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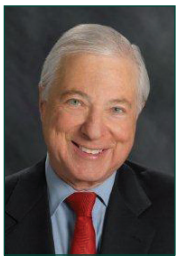
View From The Bar
Winter 2013

A Message from the Chairman



This year we witnessed the New Jersey economy on the mend. Notwithstanding New Jersey's poor metrics compared to other states on unemployment, foreclosures, and high taxes, Mandelbaum Salsburg had a highly successful year which is a testament to the firm's attorneys and staff, as well as the loyalty of our clients.

As 2013 draws to a close and we start our 84th year, the growth and achievements in our Intellectual Property and Employment Departments, as well as in other practice areas of the firm, were outstanding. This year we welcomed Steve Adler and Lauren Topelsohn in Employment Law; Michael Kochka in Intellectual Property; Martin Hauptman in Tax and ERISA matters; Khizar Sheikh in Cyber Security and Commercial Litigation; and the Honorable Paul Vichness (retired) in Business Litigation Mediation. In January 2014, we will welcome Damien Biondo in the Intellectual Property Department. It appears that 2014 will offer Mandelbaum Salsburg even more opportunities for growth and expanded services for our clients.

We also thanked our clients by hosting a Breakfast Seminar Series which included presentations on estate planning, employment law and coming up in December, cyber security and intellectual property issues. We also had two very successful networking events hosted by the Mandelbaum Salsburg Women's Initiative, a group which is comprised of the women attorneys in the firm. The attendees of this year's events included their counterparts in many different areas of work, including business and banking and the group is looking forward to hosting more events in the coming year.

As the holidays come upon us, I extend to our clients, friends and their families a joyous holiday season.

Very truly yours,

Barry R. Mandelbaum

An Individual Debtor by the Wrong Name Spells Defeat

By Richard Simon

Article 9 to the Uniform Commercial Code contains the statutory provisions for the attachment, perfection and priority of a creditor's security interest in the personal property of a debtor. Effective July 1, 2013 the State of New Jersey, along with a substantial majority of other States adopted what is commonly referred to as the 2010 Amendments to Article 9. One of the most problematic issues that was addressed related to confusion and inconsistent court rulings over what constituted the correct name to file a financing statement against a debtor who was an individual, *i.e.*, an individual's name on a birth certificate, driver's license, tax return or reliance on another record or the use of an apparent nickname by which the individual is generally known. The drafters of the Amendments attempted to balance the creditor's need of reasonable assurance it used the individuals correct name for perfection purposes and the subsequent searcher's need of reasonable assurance that even if it has reason to believe that the name of a debtor as set forth on a financing statement refers to the debtor, there is an objective standard of searching, which, if followed, does not subject the searcher to competing claims regarding perfection or priority.

Unable to reach a singular position, the drafters of the 2010 Amendments presented two available options to adopting States for filing a financing statement against the name of an *individual debtor*.

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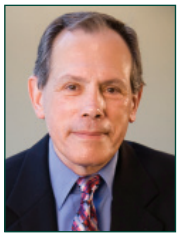
Affordable Care Act Creates Tough Healthcare Choices for Small Businesses

By Dennis J. Alessi



Small businesses which provide employee health insurance face a three-choice conundrum in deciding what to do under the Affordable Care Act (ACA). They can:

(1) Remain with their current group plans;

(2) Terminate those plans and purchase insurance at the Health Insurance Marketplaces mandated under the ACA and available in every state; or

(3) Eliminate their employer-sponsored health insurance, let employees purchase it individually at the Marketplace, and give employees a stipend of a fixed amount towards their premiums.

Which option to choose is particularly difficult for small business owner, particularly those with workforces of relatively low wage earners.

Small Employer Health Insurance

The Robert Wood Johnson Foundation has reported that as of 2011 approximately 37.5 percent of small employers nationwide, defined as having 50 or fewer full-time employees, offered some form of health insurance for their employees. Because under the ACA these employers are not subject to the per employee penalty for not providing health insurance, many may erroneously believe that they are immune from the ACA's effects. Nothing could be further from reality.

With purchases of insurance under the ACA starting Oct. 1, for coverage beginning Jan. 1, 2014, this is a pressing issue that small employers must address now.

Possible Employee Defections From Employer Plans

As of Oct. 1, individuals can purchase health insurance through Marketplaces. Even employees at small businesses, which already have employer-sponsored group insurance plans, will be able to purchase insurance through these Marketplaces in certain situations. In fact, from the employee's perspective, the Marketplace may provide a better deal because of the mandatory coverage and benefits which insurance plans must provide in the Marketplace, and the tax credits employees may receive on their personal income tax to defray premium costs.

Considering these factors, small employers may find a significant segment of their workforce, particularly the lower-paid employees who will be eligible for the maximum tax credit, will opt out of the company-sponsored group plan to purchase insurance through the Marketplace.

For a small business owner, even a few employee defections from the company's group plan may still adversely impact them in a significant way. With a smaller pool of participants remaining in the group plan, the plan's experience ratings and premiums may increase. For the business owner, the continued financial viability of the group plan may become at risk.

Employees are not entitled to any premium tax credits to purchase health insurance individually at the Marketplace if their employer's group plan is deemed "affordable" and meets a "minimum value" standard.

Assessing the Risk of Defections

Employees are not entitled to any premium tax credits to purchase health insurance individually at the Marketplace if their employer's group plan is deemed "affordable" and meets a "minimum value" standard. The employer's plan is considered affordable if the employee's share of the annual premium for coverage (not including coverage costs for other family members) is more than 9.5 percent of annual household income.

The Kaiser Family Foundation's study of 2,000 businesses found that businesses with less than 200 employees pay approximately 84 percent of an employee's premiums and about 35 percent of dependent premiums. This writer's experience with small businesses (those with less than 50 full-time employees) is that these employers generally pay 80 percent of employee premiums and no dependent premiums at all.

Take for example a single employee making $30,000 a year. If she pays more than $2,850 in annual premiums for her employer-sponsored coverage (i.e. $237.56/month), then the employer's plan is not "affordable." Similarly, if a household with a total income of $50,000 pays more than $4,750 a year (i.e. $396/month) for family coverage, that too would be deemed not affordable. The employee would be entitled to a premium tax credit for purchasing at the Marketplace and may defect from the employer's group plan, depending on what the premiums are at the Marketplace.

Even when the employer's plan is affordable, the employee is still entitled to the tax credit to purchase insurance at

the Marketplace if the employer's plan fails to meet the "minimum value" standard. This standard rates the quality of the group plan based on the plan's scope of coverage; its levels of benefits; and the employee's costs as compared to the employer's costs.

Projections on the percentage of company-sponsored plans, for both small and large employers, that will not meet the minimum value standard are hard to come by. However, one of the underlying premises of the Affordable Care Act is that many current employer plans provide scant coverage, and then only for acute (i.e. hospital) care of major illnesses. This premise is why the ACA mandates coverage and benefit levels, and other mandatory provisions, for those insurance plans that participate in the Marketplaces. It appears reasonable to assume that many small employer group plans will not meet the minimum value standard.

Another consideration, on this issue of possible employee defections, is that premiums for small employer group plans are clearly going to increase, thereby increasing employee premium co-payments. (Our experience is that most small employers require that employees pay most, if not all, the premiums for dependent coverage, so this is a major factor in gaging possible employee defections to the Marketplace.)

Horizon has already sent notices to its small employer subscribers advising that premiums, for most of these plans will be increasing in 2014 because of the new plans Horizon must offer to meet various requirements under the ACA. (These are the plans which Horizon offers under the Small Employer Health Benefits Program mandated by the State of New Jersey, which now must comply with the ACA.)

A final consideration on possible defections is that most insurance carriers will not even issue a plan to a small employer unless at least seventy-five percent of its employees participate in it. Horizon has already reaffirmed this percentage requirement to its small employer subscribers. Consequently, if the employer currently has less than one hundred percent participation, even a very small defection could bring it below this seventy-five percent (75%) threshold.

Small employers should evaluate their current plans in light of all the above considerations. If there is a serious potential for employee defections, then employers need to question the viability of continuing their current group plans, particularly with health insurance having become available at the Marketplaces as of Oct. 1.

In evaluating the potential for defections, business owners should consider a number of factors, including: (1) the income of their employees; (2) the amounts employees currently contribute to their premiums; (3) how many employees currently participate in the employer's plan; (4) how many of them may be entitled to the premium tax credit, and to what extent; (5) the anticipated premium increase for the employer's current group plan; and (6) what are the premiums for the lowest level (Bronze) plans at the Marketplace. Even with this number of variables, the company's accountant should still be able to make these calculations fairly easily because the formulae for determining an employee's entitlement to a tax credit, and the amount of it, is very simple and should be available at the Marketplace website.

A business owner needs to first calculate the bottom-line, current cost for health insurance. This cost includes the tax ramifications, in that the employer's premium costs are taken as a business deduction.

Determining Which of Three Courses To Take

Even when their plans are affordable and meet minimum value, small business owners should still evaluate options to continuing their group plan. These options are either to terminate the group plan and purchase insurance at the Marketplace; or eliminate the group plan, let employees purchase insurance individually at the Marketplace, and then give a stipend towards the employees' premiums.

A business owner needs to first calculate the bottom-line, current cost for health insurance. This cost includes the tax ramifications, in that the employer's premium costs are taken as a business deduction.

Then, the employer should initially assume that employees and their dependents currently participating in the group plan will continue to participate if the employer purchases group insurance at the Marketplace. With this assumption, the employer can compare the benefits and costs of its current group plan with what is available at the Marketplace. (If the employer makes a preliminary decision to purchase at the Marketplace, it can then require that employees commit to whether they will participate in the plan, before making a final decision.)

Under the ACA, the Marketplace's Small Employer Health Options Program (SHOP) is particularly tailored as a simplified process for small employers to compare plan benefits and costs. The Marketplace categorizes participating insurance plans into four classes – Bronze, Silver, Gold, and Platinum – depending on the scopes of services provided and levels of benefit payments. For purposes of comparison, small business owners most likely will want to compare their current group plan against the Marketplace Bronze plans.

Once the employer has found the Marketplace plan most comparable to its current group plan, then the employer's current bottom-line insurance cost (including tax ramifications), and any anticipated premium increase, should be compared to the cost for purchasing a plan at the Marketplace.

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UPDATE: More Questions Answered in the Wake of DOMA's Repeal

By Casey L. Carhart

In my recent article entitled "The Impact of DOMA's Repeal on Same-Sex Couples Living in New Jersey", I posed two questions: (i) how will the federal government treat married same-sex couples living in states that do not permit same-sex marriages; and (ii) are the federal benefits now available to married same-sex couples retroactive.

Since the Supreme Court struck down section 3 of DOMA on June 26, 2013, the legal landscape has changed dramatically, and it appears it will continue to evolve as these questions are answered.

Federal Developments

In the weeks following the Supreme Court ruling, several government departments and agencies clarified the application of their respective rules to married same-sex couples or announced their intention to do so.

Immediately after the ruling, the Department of Defense acknowledged its support of the Supreme Court's decision and its intention to extend full benefits to same-sex military families. The Department of Health and Human Services as well as the Office of Personnel Management also confirmed that they would work swiftly to implement the DOMA decision. Days later, Secretary of Homeland Security, Janet Napolitano, directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.

On August 28, 2013, in Revenue Ruling 2013-17, the U.S. Department of Treasury and the IRS ruled that "individuals of the same sex will be considered lawfully married under the [Internal Revenue Code] as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages." This means that same-sex couples are free to live anywhere in the U.S. without fear that their marriage will not be recognized for federal tax purposes. The IRS went on to state that same-sex couples may rely on Revenue Ruling 2013-17 retroactively with respect to filing amended tax returns (provided that the statute of limitations has not expired).

The Social Security Administration recently revised its website to state: "In the coming weeks and months, we will develop and implement additional policy and processing instructions. If you are in a same-sex marriage or other legal same-sex relationship, even if you live in a state that prohibits same-sex marriage, we encourage you to apply right away."

It should be noted that there are still many questions to be answered in the wake of DOMA's repeal. As stated in Rev. Rul. 2013-17, "The Service intends to issue further guidance on the retroactive application of the Supreme Court's opinion in Windsor to other employee benefits and employee benefit plans and arrangements." In addition, although the Social Security Administration, Department of Defense and Department of Health and Human Services have all acknowledged that they will be changing their rules, it is unclear when such changes will be announced, to what extent they will be retroactive and what impact they will have on same-sex married couples living in states which do not recognize their marriages.

On September 27, 2013, a New Jersey Superior Court judge ruled that same-sex couples will have the right to marry in New Jersey as of October 21st.

Nevertheless, it appears at this time, that the federal departments are making every effort to carry out the mandates set forth in United States v. Windsor in a consistent manner.

New Jersey Developments

On September 27, 2013, a New Jersey Superior Court judge ruled that same-sex couples will have the right to marry in New Jersey as of October 21st. Not surprisingly, Governor Christie immediately filed an appeal with the State Supreme Court and requested a delay pending the appeal. On October 18th, in a unanimous decision, the Supreme Court denied the Governor's request for a delay and on October 21, 2013, New Jersey became the 14th state to officiate same-sex marriages.

Just hours after the first ceremonies were performed, Governor Christie withdrew his appeal. A statement from Christie's office noted that "although the Governor strongly disagrees with the court substituting its judgment for the constitutional process of the elected branches or a vote of the people, the court has now spoken clearly as to their view of the New Jersey Constitution and, therefore, same-sex marriage is the law. The Governor will do his constitutional duty and ensure his administration enforces the law as dictated by the New Jersey Supreme Court."

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An Individual Debtor by the Wrong Name Spells Defeat

New Jersey adopted what is referred to as the "only if" alternative[1], which provides that a financing statement against an individual debtor to whom the State of New Jersey has issued a driver's license that has not expired sufficiently provides the name of an individual debtor "only if" the financing statement provides the name exactly as set forth on the driver's license. If the State has not issued a driver's license to the individual debtor, or having issued a driver's license, the license has expired, the financing statement is sufficient, "only if" the financing statement provides the individual name of the debtor or the surname and first personal name of the debtor.

If a creditor follows the requirements of the "only if" provisions, there is no reason not to correctly set forth the individual debtor's name. However, there are still pitfalls that if the creditor is not careful, could lead to a determination that the name inserted on the filing is seriously misleading resulting in the filing being ineffective.

- Make sure that the unexpired driver's license is issued by the State in which the financing statement is required to be filed for purposes of perfection. Using the name on a driver's license from a jurisdiction other than the filing state will not satisfy the "only if" requirement. Thus, the name on a New York driver's license will be irrelevant for purposes of perfecting a security interest against an individual debtor that is required to be filed in New Jersey.
- A financing statement that was filed prior to July 1, 2013 continues to be effective if it was otherwise effective at the time of its filing until the earlier of five (5) years from the date it was filed or June 30, 2018. However, any amendment or continuation statement of an original financing statement filed prior to July 1, 2013 must comply with the "only if" requirements.
- If there is a typographical error on the driver's license, file using the exact name, inclusive of the error,
- If the driver's license contains an obvious nickname, or the first name is a compound name such as "Annemarie" (Anne Marie, Anne-Marie) file against the name on the driver's license, and also file against all variations by inserting the variations in the "additional debtor" boxes on the financing statement.
- If you file an amendment or continuation statement to a previously filed "only if" statement, re-confirm that at the time of the new filing the debtor continues to hold an unexpired driver's license issued by the State in which the filing was originally made and that the debtor's name has not changed.
- Understand that if an individual's driver license expires after you file the financing statement or the individual debtor's name on the relevant driver's license is subsequently changed, your financing statement is perfected only for personal property in existence as of the date of name change and within the four (4) months following the name change . Thus, a filing covering equipment that was filed before the name change would remain perfected. However, a security interest on accounts, inventory, chattel paper, would only be perfected with regard to such personal property that first came into existence before the expiration of the four (4) month grace period. It is recommended that protectively a creditor should file not only against the name of the individual debtor on a relevant driver's license but against other known individual names, as well.

Using the name on a driver's license from a jurisdiction other than the filing state will not satisfy the "only if" requirement.

Notwithstanding the increased certainty under the "only if" provision, the general recommendation is that filings should be made against all possible names that could be the correct driver's license name, including the surname on the debtor's birth certificate, passport and the like.

Since the "only if" requirements are new and untested, unusual circumstances and unanticipated issues may arise that would require careful analysis when attempting to determine the "only if" name for an individual debtor or whether an amendment need be filed to retain perfection and priority of your security interest. If you have any doubt, counsel should be consulted.

Richard Simon is a partner and member of the Firm's Finance Group. If you have any questions you may contact him at rsimon@msgld.com. ■

[1] *See N.J.S.A. 12A:9-503(a)(4) and (5).*

Bringing on a Partner? Thinking about Joining the Partnership Ranks? Eight Issues to Consider Before Moving Forward.

By William S. Barrett

Expanding the partnership ranks within a business is a lot like getting married. Plenty have had cold feet before taking the plunge. Some jump into it quickly and are then disappointed when their partners aren't everything they had hoped for. The successful ones take their time, look for the right fit, are committed to the business for the long haul, and are willing to work through any differences encountered along the way.

The following eight key issues should be considered by both the partner in the established business, as well as the prospective partner ready to make the jump.

Issue 1: Culture Fit/Philosophy

Ideally, partnerships are long-term. When the arrangement is good, life is good. When partnerships go bad, they can feel like never-ending nightmares. Before anything else, a prospective partner needs to think deeply about whether he or she shares the same professional and business philosophies of the existing principal of the company he or she may buy into. It's important to be like-minded about important issues such as how and when to invest in the business. The business's culture - and whether the prospective partner feels comfortable with it - also needs to be considered. Business ownership is not for everyone. Some people have no desire to subject themselves and their families to the financial risk and the management responsibilities that come with business ownership.

Issue 2: Do Due Diligence

Before buying into a partnership, thoroughly review the documents provided by the company. Don't be shy about asking questions concerning all aspects of the company: financial statements and records, personnel records, tax returns, bank statements, accounting functions, marketing programs, supply vendor records (if applicable), leases, important contracts, determination of compensation, etc. Understand the company's expenses during your due diligence, and raise concerns if there are issues. Beware of existing partners who are dangerously free with a dollar. They might run an outstanding business, but they have a tendency to run cash-poor. With the help of a CPA, analyze the company's tax returns, financial statements and bank statements. Perform a trend analysis, not only of revenues, but of the customer/client base as well. Carefully review the hard assets and where they stand in terms of their useful life before replacement. Is the equipment up-to-date or will funds need to be earmarked for newer equipment? Is the equipment connected to a lease obligation? The bottom line: If you are considering buying into the business, you need to thoroughly analyze the inner workings of the company.

Before buying into a partnership, thoroughly review the documents provided by the company.

Issue 3: The Purchase Price

Establishing and agreeing upon the value of the company when buying-in is a major hurdle. It is essential to get a fair market independent appraisal of the company at the outset to avoid frustration and disappointment with the outcome. With a closely held business, it is common for buyers and sellers to get emotionally involved in the negotiations. However, both would do well to remember that open communication is essential. After all, both parties will be working side-by-side, and a positive introduction of a new partner can make all the difference between the success or failure of the partnership and, thus, the company itself in the long term. Any lingering animosity on either side over a contentious negotiation or a less-than-fair deal can negate the benefits of a flourishing partnership and successful business.

Important factors that are generally considered in valuing a business are: 1) its location; 2) the ability to effectively transfer goodwill to a future buyer; 3) years in existence, and the stability of the business; 4) demand for the business' services or product; 5) the quality of the staff; 6) the business earnings; and (7) the business' revenue trend.

Issue 4: Structuring the Buy-In and Financing Options

Structuring the buy-in, including how it will be financed, is one of the most important parts of the partnership arrangement. How the buy-in is financed is a key determinant of the new partner's long-term cash flow and, ultimately, his/her success. In most cases, the incoming partner will pay a portion of the initial purchase price upfront and pay the remainder over time pursuant to the terms of a promissory note. Other purchase options include "sweat equity" buy-ins or financing through a commercial lender.

There is more than one way to structure and effect a successful buy-in. Much of it depends on the special circumstances of each buy-in. Obviously, the purchase price

and the payment structure will have tax consequences for both parties that will need to be considered and addressed.

Issue 5: The Purchase Agreement

The purchase agreement will need to address: 1) liabilities arising from the acts of other partners (if applicable) that occurred prior to the actual buy-in (the closing date); and 2) general liabilities of the company (such as long-term debt, payables, real property and equipment leases). In addition, the purchase agreement must also address whether the partner who is buying in will be required to guarantee any existing loans or leases.

The purchase agreement will also likely include the following terms: 1) percentage of ownership interest being acquired; 2) purchase price; 3) loan contingencies; 4) due diligence; and 5) representations of the current owner(s) (concerning pending litigation, power and authority of the seller, taxes, compliance with laws and regulations, etc.).

The terms of the partnership agreement should address how the company will be managed and who will be responsible for the company's day-to-day operation.

Issue 6: The "Partnership" Agreement

The terms of the partnership agreement should address how the company will be managed and who will be responsible for the company's day-to-day operation. The partnership agreement can call for the new partner's input on "major decisions" that are identified in the agreement. The agreement should also address exit strategy issues that are set forth in the "buy-sell" section of the agreement. The parties need to establish under what circumstances a co-owner (or his or her estate, if deceased) would be forced to sell an ownership interest, and upon what terms. As part of the process, the partnership agreement must identify a formula to value the ownership interest and provide for payment terms that will either require the owners to buy insurance to fund a purchase (such as life insurance or lump sum buy-out disability insurance) or will specify the length of time for payment (for example, 60 months) and the rate at which the unpaid balance will accrue interest.

Issue 7: Employment Agreements

Each of the partners should have written employment agreements, describing how each partner will be compensated and what benefits they are to receive. A company's compensation structure is the most important part of its culture and one of the hardest things to get right and keep right. The employment agreements will set forth how each partner can be terminated for "cause" (such as a conviction of a felony, suspension or termination of a professional license, etc.). The agreements will also set forth the restrictive covenants (non-competition, non-solicitation and confidentiality) that each partner must comply with for an agreed upon period of time in the event their employment is terminated.

Issue 8: Restrictive Covenants

One issue to be addressed at some point in the negotiation process is whether a new owner should be subject to a non-competition/non-solicitation covenant if he or she leaves the business. The short answer is a definitive "yes." Many co-owners view the restrictive covenant negatively, but a restrictive covenant protects the co-owners equally from a departing co-owner competing in the same area of business as the company. Restrictive covenants that arise as part of a "partnership" agreement are typically deemed enforceable if reasonable in scope (the geographic radius of the restriction) and in duration (the term of the restriction, typically a maximum of three years or less).

Conclusion

The buy-in transaction has a natural flow and process. The partners should focus on running the business and let their advisors advise them. Each deal and business enterprise is unique, so be careful when comparing buy-in deals involving different companies. It is important to engage an experienced transactional attorney and a CPA who are familiar with the issues to guide potential partners through this important process.

William Barrett is a partner at Mandelbaum Salsburg and Chair of the Firm's Corporate & Transactional Practice Group. He can be reached at 973-736-4600, or at wbarrett@msgld.com. ■

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UPDATE: More Questions Answered in the Wake of DOMA's Repeal

The impact of the repeal of DOMA is spreading like wildfire and the rights afforded to same-sex couples seem to be increasing and evolving almost daily. With 14 states and the federal government on the same page, it will be interesting to see what happens next. Will the rest of the states voluntarily legalize same-sex marriage, or will the U.S. Supreme Court repeal Article 2 of DOMA and eliminate the states' choice? Only time will tell, but the bottom line is clear...same-sex marriage is here to stay.

Casey Carhart concentrates her practice in taxation, estate planning, tax controversy and business transactions. She can be reached at ccarhart@msgld.com. ■

Custody and Religion

By Lynne Strober

The issue of religion sometimes plays a role in custody determinations. While differences in religious beliefs may be inconsequential or highly significant during a marriage, once parents part ways, concerns over the religious upbringing of their children can become as relevant as decisions about education, health, and financial responsibility for their children's lives. Courts typically address issues of religion on a case-by-case basis, engaging in fact-specific analysis to determine custody decisions. Because of the uncertainty inherent to this analysis, parents are likely better off trying to reach a resolution outside the court system regarding the religious upbringing of their children.

The clear goal in all custody cases is to protect the child. The sanctity of the family is to be embraced as well as to the extent that such is in the best interests of the child keeping the State from interfering with a family's religious practices. The intention is to keep the State from unduly getting involved in the day to day lives of family unless each parent's approach is very divergent. When the religious practices become highly unusual, a Court can look to see if they are unduly burdensome on the child, particularly if these religious practices are new, arising after the divorce action.

Courts typically address issues of religion on a case-by-case basis, engaging in fact-specific analysis to determine custody decisions.

I. Philosophical Underpinnings

Religion can be an influential factor in a child's developing identity. While the law should not ordinarily dictate the religious practices of a family, when custody is involved, courts can be obliged to get involved with the social, cultural, and religious aspects of a child's life if the issue is presented. Specifically, courts address religion for three reasons: first, religion may be a necessary consideration to completing an analysis of the child's bests interests; second, religion may be a factor in access and time sharing, requiring a court to address scheduling due to religious practice and the obligations of the non-custodial or custodial parent; third, the court may have to assess freedom of religion claims by a parent who feels obligated to provide religious training to the child against the parent's wishes or belief system. Clearly, courts can't judge the content or substance of either parent's religion in these contexts so long as the practices are not contrary to the child's health, safety and well being. In such events, courts can get involved, such as medical care issues, for example.

Religion can affect the way a child interacts at home, at school and in their community. Religion may also relate to a child's ethnic and cultural identity, and thus represents an important part of the child's character. As with all child related matters, it is the best interests standard the applies. When religion is an issue in custody determinations, parents may lose sight of their genuine concerns in the child's best interest and fall into the trap of trying to "win." Alternatively, parents may be motivated in the first place in trying to exert power and use religion as a weapon to gain custody of the child.

II. Typical Court Treatment

a. Rights of Residential Parent

New Jersey and some other courts around the country employ a default rule, where the residential parent automatically has the right to determine the religious upbringing of the child. However, the parents are permitted to reach an alternative arrangement if the case is settled.

In Feldman v. Feldman, 378 N.J. Super. 83 (App. Div. 2005), the children had a Jewish father and a Catholic mother, and were baptized and named in both traditions. After the divorce, the father was appointed the residential parent. The children were still raised in both faiths, but the father objected when the mother tried to compel him to allow the oldest child to attend religious classes that would take place all day on Sundays, which was a day the child spent with the father. The court held that because the residential parent has the right to determine the religious upbringing of the child, he could forbid the child's participation in Catholic religious education classes.

The court's determination that faith is central to a child's upbringing may influence the determination of which parent should have physical custody. In T. v. H., 102 N.J.Super. 38 (Ch. Div. 1968), the court awarded custody to father where the parties' separation agreement provided that the children would be raised in the Jewish faith, the father lived in Northern New Jersey and had access to numerous temples, and the mother who was remarried to a non-Jewish person and lived in Idaho, with over 80 miles to the nearest temple. Id. at 42.

b. Matrimonial Settlement Agreement

While the rights of the residential parent are often controlling, courts also place great weight on the Settlement Agreement incorporated in the Judgment of Divorce if it set forth provisions relating to the child's religious upbringing. In

Hoefers v. Jones, 288 N.J. Super. 590 (Ch. Div. 1994), Father sought termination of the joint custody agreement, which required him to pay private school tuition. Father argued these payments infringed on his Constitutional rights to freedom of religion. Mother sought enforcement of the order as the residential parent. The court held Father was bound by the Agreement because the children's attendance at a religious private school did not interfere with defendant's right to practice his own religion.

c. Changed Circumstances/ Modification

Parents may petition the court for modification relating to some aspect of the child's religious life based on changed circumstances, or, in some cases, religion itself constitutes a change in circumstance justifying modification. In McCown v. McCown, 277 N.J.Super. 213 (App. Div. 1994), the Appellate Division held that the trial court had discretion to deny wife's petition to modify the custody agreement after converting to orthodox Judaism and wishing to send children to a Hebrew school rather than a private school. Id. at 218. The court drew its rationale from the desire to "minimize conflicting pressures placed on children and permit them to steer the course between the conflicting views and beliefs of parents." Id. at 219.

In Brown v. Szakal, 212 N.J. Super. 136 (Ch. Div. 1986), Mother sought the modification of visitation rights to restrain father from allowing children to violate Jewish Sabbath and dietary laws during his visitation. The court denied the request because there was no clear and convincing showing that the children would be at risk without the requested relief. Mother had rights based on the Settlement Agreement to choose the religion of their children, but could not compel the court as a state agency to constitutionally impose the practice of her beliefs and those of her children on defendant.

New Jersey and some other courts around the country employ a default rule, where the residential parent automatically has the right to determine the religious upbringing of the child.

III. Cases Around the Nation and Non-Mainstream Religions

a. Decision-making power

In numerous cases, courts refer to the "decision-making power" of one parent over another to make determinations regarding the child's religion. In Hodgins v. Hodgins, No. 2100022, 2011 Ala. Civ. App. LEXIS 286 (Ala. App. Ct. Oct. 28, 2011), Mother and Father divorced in 2008; the divorce judgment incorporated a settlement agreement which provided that they would share joint legal custody, Father had sole physical custody, and Mother had visitation. The agreement provided that the father should consult with mother on issues of health, education, and religion of child. After Mother petitioned the court for modification of her visitation rights, Father appealed the court's order granting Mother final decision-making authority over religious and educational matters based on the child's best interests because Mother lived in South Carolina while Father and child lived in California. The court upheld the decision based on evidence presented to trial court that Father used his position as the parent with final decision-making authority to exclude Mother from child's life. Father also argued awarding mother final decision-making authority over religious matters violated his right to freedom of religion. The court found insufficient case law to support that position and did not consider it.

b. Development of Religion After Divorce

Courts differ on their treatment of custody determination in petitions brought by a parent in the situation when one of the parents has changed his or her religion post-divorce. In In re Marriage of Pace, No. 1 CA-CV 09-0575, 2010 Ariz. App. Unpub. LEXIS 1230 (Ariz. App. Oct. 26, 2010), Mother appealed order granting Father final decision-making authority of children's religious matters. The children were raised Jewish and continued to attend Hebrew school post-divorce. However, after the divorce, mother converted from Judaism to Christianity. She sought modification of visitation to obtain custody of children on all Christian holidays and on alternate full weekends. Father objected to the proposed modification because it would prevent children from attending Hebrew school on Sundays. He sought an order that children be raised in Jewish faith, or, alternatively that Mother takes them to Hebrew school on Sundays. The trial court granted Mother's petition, finding Father failed to show that conflicting religious beliefs were detrimental to children. However, on appeal, the appellate court granted Father final decision-making authority based on findings that Mother's changed religion constituted changed circumstances.

In Khalsa v. Khalsa, 751 P.2d 715 (NM Ct. App. 1988), New Mexico's appellate court remanded a custody decision where the lower court improperly enjoined the father from discussing his religious beliefs with the children. Id. at 721. Both Father and Mother practiced the Sikh religion during the marriage and the children were raised as Sikhs and followed the requirements of their religion. Id. at 716. After the parties divorced, the mother obtained sole custody of the children, subsequently remarried and abandoned the Sikh religion. Id. at 716-17. She discouraged the children from practicing Sikhism; the father sought sole or joint custody of the children. Id. The court stated that courts should follow a policy of impartiality between religions, and intervene only where there is a "clear and affirmative showing of harm to the children." Id. at 721. Factors include: (1) whether there is evidence showing that the conflicting beliefs or practices of parents pose substantial physical or emotional harm to the child; (2) whether restricting the religious interaction between parent and child will alleviate this harm; and (3) whether restrictions are narrowly tailored so as to minimize interference with the parents' religious freedom. Id. The Appellate Court failed to identify any harm and thus held the lower court erred in restricting the father's ability to communicate about his religion with his children. Id.

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What Happens If I Don't Have a Will?

By Casey L. Carhart

I recently asked a group of people to answer this simple question: What will happen to your assets if you die without a will? The most common responses were "all of my assets will pass to my spouse" or "all of my assets will pass to my children." A few people believed that their assets would go to the State, particularly in cases where the person answering the question had neither a spouse nor children. The most surprising thing about this exercise was that of people questioned only 15% were correct!

So, what happens to your assets if you don't have a will? The correct answer is that it depends on two factors. First, are your assets "probate" or "non-probate" assets? Second, who are your surviving family members?

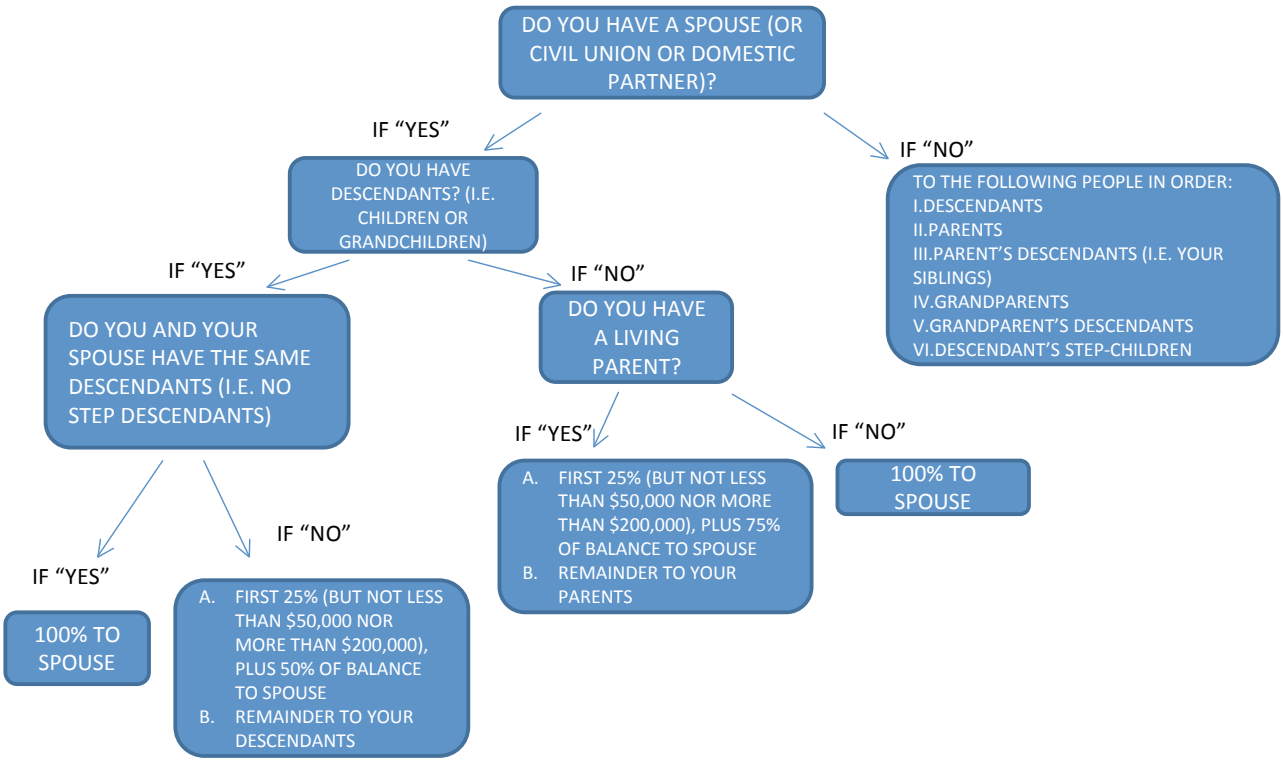
Non-probate assets are those assets that are jointly owned and pass by rights of survivorship, and assets that pass by beneficiary designation. Upon death, non-probate assets pass directly to the joint owner or the designated beneficiary and do not pass to your heirs pursuant to the provisions of a will. Examples of non-probate assets include:

- Property owned with rights of survivorship (i.e., property owned jointly with a spouse)
- Retirement plans with beneficiary designations (i.e., 401(k) plans)
- Jointly held bank or brokerage accounts and accounts with POD (payable on death) beneficiaries
- Life insurance
- Property held in a revocable trust

Any asset which you own at the time of your death that is not classified as a non-probate asset is a probate asset. Probate assets pass to the beneficiaries named in your will or, in the event that you do not have a will, to your surviving family members pursuant to state intestacy law.

The chart below outlines the New Jersey intestacy law and will aid you in determining where your probate assets will go in the event that you die without a will. If the result is not what you expected, it may be time to speak to an estate planning attorney.

Casey Carhart concentrates her practice in taxation, estate planning, tax controversy and business transactions. She can be reached at ccarhart@msgld.com. ■



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Affordable Care Act Creates Tough Healthcare Choices for Small Businesses

When comparing costs, it is vital for business owners to determine whether their companies qualify for a small business health care tax credit worth up to 50 percent of the employer's contributions toward the employee's premiums for a Marketplace plan. In general, to qualify for this tax credit the small business must purchase insurance through SHOP; have fewer than 25 full-time employees, or the equivalent (part-time employees who total 25 full-timers); pay employees salaries averaging less than $50,000; and pay at least 50 percent of the employee-only premiums for the plan purchased through SHOP.

The remainder of the premiums paid by the employer, which are not covered by the tax credit, can still be deducted as the employer's business expense. (Employers who do not qualify for any tax credit can still deduct the entire premium cost for a Marketplace plan as a business expense.)

It's All About the Taxes

In sum, once an employer has made a comparison of its current group plan with what is available at the Marketplace, to find the most comparable plans, then the whole issue of determining how to proceed is one of cost and the key, perhaps the determining, factor is the tax considerations of whether the employer qualifies for the tax credit under SHOP, and whether its employees qualify for a personal tax credit, and in what amount, if they individually purchase at the Marketplace.

The Final Step

The final step is to determine whether employees, because of the employee premium tax credit, would be better off financially, and obtain a better quality of insurance, if the employer simply eliminates providing health insurance, allowing employees to purchase individually at the Marketplace, and then the employer gives the employees a stipend, of a fixed amount, as its contribution to the premiums. This may be the best option for many small employers, particularly those with workforces primarily comprised of particularly low-paid employees, each with a number of dependents.

There are many tax advantages to this option which may make it the best of all. If the employer eliminates its group plan, then all its employees who would have to spend more than 9.5 percent of annual household income on their individual premiums (excluding dependents' premiums) should be entitled to the tax credit at the Marketplace. With the premiums reduced because of this tax credit, the employer can then give its employees a fairly modest stipend to further defray their costs

Under current Internal Revenue Regulations, the employer can take the stipend as a business expense on the company's tax returns. And, the stipend is not considered income to the employees, provided certain very simply requirements are met. So the stipend does not affect the employees eligibility for the premium tax credit.

The only IRS requirements for this option are that, if the employer pays the stipend directly to the employees, then they have to provide documentation to the employer that it was used to purchase health insurance at the Marketplace. The employer can also pay the stipend directly to the insurance carrier as proof for the deduction. (Obviously this is the recommended approach) At this time we have no reason to believe that these IRS regulations will not apply to health insurance purchased at the Marketplace.

Conclusion

Like so much else with the ACA, it remains to be determined whether the Marketplace SHOP will be a boon to small employers in trying to provide their employees with affordable, quality health care, either through direct employer purchase or thought individual employee purchases with the employer's financial support.

Dennis Alessi is Chair of the firm's Healthcare practice and Co-Chair of its Labor & Employment Law practice. He can be reached at dalessi@msgld.com. ■

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Custody and Religion

In De Luca v. De Luca, 609 N.Y.S.2d 80 (2d Dep't 1994), the Appellate court reversed lower court's decision prohibiting children of marriage from attending services or meetings of Jehovah's Witnesses or otherwise practicing the religion. During the marriage, the family practiced Catholicism, and upon divorce, the mother began practicing as a Jehovah's Witness. Id. at 81. The father requested custody based on concerns that the children would be unable to receive proper medical attention, including blood transfusions, would be unable to celebrate birthdays and holidays, including Christmas and Halloween. Id. at 81. The Appellate Court refused to alter the custody arrangement, finding that there was no harm or effect on the health or morals of the children. Id. at 81.

c. Constitutional Freedom of Religion

The Constitutional right to Freedom of Religion also plays a role in custody issues involving religion. The state's obligation to protect children from harm often conflicts with the state's constitutional obligation not to violate freedom of religion. Often, parents arguing that they should not have to comply with the other parent's religious preferences for the child will argue that such an obligation violates his or her right to freedom of religion.

In Gould v. Gould, 342 N.W.2d 426 (1984), Wisconsin's Supreme Court reversed a lower court ruling awarding custody to the father, based on its determination that the religious upbringing that would be provided by the father

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Custody and Religion

was more beneficial to the children than a non-religious upbringing by the mother. Id. at 428. The court noted that "there is a constitutional 'right to disbelieve' and also the right to believe in such nontheistic creeds as Buddhism, Taoism, Ethical Culture, and Secular Humanism." Id. at 432. The court further declared that when a child's custody is in issue, the court must narrowly inquire into the religious practices of the parents, and that the consideration should only depend on whether the religion could be "dangerous to the child's health or morals." Id. at 432-33.

In Muhammad v. Muhammad, 622 So. 2d 1239 (Miss. 1993), the court upheld the lower court's award of custody to the mother due to the father's involvement in the Black Muslim religion. Id. at 1251. The father contested this decision arguing that the tribunal violated his constitutional right to religious freedom. Id. at 1243. However, upon review, the appellate court found that the lower tribunal's comparison of Islam with a traditionally American lifestyle was not based on religious bias, but instead on the impact of the Islamic lifestyle on the children and the consideration of their best interests. Id. at 1248.

In Sagar v. Sagar, 781 N.E.2d 54 (Mass. App. Ct. 2003), the Appellate Court determined that trial court's decision did not violate father's right to the free exercise of religion in finding that the Hindu ceremony, Chudakarana, which involved tonsure and prayer, should not be performed on the parties' minor child until she was of sufficient age to decide whether or not she wanted to participate. Id. at 57.

Ultimately, the issue is the best interest of the children. Custodial parent's religious choices are given preference. Interference with religious practice is grounded in an analysis that examines whether such religious practice presents a danger or is harmful to the child.

Lynne Strober is Chair of the Family Law Practice. She can be reached at lstrober@msgld.com. ■

Mandelbaum Salsburg News

Partner **Craig W. Alexander,** represented the owner of a grocery-anchored shopping center in Somerset County in connection with a multi-million dollar construction loan and negotiation of a lease agreement.

Mr. Alexander, also represented the owner of two child care centers in connection with the multi-million dollar refinancing of those centers.

Partner **Peter Tanella**, represented the Buyers in the acquisition of a veterinary hospital and commercial real estate for $1M in Bergen County, New Jersey.

Mr. Tanella, also represented the Sellers in the sale of a veterinary hospital in excess of $1.5M in Passaic County.

On September 21, 2013, **Khizar Sheikh** spoke at the New Jersey State Bar Association's "Suddenly Successful" Seminar. Khizar spoke to fellow attorneys on "How To Find Your Niche As An Attorney In A Large World Of Lawyers."

On Oct. 22nd Partner **Steven Adler** Co-Chaired the Jewish Federation of Northern NJ's Commerce and Professionals Power Networking Breakfast and Seminar.

Partner **Martin D. Hauptman** spoke on October 29th at the Metuchen Inn to the Northeast Financial Group.

Partner and C.O.O. **William S. Barrett** spoke about Employment Issues for Business Owners on Wednesday, October 30th which was part of an all day seminar that was presented by the Dental Resource Alliance.

Partner **Arla Cahill** has been invited to attend the 22nd Annual Excellence in CLE Awards Reception recognizing professionals who have assisted the New Jersey Institute for Continuing Legal Education. Cahill is also an invited speaker for the Worrall F. Mountain Inn of Court on punitive damages in commercial litigation cases in December 2013.

Judge Michael Diamond (Ret) lectured at Fordham Law School on the topic of Pre-nuptial Agreements in October and will be teaching a Mediation course at Seton Hall Law School in January.

The **Hon. Paul J. Vichness (Ret)** spoke at the New Jersey Association for Justice Meadowlands Seminar 2013 at the Sheraton Meadowlands on November 15, 2013. The title of the presentation was Summing Up The Damages: "A Judicial Perspective."

Judge Vichness was also the featured speaker/presenter at the seminar "Current Issues in Jury Trials" which was held on November 25, 2013 at the Renaissance Hotel in Woodbridge, New Jersey.

Partner **Stuart Gold**, spoke at the annual meeting of the American Society for Legal History on November 8, 2013, where he presented a paper on "Testamentary Manumission in Early Republic New Jersey." The paper will be published in the Spring 2014 issue of the Rutgers Race & the Law Review.

Mandelbaum Salsburg in the Community

The Women's Initiative hosted their second event, a wine tasting, at the Orange Lawn Tennis Club in South Orange on Tuesday, October 29th. Over 70 women were in attendance to network, make introductions and meet new contacts. The attendees brought donations for Dress for Success Morris County. The event was very well received and the group is now in the planning stages for the next event.

Partner **Arla Cahill** participated in the 5th Turkey Ride, a 25-mile charity bike ride benefitting the New Jersey Food Bank in November 2013. She has also participated in a 45-mile charity bike ride benefiting the National MS Society, Delaware Valley Chapter in September 2013.