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A Message from the Chairman

This year has been a very memorable one for the firm as we celebrate our 85th anniversary. We are proud of the firm's history and are excited about its future as we continue to grow. We welcome six attorneys to our already impressive roster of legal practitioners. Daniel Barkin has recently joined the firm as a Member in the Banking and Financial Services, Corporate Law and Bankruptcy and Creditors' Rights Practice Groups. Peter Levy has joined the Firm as a Member and the Director of Business Development. Rachita Bhatt joined us this Spring as an Associate in the Commercial Litigation, Employment Law and Health Care Practice Groups. Brian Block (formerly a law clerk for Justice Patterson) has joined the firm as an Associate in the Commercial Litigation Practice Group. Joshua Gorsky has joined the firm as an Associate in the Real Estate and Corporate Practice Groups and Jake Bayak has joined the firm as an Associate in the Personal Injury Practice Group.

The Firm is also excited about the upcoming launch of our new website. The site will be more user friendly and will allow our clients full access to all events and Firm news. Our clients will also be able to sign up for the Firm's newsletter or watch one of our seminar videos.

Our 85 year history, along with the arrival of our new colleagues, make Mandelbaum Salsburg what it is today - "forever young."

Very truly yours,

Barry R. Mandelbaum



Recent Developments in Planning for Individuals with Special Needs

By Richard I. Miller

Recent legislative efforts have focused on the promotion of self-determination for disabled individuals. The Special Trust Fairness Act of 2015 and the ABLE Act of 2014 are examples of this trend.

Special Needs Trusts (SNTs) provide an opportunity to preserve the assets of disabled individuals while allowing them to qualify for government benefits such as Medicaid, SSI and services from the Division of Developmental Disabilities (DDD).

Many government programs have a resource limit of \$2,000 that results in individuals having to spend down nearly all of their assets as a condition of eligibility. SNTs permit individuals to maintain assets to pay for expenses not covered by government programs – thereby enhancing the beneficiary's quality of life. For example, the money in an SNT can be used to pay for the beneficiary's entertainment, travel, electronics and furnishings.

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Computers Replacing Lawyers? Rumors of Our Deaths Are Greatly Exaggerated



By David S. Carton

Recent legislative efforts have focused on Simply by typing in "Computers Replacing Jobs" into a search engine will result in a plethora of results that will make one think that computers are taking over the world and will put all of us out to pasture. This is simply not true.

Computers are now performing surgery and telling us what music, movies and books we would like based on our past history; our "likes." We all saw "Watson" win on Jeopardy and "Big Blue" triumph over chess masters.

In many cases these are based on algorithms and search engine optimization. And these are all good taken for what they are. In most ways they have made our lives more convenient and provided us information at our fingertip the way shelves of Encyclopedia Britannica never could. This author is not a luddite. Computers have made many aspects of what we do as attorneys simpler and more cost effective for our clients. This is also a wonderful thing.

While computers may be able to research facts quicker and spit back statistics faster than any human being, they will never wholly replace the job of an attorney.

A good attorney will write a persuasive brief. They will go to the mat to convince a judge or jury that their client is correct. They will be responsive to calls or emails. However, a great attorney will "think outside of the box." Of any compliment given to a lawyer, this is without a doubt the most meaningful. While a computer will be able to say the words, "I understand" it will never really be able to truly empathize.

While a computer may be able to research issues based on how they were previously decided, they cannot think of novel approaches or new causes of action. A computer can tell us that an approach will likely work or not work based on a past record, but it cannot tell us how to push the envelope and allow us to obtain a winning result for a client when traditional approaches with similar facts were not successful. The human character traits of insightfulness, creativity, innovation, compassion and imagination will never be fulfilled by a machine.

Many of the founding fathers of the United States of America were attorneys. Thirty-two of the fifty-five framers of the Constitution were lawyers. Of the fifty six signers of the Declaration of Independence, twenty five were attorneys. In school we all learned about Thomas Jefferson, Alexander Hamilton and John Adams. These lawyers knew only of hundreds of years of English history living under the Crown. They were integral to the idea of a new country and doing things differently than anyone had thought of before. Attorney Abraham Lincoln also implemented a sea change compared to the status quo. Our children and our children's children will learn about these lawyers. While lawyers are the punchline of innumerable jokes, we are the first call when someone is in trouble and the last line of defense when our client's rights, property or liberty is being challenged.

A computer driven laser may be able to cut on a straighter line than a laser held by hand. A computer may be able to complete a mathematical equation quicker than a human. But computer cannot "have a client's back." A computer will not be able to say, "nothing in the past indicates that we can obtain the results you want so let's try A, B and C. They have never been tried before or even thought of before but may get us to where we need to be."

Tread cautiously when you see legal products advertised on internet or stores. These DIY products may look like the cheap way to do something but the long run costs may be more expensive. It is almost always less costly to do something correct the first time around rather than paying a professional to do it correctly the second time around and undo what was done initially.

Remember that the smart phones that most of us carry around with us have more computing power in them than the entirety of NASA's computer system when Neil Armstrong landed on the moon. These phones will do what we tell them to and provide us information that we request. What they won't do is think outside the box.

David Carton is a member of the firm in the Family Law Practice. He can be reached at dcarton@lawfirm.ms.

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Recent Developments in Planning for Individuals with Special Needs

Unfortunately, under the current law, an SNT can only be established by (i) the beneficiary's parent or grandparent, (ii) a legal guardian or (iii) a Court. Individuals, however, cannot set up an SNT for themselves. As a result, it is often necessary to obtain Court approval to establish an SNT, thereby creating unnecessary legal costs.

The Special Needs Trust Fairness Act of 2015 addresses this issue and would allow individuals to set up their own SNT. Bills have recently been introduced to the House of Representatives and Senate in February, 2015 and placed on the Senate's legislative calendar for discussion in July, 2015. It is unclear how far this bill will progress through Congress, but at least a dialogue is under way to address the inequity in the system.

The Achieving a Better Life Experience (ABLE) Act was signed into law on December 19, 2014. An ABLE account is a tax advantaged

savings account for individuals with disabilities (similar to a 529 account). Like a Special Needs Trust, (SNT) the funds in an ABLE Account are not treated as a resource for Medicaid, SSI or DDD. Disabled individuals are permitted to establish and control their own ABLE account. This provides an advantage over SNT's which cannot be created or controlled by the disabled individual. ABLE accounts do, however, have certain restrictions that limit their use and benefit. By way of illustration, an individual must be disabled prior to turning age 26; the total annual contribution cannot exceed \$14,000; accounts in excess of \$100,000 will cause disqualification from SSI and the account must be established in the State where the eligible individual resides.

Due to the intricacies and differences between SNTs and ABLE Accounts it is important to seek the appropriate legal and tax advice to learn which option is right for your situation.

Richard Miller is a member of the firm and Chair of the Elder Care Practice. He is designated as a "Certified Elder Law Attorney" by the National Elder Law Foundation. He can be reached at rmiller@lawfirm.ms

Evaluate All Your Independent Contractors Against The "ABC" Test



By Dennis J. Alessi

On January 14, 2015, the Supreme Court of New Jersey was asked to determine which test should apply under New Jersey law to determine a worker's status, as an employee or independent contractor, for purposes of the Wage Payment Law (WPL) and the Wage and Hour Law (WHL).

The Court concluded that the "ABC" test, as derived from the New Jersey Unemployment Compensation Act, governs whether a worker is an employee or independent contractor for purposes of resolving a wage-payment or wage-and-hour claim.

In *Hargrove v. Sleepy's, LLC*, the Court reasoned that the ABC test should be adopted when classifying a worker as either an employee or independent contractor. The plaintiffs in *Hargrove* claimed they were actually employees and that Sleepy's improperly classified them as independent contractors. They argued that this misclassification deprived them of certain employee benefits, including health insurance. In 2012, a Federal Court in New Jersey held that the plaintiffs were independent contractors. But then the case was sent to the New Jersey State Supreme Court which held exactly the opposite; that the plaintiffs were employees of Sleepy's. For purposes of New Jersey law, this is the final controlling Court decision.

This Court decision determined that employment-status issues raised under the WPL or WHL are governed by what is known as the ABC test. Under the ABC test a worker is presumed (i.e. it is assumed by the court) that the individual is an employee, unless the employer satisfies its burden to prove that all three factors, which classify an individual as an independent contractor, are met. For an individual to be considered an independent contractor under the ABC test, the employer must prove that:

a. The individual is free from control or direction over the performance of services;

- b. The service is outside the usual course of the business for which it is performed, or the service is performed outside of all the places of business of the enterprise for which it is performed; and
- c. The individual is customarily engaged in an independently established trade, occupation, profession, or business.

If the employer is unable to prove all three elements of this test, then the courts in New Jersey will presume that the individual is an employee. The employer will then be responsible for all the social security, Medicare, unemployment compensation and other employee payroll taxes it did not pay for the individual, plus penalties and interests; and will also be responsible for all the wages, particularly overtime pay, and all employee benefits, most importantly and costly, the health insurance, which the employer did not provide because of its misclassification of the employee as an independent contractor.

Even for just a few misclassified individuals, these liabilities can quickly add up to considerable amounts of money. In our opinion the ABC test will greatly reduce those individuals who will be considered independent contractors. Consequently we urge all of our clients to evaluate all of their independent contractors against the ABC test.

As the New Jersey ABC test is different from the test under federal law, employers may encounter instances where a worker qualifies as an independent contractor under federal law but does not meet the stricter New Jersey test. These differing standards may be challenging for employers with multistate operations to impose one classification standard across states. All multistate employers need only evaluate their independent contractors in New Jersey under this stricter ABC test, because it does not apply to those individuals who are contracted in other states.

Dennis Alessi is a member of the firm and Chair of the firm's Healthcare Practice and Co-Chair of its Labor & Employment Law Practice. He can be reached at dalessi@lawfirm.ms.

The Impact of Cohabitation On The Payment Of Alimony When Does a Few Dates Turn Into a Plenary Hearing?



By Lynne Strober

The law on the impact of cohabitation or the entitlement to alimony has changed. The law had required that two people live together in a relationship tantamount to marriage before that relationship could terminate a payor's obligation to pay alimony to a former spouse. Then the standard evolved into whether there was comingling/sharing of economics.

The new Statute, which became law about a year ago, amending the prior Statute, puts us in uncharted territory. The new Statute says:

N.J.S.2A:34-23. Alimony, maintenance.

Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.

When assessing whether cohabitation is occurring, the court shall consider the following:

1. Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
2. Sharing or joint responsibility for living expenses;
3. Recognition of the relationship in the couple's social and family circle;
4. Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
5. Sharing household chores;
6. Whether the recipient of alimony has received an enforceable promise of support from another person within this meaning of subsection h. of R.S.25:1-5; and
7. All other relevant evidence.

In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.

The key word in the entire Statute is "may". In the first sentence, it says "Alimony may be suspended or terminated." There is no clear cut determination of when alimony should be impacted by a recipient's relationship with a third party. This statute is vague and provides little direction and massive discretion.

The parties do not have to live together to be deemed to be cohabiting under this Statute in order to have it impact the alimony. As a result, the new Statute could impact a dating relationship with frequent sleepovers. Courts have a broad discretion in these matters to determine how to handle a payor's support obligation in a situation where a divorced recipient has a significant other. One of the problems is the cost of litigating the issue.

Ultimately, this issue will be addressed by the proofs that each party can provide with regard to the economic relationship between the recipient and the significant third party. This will involve the use of detectives and witnesses. Once the issue is raised and the burden of proof met to show that there is enough to establish a relationship both the recipient and the third party need to realize that they may have to show their financial records to be able to have it determined whether or not there is a comingling of money. This alone can be an invasive enough request that sometimes to avoid the discovery a resolution can be achieved. The Statute requires more than a holiday dinner but there is no clear understanding of exactly what is required. Common sense would say that there needs to be sharing of money including accounts, expenses, and an ongoing relationship where the parties have significant overnight time together.

However, due the fact sensitive findings required by the Statute, there is no way to guarantee what the outcome will be when the issue is raised. The analysis will be costly to determine whether there should be a change. Unless an agreement is reached quickly the parties will wind up in a mediation setting or possibly after costly depositions, in court. An application to a court will probably require a plenary hearing, which is basically a mini trial, to assess the facts each side presents. A court would not be able to decide such an issue on Certifications, as it is anticipated there would be a disparity in the facts which could not be resolved from a reading of conflicting papers.

The recipients of alimony and the people they date, as well as the payor, need to recognize that more than a dating relationship is required or a third party putting the garbage out. However, less than a full blown living together situation needs to be proven with expenses shared. It is unfortunate that the Statute is drafted in this way. It is unfair to take alimony away from a recipient just because the recipient's spouse is being social. One of the complaints of litigants is that the payors can do what they want, and the recipients cannot. However, the payor's behavior is not relevant to the analysis.

Therefore, the recipients need to be careful to keep separate financial accounts, not to join Clubs as a couple, or do things that appear as if they are a unit economically and socially. Under this statute it might not be recommended for a recipient and their significant other to even host a large party together. A payor is still going to have to gather evidence to present potentially with the use of a detective to show that the parties are staying together with frequency. Does the third party have a genuine separate residence? Do they keep their finances separate?

All this requires good lawyering to assess the facts and make the best arguments and have the issues addressed in an efficient way. It will take time for new case law to develop. While there have been cases that have been decided since the Statute was enacted, the applicable law in those cases was the old law which is no longer in effect. Therefore, there is no direction other than the Statute as to what behavior is definitely going to trigger a modification of alimony. Again, the stronger the proofs, the more likely there will be a suspension or limitation. The Statute does not specifically provide for a modification of the amount but doesn't preclude such a result.

Lynne Strober is a member of the firm and Chair of the Family Law Practice. She can be reached at lstrober@lawfirm.ms.

Mandelbaum Salsburg News

Judge Paul J. Vichness spoke at Union County's 15th Annual Continuing Education Mediation Seminar. The topic presented to the approximately 200 attendees was Unique Issues During Mediation.

Judge Michael Diamond was a panelist speaker for the Trial Attorneys of New Jersey discussion Motions in Limine in April, 2015; he was also a speaker panelist in the Summer Family Law Institute in July, 2015 on the topic of Financial Issues of Divorce and was a speaker panelist in September, 2015 for the CLE Symposium presented by the Bederson Accounting Firm on the issues of Social Media and Economic Hot Topics.

Member Arla Cahill gave a presentation in April at the Saturday Seminar at Berkeley College entitled "Ethical Considerations For Paralegals". Ms. Cahill was appointed by the Supreme Court of New Jersey to serve a four-year term on the District V-B Ethics Committee commencing September 2015.

On June 30, 2015, the Asian Pacific American Lawyers Association of New Jersey hosted its 30th Anniversary Gala. **Associate Rachita H. Bhatt** was on the Gala Committee. She assisted in organizing the event by coordinating with the venue, selecting the menu items, reaching out to potential speakers, and fundraising donations. **Member Khizar Sheikh** and **Counsel Umar Sheikh** were also in attendance.

Counsel Umar Sheikh participated as a faculty member in the all-day Trial Advocacy Program was held at The Asian American Bar Association of New York's 6th Annual Fall Conference on September 19th in Manhattan.

In September the firm supported the **National Ovarian Cancer Coalition**. On Friday, September 25th, the firm had a Denim Day where all staff and attorneys were able to wear denim to the office in exchange for a donation to the coalition, and on Sunday, September 27th, Team Mandelbaum participated in a 5K walk/run in West Orange to benefit the cause.



Team Mandelbaum



The Verizon Corp. Challenge in July

The **MS Women's Initiative** hosted a cocktail party on October 8th at Il Tulipano in Cedar Grove, New Jersey. The Women's Initiative welcomes all women in business to come and join the group for an evening of networking and noshing. As October was Breast Cancer Awareness month, the group accepted donations at the event to benefit the Avon Walk to End Breast Cancer.

Mandelbaum Salsburg News, continued

Member Lynne Strober has been named President of the Barry Croland Family American Inn at Court. The Inn is an Association of legal professionals organized to enhance and improve the professional and ethical quality of the Family Law Practice in the community. The Inn provides programming designed to increase advocacy skills, collegiality and professionalism among its members.

Member David Carton has been appointed to the Essex County Family Law Bench Bar Committee.

The Firm participated in the Verizon Corporate Challenge in Morristown on July 16th. The race beneficiary is Jersey Battered Women's Service, Inc. which provides valuable life-saving services to victims of domestic violence and their families.

Counsel Marc Comer had a speaking event on Sunday, October 18th. He presented a seminar on estate planning and planned giving at Congregation Torat El in Oakhurst, New Jersey. He serves on the Synagogue's Endowment Committee.



Member Lauren Topelsohn attended the RSA Conference and was a panelist on the 2015 presentation of a mock trial on April 20th – April 24th in San Francisco.

Member Richard Miller was a panelist for the seminar "Probate: A Jambalaya of Issues" at the New Jersey State Bar Association 2015 mid-year meeting in New Orleans on November 7, 2015.

Member and COO William Barrett was sworn in earlier this year to the Mountain Lakes Town Council. It is Bill's first term as a town councilman.



Member Richard I. Miller was honored by the Passaic County Bar Association with the Distinguished Practitioner in Chancery Law 2015 Award.

Member Peter H. Tanella has been appointed Deputy Mayor in the Township of Cedar Grove. Peter has served on the Cedar Grove Township Council for 10 years, including two terms as Mayor in 2008 and 2013.

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