married and has two children could make a joint cash gift of $26,000 to the adult child, the child's spouse and each grandchild—four people—providing the family with $104,000 a year. If some of the recipients are minors, their portion of the gift may have to go into a custodial account that designates an adult to oversee the money, generally until the child reaches age 21. Be aware that if you name yourself as the custodian, the funds could be considered part of your estate. Instead, you should name the child's parent, or some other person, who can use the money to purchase items or services for the child.

2. You can invest money in Section 529 education savings plans for your children, grandchildren or other relatives. Establishing these plans for relatives could relieve your children or grandchildren of the need to save for college at a time when they may be overwhelmed with current expenses. You can set up a separate account for each family member you want to benefit. Although your contributions to a 529 account are considered gifts, there are two unusual benefits: money in these accounts grows tax-free and it can be withdrawn tax-free, provided it is used to pay for college, a graduate, vocational or another accredited school, or for related expenses.

3. The IRS also permits lump-sum deposits of as much as $65,000 to a person at once ($130,000 for married couples), as long as you file a gift-tax return that treats the gift as if it had been spread over five years. However, if you die before the five years is up, the part of the gift that reflects the number of years remaining will be considered part of your estate. Also, if you need the money yourself, any earnings that are withdrawn are subject to income tax and a 10% penalty.

4. Without using your annual $13,000 exclusion, you can pay for tuition, dental and medical expenses of anyone you want as long as you make the payments directly to the providers of those services. This is an effective way to help family members with increasing tuition costs, whether for preschool, private school or college or even health care expenses, including health insurance premiums, orthodontia, medically necessary home improvements or home-care attendants.

5. You can lend money to family members at favorable rates as long as you formalize the loan. If you lend money to family members, for example to buy a house or a car or start a business, you have to charge a minimum rate of interest set each month by the Treasury, called the Applicable Federal Rate, to avoid potential gift tax and income tax consequences. Recently, the rate for long-term loans (those lasting more than nine years) and requiring monthly payments has been an extremely attractive rate between 4 and 5%. That's less than your family members would have to pay for a bank loan, assuming they could get one in today's tight credit market, but more than you could earn from CDs or money market accounts.

Gifting now when you are alive may leave less for inheritance, but you receive the immediate benefit of reducing your taxable estate while giving money to the people you love when they need it most.

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WE'VE GONE GREEN!

Konowitz & Greenberg has gone green and is attempting to reduce unnecessary waste.

If you enjoy receiving The Brief each quarter, please be sure to keep us updated with any changes to your email address so that you can continue to receive our newsletter electronically.

Please email Ellen O'Hare, our office manager, at elo@kongreen.com with any changes to your email address or call her at 781-237-0033 ext. 237.

We look forward to continuing to provide you with informative and interesting information via The Brief.

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What's in a Name?

I recall the time, as a joke, a relative made a piece of ceramic "art" and signed it "Picasso." He then told our family that he had purchased an original ceramic ashtray by the late, great artist. We all had a good laugh. But had this event happened today, and if Picasso were still alive, my relative would have been in violation of the Visual Artists Rights Act of 1990.

The Visual Artists Rights Act of 1990, 17 USC section 106A, ("VARA") is the statute that provides protection for the moral rights of an artist; it affords protection for the artist's name and reputation. This statute states that an artist has the right to "prevent the use of his or her name as the author of any work of visual art which he or she did not create." It also provides that an artist "shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."

Furthermore, the statute prohibits "any intentional distortion, mutilation, or other modification of that work which would be prejudicial to (the artists') honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and…prevents any destruction of a work of recognized stature," This statute also prohibits intentional destruction and destruction due to gross negligence of works of "recognizable stature."

While these rights appear to be large in scope, there are some limitations. The rights are only granted for the life of the author. Also, the statute is limited by the Copyright Act, which defines a work of visual art in a limited manner. Most significantly, the concept of a "work of visual art" does not include any poster, map, globe, chart, technical drawing, diagram, model, applied art, or any work made for hire.

If you have a question or legal matter involving VARA, feel free to contact Mia Rosenblatt Tinkjian at mrt@kongreen.com.

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Using Strategic and Tactical Decision Making to Control Litigation Costs

It is, perhaps, too obvious to be worth noting that the costs of litigation are a primary source of friction between clients and their attorneys. Though a good attorney will do his or her best to advise a client of the likely costs of litigation at the outset of a case, all too often, as cases drag on, the costs of litigating a case spiral far beyond the expectations of clients. Such a result can threaten the working relationship between a party and its attorney, and, if left unaddressed, can impact the results of the litigation itself.

While some of the costs of litigation cannot be avoided, and unexpected and unavoidable expenses may arise inevitably as a result of the actions of an opposing party, often higher than anticipated costs of litigation are a direct result of strategic and tactical decisions made by the party and its attorneys. Decisions made at the start of a case, for example, may significantly impact the cost of litigation. In a case for breach of contract between businesses, for example, a decision to name the defendant company's president as a party, and to assert claims of fraud against him or her, while possibly made in the hope of impressing the defendants with the seriousness of the claims against them, also is likely to result in significantly higher litigation costs when the defendants vigorously fight those claims.

Similarly, when, in the course of litigation, a party faced with a request to produce documents decides to resist providing documents despite the fact that there is only a small chance it's opposition will succeed, or when it opposes a reasonable position taken by the other party to avoid looking "weak," the party is making a tactical decision that directly increases its costs. Those types of decisions, repeated over the course of a case, can dramatically increase the cost of the litigation.

At *Konowitz & Greenberg,* we encourage our clients to consider these factors both at the outset and throughout the course of litigation. We work with our clients to ensure that they understand the implications of their decisions; the impact of these decisions on the litigation and on their bottom line. It is our goal to have a client that not only is happy with the results of litigation, but satisfied with the manner in which the result was achieved.