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ATTORNEYS AT LAW

THE BRIEF
of konowitz & greenberg

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Helping our clients navigate difficult waters...

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Contested Adoptions are not Child's Play

Representing any one of the parties in an adoption, especially when the prospective adoptive family is still reeling with delight that "The Call" finally came and a child waits to be placed with them, can be rather daunting. This is because there often are many unknowns in the process, such as the health and medical history of the child, and whether both expecting parents are participating in the adoption plan.

Representing an adoption agency, I recently had the pleasure of meeting a particularly intelligent and articulate young mother, who, with the full and loving support of her parents, told me her plan for adoption. She identified the birth father, explained the circumstances of the pregnancy, and described her unequivocal plan for adoption for the child. She explained that there were many reasons why the father, who lived on a remote island, did not have the ability to raise the child. I cautioned her that, even after she signed a surrender, the rights of the father, whose exact location was then unknown, would still be intact until and unless I was able to convince a court he was not fit to parent the child, through the filing of a Petition to Dispense with Parental Consent.

In accordance with Massachusetts law, upon the filing of the Petition to Dispense with Parental Consent, meaning a judicial, involuntary termination of the father's rights, a citation notifying the named father issued, and in the ordinary course, I had him served via email, Federal Express, and regular mail. At that time, the father refused to tell anyone where he lived, but, per statute, we served him at his last known and usual address.

After receiving the petition, the birth father objected to the adoption, filed a petition for custody of the child, and was appointed counsel to represent him. More than two years after the birth of the child, the case was tried in Massachusetts over five days.

The father never came to court or even attempted to travel to Massachusetts for the trial. The judge refused his request to be allowed to testify by cell phone, but he was permitted to listen to the proceedings by cell phone and testify using Skype.

With the assistance of two expert witnesses, one in attachment and bonding between the child and prospective adoptive family, who had cared for the child since shortly after his birth, and the other in immigration, the Court ruled in our favor and ordered termination of the father's rights. The Court found that there was clear and convincing evidence that the father was not fit to parent this particular child. The Court's decision was based, in part, on the fact that the father had made no effort to see the child for more than two years since his birth. More important, however, was the Court's finding that the child would suffer emotional harm with the severance of the bond he had with the prospective adoptive family, and that the father was not able to meet the child's special needs resulting from the disruption of his placement and adoption.

The father has now appealed, claiming the trial court abused its discretion in terminating his rights, in the face of what he called overwhelming evidence to the contrary. Stay tuned…

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A Gallery is Selling Your Artwork: What to Know to Protect Your Rights

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As a practicing artist, I know how exciting it is to find and secure gallery representation. As an attorney, I have represented artists whose consignment agreements with a gallery went sour, and so I am well aware of the possible pitfalls that may arise once this relationship has commenced.

In Massachusetts, the artist is protected in her relationship with a gallery by Massachusetts General Law Ch. 104A, which creates a specific type of legal relationship, known as a "trust relationship," between art owners and art dealers. The statute provides that an art dealer has a fiduciary duty to protect the trust assets of the art owner (i.e., their works of art and sales fees) as trust property. An art dealer cannot use or claim an art owner's fine art as property of the gallery. Consequently, when money from the sale of a work comes to the art dealer, the law treats the money as property of the art owner, not the art dealer. The art dealer cannot collect his percentage from the sale of the artwork until the art owner's share has been paid.

Under Massachusetts General Law Ch. 104A, Section 2 (c), art dealers are charged with maintaining accurate records for better transparency both in day-to-day business and in the event of a bankruptcy filing. Art dealers must keep a copy of the written statement provided by the art owner upon delivery of the work. When the art work is sold, the dealer must record the date of the sale, the amount of the sale, and the name and contact information of the purchaser. In addition, if the consignor is the artist who created the work or the artist's heirs, the dealer must provide the consignor with the name and contact information of the purchaser of the work.

The statute also provides guidelines for payment when a consigned work is sold. A gallery must pay the owner monies due from the sale of the consigned work within 90 days of receipt of payment. The failure to provide payment within 90 days subjects the gallery to an additional payment for damages (5% interest plus reasonable attorneys' fees). If payment has not been made to the artist within 180 days, this figure increases to three times the amount owed, plus 5% interest. The art dealer is at all times responsible and liable for the loss of or damage to the work of fine art.

If you have questions about consignment agreements or concerning dealings with an art gallery, please contact Mia Rosenblatt Tinkjian.

Business Succession Planning: Be Prepared

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According to the Small Business Administration, approximately 90% of all businesses are closely held and family owned. However, of those, only 30% succeed into the next generation, and a mere 15% survive into a third generation. Why do 70% of family businesses fail to succeed into the next generation? The primary reason is that family business owners neglect to create a comprehensive succession plan or "exit-strategy" for themselves.

When business owners work hard over many years to create a business that generates wealth for them and their families, more often than not, the business is the owner's most valuable asset. More importantly, however, the owner is also the business' most important asset. That is, the value of a small business very often lies within the owner's experience, contacts and specialized skills.

These facts raise several questions. First, what happens to the value of the business when the owner or other key employees are no longer there? Second, when the owner is ready to exit the business, how does he or she extract from the business the value and wealth he or she has created? The answer is a business succession plan.

The objective of a business succession plan is to successfully transition the business from existing owners to new owners, and to protect and/or extract the business' wealth created by the departing owners. When the current owners are no longer working for the business, either due to retirement, death or disability, a carefully prepared business succession plan, based on the needs and goals of the business owner, ensures continuity for business operations and continued financial security for the departing owners and their families.

For some businesses, the successor owner will be the owner's business partner, the owner's children, or perhaps a group of key employees. For others, it will be a third party. In all of these situations, though, the most effective kind of business succession plan is generally one that is integrated into a client's estate plan, because succession planning invariably touches upon estate, tax, real estate and retirement planning.

If you want to protect the success of your business and provide for your family's financial well being in the future, then a well thought out and executed business succession plan is imperative. If you have questions about succession planning, please contact Arlene Kasarjian.

So, What Makes a Good Client?

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When I work with good clients, I find that I am especially motivated to get them great results because the relationship is rewarding for me. Conversations with clients result in new ideas, constructive criticism and to-do items that keep the project moving in a forward direction that produces results. I find myself suggesting new things to try with these clients, even if I haven't tried it before.

So what makes a "good client?" The glib answer, for many attorneys, would simply be a client that pays his or her bills. But the fact that someone is willing to give you their money in exchange for your legal services, while a good thing, does not automatically make them a good client. I have many clients, each with varying personalities and qualities that make them unique. What I have learned over many years is that the clients I consider the best generally share a number of characteristics.

Communicates expectations clearly. The number one characteristic of a good client is that they are able to express what they want and need. This ability is vital to delivering the right service.

Allows a reasonable amount of time for the work. The world is filled with clients who want it "yesterday." Often, what these clients actually get is a rushed job, potentially full of mistakes, and ultimately requiring a lot of rework. A good client, however, understands that quality work takes time and plans accordingly.

Is accessible. There's nothing more frustrating than being surprised by an obstacle and being unable to reach your client. Good clients make themselves available are prepared and give 100% to every meeting.

Understands the value of the work performed. A good client understands the difference between value and cost. At the end of the day, it is the value received from a service that matters, not what it cost.

Has high integrity. Honesty is at the core of every successful relationship. Both the good client and K&G conduct all of their business together in an honest and transparent fashion.

Seeks an ongoing relationship. The best clients understand the value of an ongoing relationship. They are a good fit with K&G's talents and skills. Regardless of how much creativity and versatility K&G offers, we are better suited for some clients than others. The closer K&G's talents and skills match a client's needs, the more enjoyable and beneficial their relationship will be.

Allows the attorney to do the job. A good client keeps an open mind and is not constantly second-guessing. Negotiation and debate is, and should be, a part of every engagement involving professional services. It should be characterized by a friendly and realistic give-and-take, to arrive at an agreed upon strategy. However, once that strategy is established, a good client demonstrates trust in the attorney. Clients who micro-manage every action may not understand what is truly involved in representing them, and are likely to get a worse result than if they let their attorney perform the tasks they are paying for.

The best client relationships are ones where there is mutual respect and appreciation. Fun, challenge, prestige, satisfaction, creative freedom, peer recognition, personal chemistry: these are all important aspects of a good attorney-client relationship. If you like your client, and vice-versa, it influences attitude and energy level. A client with the right attitude is a proven asset.

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LATEST NEWS

In November 2011, Karen Greenberg and Arlene Kasarjian will be speaking on adoption issues on behalf of the National Business Institute in Boston.

Karen Greenberg has been appointed the Editor of the Policies and Procedures Manual of the American Academy of Adoption Attorneys (AAAA). In May, she attended the annual conference of the AAAA in Savannah, Georgia.

Karen Greenberg recently spoke on behalf of the Boston Bar Association regarding Adoption and Immigration issues.

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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Mortgage Practices Continue to Be Scrutinized by the Courts

The mortgage industry continues to be a subject of heavy scrutiny in both the press and the courts. Some issues, such as the industry's widespread failure to properly prove ownership prior to foreclosure and the marketing of subprime loans, have made national news. Others, such as lenders' failure to pay recording fees when mortgages are resold, have recently made headlines within Massachusetts. At the same time, however, numerous cases continue to work through the courts and are clarifying and, in some cases, redefining the obligations of lenders and mortgage brokers.

The Suffolk Superior Court Business Litigation Session, for example, recently denied a lender and mortgage broker summary judgment on claims brought by a borrower alleging unfair and deceptive practices in violation of Chapter 93A, civil conspiracy, and breach of the covenant of good faith and fair dealing. In particular, the plaintiff had alleged that they had not reviewed loan documents prior to signing under the pains and penalties of perjury, and were not aware of inflated income figures in the documents, allegedly placed there by the mortgage broker. They asserted that they had only signed the documents and entered into the loan agreement based on assurances from the mortgage broker that they would be able to refinance after six months.

The Court rejected the lenders' arguments that since the plaintiffs had signed the loan documents, they were bound by its terms and by the representations they made in the documents. The Court noted that "the problem with this argument is that a party is not bound by the terms of a document signed in reliance upon a fraudulent misrepresentation…Taking the evidence in the light most favorable to the plaintiffs, the court concludes that a reasonable jury could find that representation fraudulent and conclude that the [plaintiffs] relied upon it in entering into the loan transaction to their detriment." *Thelemaque v. Fremont Investment & Loan,* C.A. No. 08-5179-BLS1.

Numerous investigations have found that, in the middle of the real estate bubble, oral representations by lenders and brokers concerning loan terms, refinancing options, prepayment penalties, and similar issues were common. Increasingly, Courts have taken a strong line against many questionable practices within the mortgage industry. The *Thelemaque* decision, like a number of other court decisions, indicates that the Courts will, in the appropriate situation, ignore the terms of the written loan contract and hold lenders to the oral promises made by their agents. Such a possibility, of course, greatly increases the uncertainty facing lenders and means that homeowners facing possible foreclosure may have options available to them.

A Word from Our Paralegal

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Reviewing Your Purchase & Sale Agreement

The purchase of a new home is an exciting and stressful time for buyers. The buying of a new home may not only be the most significant and largest purchase most people will make, but it also involves the law of real property, which is unique and presents special problems. The legal issues that arise differ with each home purchase and, therefore, retaining the right attorney to protect your individual interests is crucial.

As the median sales price of a Massachusetts home approaches $300,000, it is crucial that buyers have the Purchase & Sale Agreement ("P&S") reviewed by an attorney. The P&S is a legal document that creates binding obligations between the seller and buyer. There are countless issues to be addressed in the P&S: the closing date, condition of the property, arranging for inspection, what personal property is included in the sale and potential title issues, to mention just a few.

Just as every home is unique, so is each real estate transaction. The use of a standard P&S form may not fully address the buyer's desires or protect their interests. For example, the minor difference in a P&S stating the seller "may" complete a repair, rather than "shall" can prevent unnecessary stress at the closing table. Would you purchase a home without an inspection? Of course not, and you should not sign a P&S without consulting an attorney either.

If you are buying or selling your home, please contact us for a consultation.