Volunteer Without Fear

With the arrival of the holiday season, many of us plan to volunteer to give back to the community. There is no shortage of those in need, and countless opportunities to lend a helping hand to those less fortunate. As valuable and admirable as your volunteer efforts may be, you could be subject to liability as a volunteer. So before you head out to serve food at a shelter, sort donated clothes, visit with a senior citizen or veteran, or help deliver gifts to children, take a moment to learn how or if you may be held liable for your volunteer activities.

Volunteers working for an organization, especially those in health care, can be subject to liability. Fortunately, both state and federal laws offer certain liability protection to volunteer professionals. On the federal level, volunteers are protected under the Volunteer Protection Act, which since 1997 has provided all volunteers for not-for-profit organizations and government entities with protection from liability for harms caused by their acts or omissions while serving as volunteers. This federal law pre-empts any conflicting state law although many states have enacted broader protections. In order for the law to apply, the volunteer must act within the scope of his or her responsibilities, be properly licensed by the state (if applicable), the harm must not be caused by willful or criminal misconduct, gross negligence or reckless conduct, and further that the harm must not be caused while the volunteer was operating a motor vehicle. It is important to note that these liability limitations apply only to the volunteer, and not the organization.

Some states have laws in place to add additional protection to volunteers, such as a charitable immunity law or a Good Samaritan law. Generally, Good Samaritan laws protect health care professionals providing care in emergency situations, while charitable immunity laws protect health care professionals who provide non-emergency care for certain charitable organizations.

Massachusetts has a law that caps the amount awarded as damages against a charitable organization, which in effect protects the assets of these charities. A cap of $20,000 applies to not-for-profits for torts (an act or omission that results in injury) committed in the course of any activity carried on to accomplish directly the charitable purposes of the organization. The charitable cap statute has been upheld in a negligence action against a hospital involving a slip and fall that occurred because of snow and ice buildup on the hospital's parking lot. Recently, in 2013, the cap was increased from $20,000 to $100,000 for not-for-profit health care providers involving medical malpractice claims, in an effort to facilitate settlement. Massachusetts also has several volunteer protection statutes which shield liability from civil damages of a director, officer or trustee of a not-for-profit charitable organization, a volunteer serving as an elder care coordinator or counselor, a physician, nurse or veterinarian acting as a Good Samaritan providing emergency care and athletic volunteers serving a not-for-profit organization.

Volunteering during the holiday season, or any time of the year can be a very gratifying experience whether you are a professional giving your time and talent to an organization or just a generous person trying to help a particular cause. It is reassuring to know that there are protections in place at the state and federal level to shield liability of volunteers and not-for-profit organizations. While the laws in place cannot prevent volunteers or organizations from being sued, they certainly make it more difficult for a plaintiff to prevail in recovering damages.

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THE BRIEF
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Help Your Case Hold Water By Documenting

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The theory of a case without supporting facts is just that—a theory—nothing more. I experienced this for the first time about a year ago as a student attorney in the Family Advocacy Clinic in law school. I was sitting across from my professors excited to tell them what I sincerely believed to be a convincing theory of my case. When they questioned, "what facts do you have to support it" my mind searched for an answer, but I had no reply. I envisioned my theory looking like a once full tub now rapidly draining. At that moment, I truly learned that supporting facts are the linchpin of a legal theory's ability to hold water. To uncover these facts, I needed to conduct a fact investigation. This bath tub analogy resonated with me and as a newly minted associate transitioning into practice, it continues to be an indelible lesson.

Cases and clients are all unique, meaning fact investigations for each case vary depending on its nature and complexity. The best source to help facilitate and expedite fact investigation is the client. In my very green legal career, I have worked with clients who retained no records, clients who kept detailed records, and clients who fell somewhere in between and it is fair to say that where more detailed records are available, the more effectual the fact investigation.

No scientific formula exists for performing fact investigation, but for those who anticipate litigation in the future, there are ways to help the case "hold water." One good habit is to keep all records, such as bills, bank and credit card statements, tax returns, receipts, and the like, storing them physically or electronically. While keeping documents can help streamline fact investigation, not retaining certain documents is not likely to be particularly damning. However, the same cannot be said for specific events that may help bolster a theory.

Often, a series of specific events that occurred can help strengthen a theory, but unlike documents, which are more concrete, more easily traced, and more easily reproduced, recollections of events are fleeting and can only be found in the memory of the person who experienced it. This is particularly true in family law, where the majority of theory development is rooted in the information the client reports. Details of events dissipate over time, lose value, and can eventually become unrecoverable. For these events to be germane to a legal theory, they must be documented soon after they are perceived to preserve the details and clients should be encouraged to do so, for example by maintaining a journal or log.

My professors used to constantly remind me to "document, document, document," as a case unfolded. What is needed in a fact investigation can be unpredictable, but the more facts that can be documented the better because you do not usually know which facts will be relevant until the case fully evolves. This advice is not only applicable to lawyers, but is also useful for those who are in the midst of or anticipating litigation. Maintaining records and documenting might not be regular habits for most, but in litigation, these habits can help promote efficiency and economy in litigation by making fact investigation a collaborative effort between client and lawyer, and can most certainly impact the outcome of the case.

MEET OUR NEW ATTORNEY
KASSANDRA C. TAT

Kassandra graduated cum laude from Suffolk University Law School in 2016 after majoring in psychology and graduating from University of Massachusetts Amherst in 2012. While in law school, she had internships with Chief Justice Angela Ordoñez and Judge Jennifer Rivera-Ulwick of the Massachusetts Probate and Family Court. After Kassandra's second year in law school, she was a student defender at the Superior Court Trial Unit of the Public Defenders Office, where she developed her passion for trial work and litigation. In addition to normal coursework and being a case comment editor on The Suffolk Journal of Trial and Appellate Advocacy, during her final year in law school, Kassandra was also a student attorney at the Suffolk Family Advocacy Clinic, where she represented survivors of domestic abuse in custody and divorce cases. Kassandra's experiences have helped her develop a compassionate and client-centered approach, which she now seeks to bring to Konowitz and Greenberg, P.C.

Andy Warhol: "In the Future, Everyone will be World-Famous for 15 Minutes!"

Recently, I appeared before the Massachusetts Appeals Court. While most attorneys do not try cases, very few have the opportunity to appear before the Appeals Court. I have been honored to have appeared a handful of times. And each time, I remain in awe of how formal the process is and how exhilarating it feels to argue a case on appeal.

First, the Rules of Appellate Procedure ("Rules") are very precise about the form of the written brief filed with the Court. The Rules dictate the size of the font, the margins, the color of ink and paper, the size of the paper, type of spacing, even where and how to bind the brief. Writing the brief is a painstaking process, months in the making to ensure that each argument is cogent and tight, and every legal citation in proper form.

Once the brief is filed, it's time to prepare for the oral argument. Each party to the case is given its "15 minutes" of fame, so to speak. For those brief 15 minutes, I spent hours, upon hours, upon hours, preparing my argument and, equally important, preparing and anticipating the questions the judges would ask me, all the while recalling my motto: "be prepared, be prepared, be prepared, and then, prepare!"

The Appeals Court usually consists of a three judge panel. Each judge and his or her law clerks will have already read my brief, and likewise the judges are poised and prepared to interrupt me with questions. The last time I appeared, I had just finished introducing myself when I was interrupted. I never returned to my prepared argument but I *was* prepared for their relentless questioning.

The timing of my allotted fifteen minutes is extremely formal and precise. On the podium, ahead on me, are three lights: green, yellow, and red. When I start my argument, the green goes off, with one and a half minutes left, the yellow goes off, and, at the end of my fixed fifteen minutes, the red goes off; even in the midst of thought, I must stop and thank the judges.

Ready, set, show time. My case was called for 9:15 a.m. at the Boston Court House. I live in Newton, and knowing that the Boston morning commute is horrible, I decided, for this normal 35 minute ride, I would leave extra early ("being early, is being on time") and left my house at 7:00 am. Surprisingly there was no traffic that morning; I parked the car and arrived at the courthouse at 7:45 a.m. After an interminable wait, the case was finally called at 11:45 am. My opponent, the Appellant, who actually filed the appeal, went first and was peppered with questions from the outset. When it was my turn, I started my introduction, and was ready to be interrupted with questions, yet, not one judge asked me a thing! After 7 minutes, the Chief Justice asked if I had anything further to say, whereupon, I said thank you, and sat down. All that preparation, and no peppering!!!

Three weeks after arguing, the Court ruled against my opponent making all the pain and angst worthwhile.

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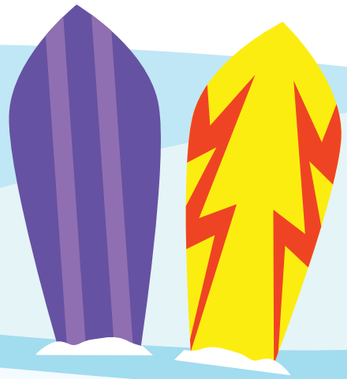

DNA: What's it to You?

I recently had the great opportunity to work with two terrific people, experts in their own right at the Mid-Year Conference in New Orleans, Helping to Healing, sponsored by the National Council for Adoption, the American Academy of Adoption Attorneys and American Academy of Assisted Reproduction Attorneys: Dan Berger an attorney who specializes in immigration and adoption related issues, Kayla Sheets, LCGC, a genetic counselor and researcher and founder of Vibrant Gene and I spoke on: DNA and the LAW.

- ***DNA use is common in criminal and parentage cases;***
- ***How a biological father may be ruled out as the legal parent;***
- ***DNA alone may not be enough to resolve a custody dispute;***
- ***DNA testing, pre-birth, in gestational carrier and surrogacy arrangements.***

Parentage Cases

When a person executes a Voluntary Acknowledgement of Parentage that person is deemed the legal parent, even if another comes forward, who is a DNA match and seeks to exercise parental rights. Recently, the Nebraska Court confirmed the man who tested positive as the biological father, had no parental rights to that child. Jesse B. v. Tylee H. (In re Adoption of Jaelyn B.), 293 Neb. 917 (2016). No pun intended: a Voluntary Acknowledgment of Paternity trumps the results of the DNA test.

Likewise, the U.S. Supreme Court acknowledged when a child is born to unmarried parents, even if the father's DNA is a match, that man may not necessarily be deemed the legal father under the law. Or, simply put: DNA does not a parent make.

Custody Disputes

DNA may or may not be helpful in other areas of the law. A parental claim does not require a genetic relationship with the child. The Massachusetts S.J.C. recently recognized the former partner in a same-sex relationship as a legal parent. Partanen v. Gallagher, (MA October 4, 2016). The parties, a same-sex couple, broke up after a committed long term relationship. They never married, the children were conceived through assisted reproduction technology, and the petitioner never adopted the two children conceived and born during their relationship. The Court concluded the lack of a biological relationship did not bar one from being deemed the legal parent, relying upon M.G.L.Ch. 209C § 6(a) (4). (man presumed father of child born out of wedlock if jointly with mother received child into his home and openly held child as their child). The moral of the story: rely upon no one's word, make it legal: marry or adopt.

It has been suggested that DNA testing would establish whether the placement of a child for adoption, triggers the Indian Child Welfare Act ("ICWA"). Nevertheless, a genetic determination is not enough to establish whether that particular child is an Indian Child subject to ICWA because each tribe has its own set of rules to determine who is an Indian Child. The takeaway: DNA results are not always the answer.

Gestational Carrier and Surrogacy Arrangements

To avert miscalculations and mix-ups, DNA testing prior to the birth of the child as soon as a DNA test may be done, should be mandatory in gestational carrier and surrogacy contracts. If the DNA test comes back negative, the carrier/surrogate misled the intended parents. Any others deceived would be the rest of the story!

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