the SideBar
Fall 2015

Groundbreaking Decision on the Employment Status of Interns

By Andrew A. Kimler, Esq.

For many years, all types of companies have utilized the services of unpaid interns who neither received minimum wage nor overtime payments for their services. In a major ruling, the Federal Court of Appeals for the Second Circuit in New York announced a new test for determining whether internships are exempt from the Fair Labor Standards Act and the New York Labor Law. The lower court had ruled that two unpaid interns for Fox Searchlight Pictures were actually employees based upon the Department of Labor's (DOL) six-part test. Accordingly, if the internship did not satisfy all six of its criteria, then the intern must be treated as a paid employee.

Rejecting the DOL's rigid test, the Appeals Court instead focused on whether the intern was the "primary beneficiary" of the experience, and "whether the intern or the employer is the primary beneficiary of the relationship." Thus, the Second Circuit provided a list of non-exhaustive factors which should be considered in determining whether an individual is an employee or an intern under the "primary beneficiary" test:

1. Do the intern and the employer clearly understand that there is no expectation of compensation?

2. Does the internship provide training that would be similar to that which is provided in an educational environment?

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3. Is the internship tied to the intern's formal education program by integrated coursework or the receipt of academic credit?

4. Does the internship accommodate the intern's academic calendar?

5. Is the internship's duration limited to the period in which the internship provides the intern with beneficial learning?

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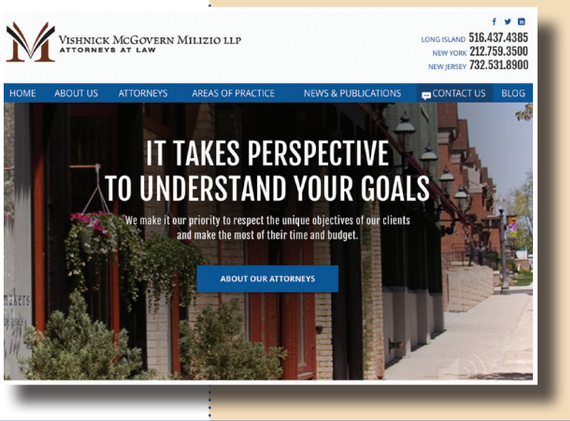
Announcing the New vmmlegal.com Website

We're proud of our new website. It's filled with pertinent information on our firm, our practice groups, our attorneys and so much more. Read our blog, press releases, SideBar newsletters and everything the site has to offer.

Our new website will contain timely information on an ongoing basis. So please come back again and again....and let your friends, colleagues and family members know about Vishnick McGovern Milizio LLP on the web.



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Understanding Guardianships

By Constantina S. Papageorgiou, Esq.

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There are three different types of Guardianships used for protecting the interest of an incapacitated individual or minor (referred to as a "ward"). Although these proceedings are necessary and useful, they can be complex, time consuming, costly, and sometimes avoidable.

An **Article 81 proceeding** is brought in the New York State Supreme Court under the Mental Hygiene Law (MHL) for an individual who is incapable of making his or her own decisions due to the inability to appreciate the nature and consequences of his or her actions. Many times the individual has mental ailments or has suffered from a tragic accident or medical condition that has resulted in an inability to take care of oneself or one's assets/property. Guardianships can be temporary or permanent and are usually brought because the individual has not executed a Power of Attorney or Health Care Proxy to nominate someone to be his or her agent or representative to make necessary decisions. The Guardian is therefore appointed to render decisions for the ward's person and/or property and can exercise certain powers without court approval; however, major decisions such as selling the ward's property or changing his or her residence, require court approval before any action may be taken.

An **Article 17 proceeding** is brought when a minor inherits property or receives a settlement. The parent of the minor or the nominated Guardian must ask the court for appointment as the ward's Guardian in order to marshal these assets. Once appointed, the Guardian collects the assets of the minor and deposits them into an account at a court approved bank where they are jointly held with the Surrogate's Court, which hears such cases. Withdrawals and expenditures can only be made if permission is granted by the Court. This Guardianship lasts until the minor reaches age of majority (18 years old). One can avoid this proceeding by establishing a trust within a will for any minor beneficiaries and by thereafter making any and all assets pass through the will if payable to a minor.

An **Article 17A proceeding** also is brought in the Surrogate's Court under the New York Surrogate's Court Procedure Act (SCPA) for an individual who is "developmentally disabled" or has an "intellectual development disorder" and needs a guardian to make his or her personal, medical and financial decisions. This Guardianship should be in place by the individual's 18th birthday to enable the Guardian to make decisions for him or her once the ward is "emancipated."

USING THIS INFORMATION WISELY

All three Guardianships require annual accountings to ensure that an incapacitated/minor individual's assets are not being spent unwisely by the Guardian. As you can imagine, these proceedings take time as they make their way through the court system. The biggest issue that relatives and other interested parties contend with is that the court becomes the final decision-maker of what is best for the ward. Although an SCPA Article 17A cannot be avoided for individuals with special needs, speak to your estate planning attorney to engage in proper planning so that Guardianships under the Article 17 and MHL Article 81 can possibly be avoided.

Constantina S. Papageorgiou is an associate in the Elder Law and Trust and Estate Practice Groups. She can be reached at cpapageorgiou@vmmlegal.com or 516-437-4385, ext. 141.

Significant Changes To New York's Alimony (Maintenance) Guidelines On The Horizon

By Joseph Trotti, Esq. and Eun Chong (EJ) Thorsen, Esq.

Just five years after new temporary maintenance guidelines were adopted in 2010, Governor Andrew Cuomo is now reviewing a new bill that would once again cause significant changes to New York's alimony (maintenance) guidelines for both during and after a divorce proceeding.

The current guidelines for temporary maintenance — that is maintenance paid while the case is ongoing in court — apply a formula which was intended in particular to benefit low-income individuals who could not afford attorneys to argue the factors considered in calculating an award. However, in practice, applying the formula resulted many times in one spouse being asked to pay more in child support, maintenance and other expenses than his or her monthly income. And because the guidelines do not apply in calculating post-divorce, or permanent maintenance, much uncertainty and consideration of all of the factors still remain.

The new bill, which passed both the New York State Assembly and Senate this past June, has modified temporary maintenance guidelines; applies guidelines also to permanent maintenance; and has a new income cap of $175,000, down from $543,000. This means that any income above $175,000 considered for purposes of calculating maintenance is left to the judge's discretion. It also provides proposed ranges for the duration of maintenance awards, such as suggesting seven to ten years of post-divorce maintenance for marriages lasting 20 years, and alters the formula when child support is is being paid. In addition, no longer will a spouse's enhanced earning capacity, such as a license, degree, celebrity goodwill or career enhancement, be required to be valued by an expert and distributed.

Please contact our Matrimonial and Family Law attorneys Joseph Trotti and Eun Chong (EJ) Thorsen to discuss these and any other family or matrimonial law issues you may have.

Partner Joseph Trotti and associate Eun Chong (EJ) Thorsen practice in the firm's Litigation Group. They can be reached at jtrotti@vmmlegal.com / 516.437.4385, ext. 140 and ejthorsen@vmmlegal.com / 516.437.4385, ext. 139.

news & Events

LIBN Publisher Scott Schoen and Joseph Milizio

VMM Managing Partner **Joseph G. Milizio** was presented with a Corporate Citizenship Award in the category of for-profit Leadership Excellence at a breakfast hosted by Long Island Business News on September 10th. Joe was recognized for his significant dedication to the community, particularly the Long Island Chapter of the National Multiple Sclerosis Society and the Human Rights Campaign, along with his role as a legal innovator.

Joseph Trotti and EJ Thorsen

Among her June and July activities, VMM Litigation associate **Eun Chong (EJ) Thorsen** was installed as vice president of the Queens County Women's Bar Association and hosted a delegation from the Korean Ministry of Gender Equality as part of its tour to learn about family law procedures to develop the Korean system. She and partner **Joseph Trotti** conducted the Korean American Family Services Center's pro bono clinic and assisted low income individuals with family and matrimonial law and domestic violence issues.

Andrew Kimler and Avrohom Gefen

Partner **Andrew Kimler** and associate **Avrohom Gefen** have once again been named to Super Lawyers, a publication of The New York Times. 2015 marks the third consecutive year that Andy has received this prestigious recognition and the second consecutive year that Avrohom has been named a New York Metro Area Rising Star.

VMM CONTINUES ITS WINNING WAYS

Vishnick McGovern Milizio attorney **Jordan Freundlich** represented the plaintiff in a dispute over the ownership of real property. The suit brought by VMM on the plaintiff's behalf resulted in a seven day trial before Queens County Supreme Court Referee Elizabeth Yablon. The decision after trial declared the plaintiff the owner of the property at issue, directed the defendants to vacate the property, and awarded the plaintiff over $500,000 in damages. With the value of the property at over $800,000, this was a victory that exceeded $1.3 million.

Joe Milizio congratulates Jordan Freundlich and Bernie Vishnick

Vishnick McGovern Milizio attorneys **Bernard Vishnick** and **Jordan Freundlich** represented the executors of a decedent's estate. After the decedent's passing, his brother produced to the estate a copy of a purported agreement providing that the decedent's brother would receive millions of dollars from a real estate transaction at the expense of the estate. The executors brought a proceeding in Queens Surrogate's Court claiming that the purported agreement was a fraud. The proceeding was tried before Surrogate Hon. Peter J. Kelly. At trial, Surrogate Kelly issued a decision invalidating the respondent's claims under the purported agreement.

Groundbreaking Decision *(Cont'd from Page 1)*

6. Does the intern's work complement, rather than displace the work of paid employees, while providing significant educational benefits to the intern?

7. Do the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship?

The court also made clear that other relevant evidence may be considered and that no one factor is controlling. Nevertheless, the court emphasized that the DOL's formula which required that all six of its criteria be met, is no longer the test to be applied when determining whether an "intern" is in reality an employee entitled to compensation. Employers should therefore work with their counsel to make certain that their internship programs satisfy these new standards. Indeed, an unpaid internship which does not meet this criteria may still result in potential liability for wage and hour violations. It should be emphasized, however, that the court noted that there are significant benefits from a "properly designed, unpaid internship" program which can "greatly benefit interns. For this reason, internships are widely supported by educators and by employers looking to hire well-trained recent graduates." Nevertheless, the court concluded that since "employers can also exploit unpaid interns by using their free labor without providing them with an appreciable benefit in education or experience," it is necessary to develop standards that provide courts with the flexibility to examine the economic realities which exist between the intern and the employer.

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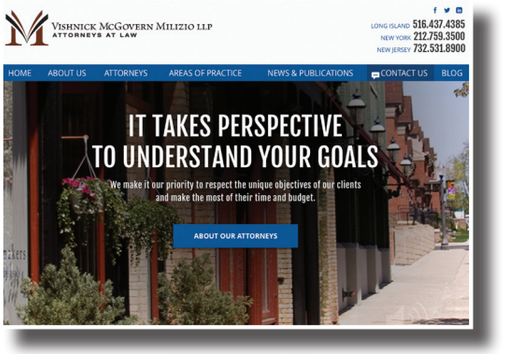

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