

## Grandparent Visitation

*Part One of a Two-Part Article*

By **Barry Abbott and Alton L. Abramowitz**

A client comes to your office and explains that her husband died recently and that she is the mother of school-age children. After expressing your condolences, you learn that your client's mother-in-law has demanded a regular schedule of visitation, but the client does not trust her. She believes, from past experience, that the grandmother is intrusive and will be more intrusive now that her son has died, and she is most concerned that her mother-in-law will undermine her role with her children. During the interview you learn that the mother-in-law has had a divisive influence on members of her own family.

The client, although sad and understandably upset, is educated, intelligent, and clearly a caring, fit parent (the latter term having significant implications in the analysis to follow). She begins to cry, reaches for her bag and removes some papers that she spreads out on your desk — a family court visitation summons and petition that she was recently served. She is due in court in a week.

The client tells you, in no uncertain terms, that she does not want a regular schedule of visitation between her mother-in-law and her young children who, you

*continued on page 5*

## Divorce Pitfalls and the Affordable Health Care Act (Obamacare)

By **Lynn Strober**

**T**he purpose of this article is to alert attorneys to the potential impact of the Affordable Health Care Act, colloquially known as "Obamacare" (the Act), 42 U.S.C.A. § 18001 et seq. (2010), on litigants and on the handling of divorce cases by matrimonial practitioners. At this juncture, there is no way to know for certain how the implementation of the Act will affect us. However, practitioners need to protect their clients' needs as best as possible and consider a litany of different factors and take into account some potential unknowns.

### MEDICAL INSURANCE

Now, more than ever, attorneys handling matrimonial matters must consider the cost of medical insurance coverage; particularly post-divorce. Preliminarily, the matrimonial practitioner and/or the litigant must consult with an insurance professional for many reasons, including:

1. To explain the Act. The Act is complex and difficult to understand. An explanation of the nuts and bolts of the Act is necessary to ensure compliance with the law and improve the ability of the practitioner and litigant to pursue their interests.
2. To assess costs. The costs for insurance vary and may be difficult to quantify. The consultation may help determine the extent to which costs may potentially increase with the age of the recipient.
3. To determine to whom and to what extent the Act applies, including individuals and businesses and the various levels of coverage.
4. To answer whether the Act does or does not affect the utilization of Divorce from Bed and Board or COBRA coverage. (A Divorce from Bed and Board is a NJ divorce that is final, except that the parties cannot remarry. The arrangement often permits one party to remain on the other's medical insurance policy. It was created in the 1950s for those whose religious

*continued on page 2*

### *In This Issue*

<b>The Affordable Health Care Act.....</b>	<b>1</b>
<b>Grandparent Visitation .....</b>	<b>1</b>
<b>The Ethics of Snooping .....</b>	<b>3</b>
<b>Practice Tip: Tax Liability .....</b>	<b>7</b>

# Obamacare

continued from page 1

beliefs prohibited divorce. It is now used to continue medical insurance coverage. Attorneys in NJ should confirm that the insurance will continue; attorneys from other states should determine whether their jurisdictions have a similar vehicle.)

The good news is that there are several benefits of the Act: there are no limitations on coverage for pre-existing conditions or gender; various preventative services are available; no medical examination is required to qualify for coverage, and no one can be turned away.

Effective Jan. 1, 2014, most individuals must have health insurance, provided either through the government exchange, an employer, privately purchased insurance, or Medicare or Medicaid. In order to purchase a marketplace health insurance plan outside the open enrollment period, there must be a qualifying life event. Divorce, like marriage or the birth of a child, is considered a qualifying life event. Attorneys need to be able to assess the impact of the Affordable Care Act on divorcing or post-divorce clients to advocate effectively for their clients.

## ALIMONY PAYMENTS

In the initial determination of alimony, the need for alimony and the ability to pay it is potentially affected by the cost of health insurance, which affects both the alimony payor and the recipient. In New Jersey, for example, one of the factors courts consider in fixing the amount of alimony to be paid is the needs of the supported spouse, N.J.S.A. § 2A:34-23 (b) (2009). If the supported spouse's insurance coverage becomes less expensive under the

**Lynn Strober**, a member of this newsletter's Board of Editors, chairs the family law department at Mandelbaum Salsburg P.C. The author would like to thank **Christie Pazdzierski**, a law clerk at the firm, for her help in the preparation of this article.

Act, then spousal support may also decrease. Since the cost of insurance is reduced, arguably, the amount of alimony the recipient requires is reduced.

The determination of the cost of medical insurance coverage is further complicated by the available government subsidies for individuals. An Affordable Health Care Act participant may be eligible for financial assistance to cover a portion of the costs of health care, which could greatly reduce that spouse's premiums. The credits are available to individuals who do not receive what is considered affordable, comprehensive coverage through their jobs and whose household income level is less than 400% of the federal poverty level. Additionally, if an individual's income changes during the year; his or her subsidy may change or be revoked. COBRA is still available for the maximum time under a plan; however, COBRA will likely be more expensive for the spouse who will have to pay the entire cost of the premium, including the piece that the employer paid in the past. Many states, including New Jersey, are expanding Medicaid programs under the Affordable Care Act, raising the eligibility threshold. The supported spouse, though previously ineligible, may now become eligible for health insurance through Medicaid.

Eligibility for Medicaid creates another opportunity for the paying spouses to argue for lower alimony payments because the supported spouse may be covered by the higher threshold. This raises another issue of who should be required to pay: the government or the paying spouse. In light of the general public policy that the government should not shoulder costs where an individual has the ability or the resources to provide for their needs, it is unclear the extent to which a court may require a supporting spouse to provide for health care costs where government subsidies are the only means by which a supported spouse can pay for health insurance.

continued on page 6

## The Matrimonial Strategist®

CHAIRMAN . . . . .	Willard H. DaSilva DaSilva Hilowitz & McEvily LLP Garden City, NY
EDITOR-IN-CHIEF . . . . .	Stephanie McEvily
EDITORIAL DIRECTOR . . . . .	Wendy Kaplan Stavino
MARKETING DIRECTOR . . . . .	Jeanne Kennedy
GRAPHIC DESIGNER . . . . .	Evelyn Fernandez
BOARD OF EDITORS	
LAURENCE J. CUTLER . . . . .	Laufer, Dalena, Cadicina, Jensen & Boyd, LLC, Morristown, NJ
MARIAJOSE DELGADO . . . . .	Shemtov Law P.C. Blue Bell, PA
PAUL L. FEINSTEIN . . . . .	Paul L. Feinstein Ltd. Chicago
LYNNE GOLD-BIKIN . . . . .	Weber Gallagher Simpson Stapleton Fires & Newby LLP Norristown, PA
JONATHAN W. GOULD, PH.D. . . . .	Psychologist Charlotte, NC
FRANK GULINO . . . . .	Private Practice Chatham, NJ
DAVID A. MARTINDALE Ph.D. . . . .	Forensic Psychological Consulting St. Petersburg, FL
CHARLES J. MCEVILY . . . . .	DaSilva Hilowitz & McEvily LLP Garden City, NY
MARK MOMJIAN . . . . .	Momjian Anderer, LLC Philadelphia
REBECCA PALMER . . . . .	Lowndes, Drosdick, Doster, Kantor & Reed, P.A. Orlando, FL
JUDITH L. POLLER . . . . .	Pryor Cashman LLP New York
LLEWELYN G. PRITCHARD . . . . .	Helsell Fetterman LLP Seattle, WA
CURTIS J. ROMANOWSKI . . . . .	(Private Practice) Metuchen, NJ
ROBERT E. SCHLEGEL . . . . .	Houlihan Valuation Advisors Indianapolis, IN
ERIC L. SCHULMAN . . . . .	Schiller DuCanto and Fleck LLP Lake Forest, IL
MARTIN M. SHENKMAN . . . . .	(Private Practice) Paramus, NJ
LYNNE STROBER . . . . .	Mandelbaum, Salsburg, P.C. West Orange, NJ
JULIA SWAIN . . . . .	Fox Rothschild LLP Philadelphia
TIMOTHY M. TIPPINS . . . . .	(Private Practice) Latham, NY
THOMAS R. WHITE 3rd . . . . .	University of Virginia School of Law Charlottesville, VA
WILLIAM R. WRIGHT . . . . .	Wright Law Firm, P.A. Jackson, MS

The Matrimonial Strategist® (ISSN 0736-4881) is published by Law Journal Newsletters, a division of ALM. © 2014 ALM Media, LLC. All rights reserved. No reproduction of any portion of this issue is allowed without written permission from the publisher.

Telephone: (877) 256-2472

Editorial e-mail: wampolsk@alm.com  
Circulation e-mail: customercare@alm.com  
Reprints: www.almreprints.com

The Matrimonial Strategist 023146  
Periodicals Postage Paid at Philadelphia, PA  
POSTMASTER: Send address changes to:

ALM  
120 Broadway, New York, NY 10271

Published Monthly by:  
Law Journal Newsletters  
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103  
www.ljonline.com



# The Ethics and Legality of Snooping

## *Advice from an Investigator*

By Philip Segal

There are few varieties of litigation more emotionally fraught than an intense matrimonial case. Even if billions are at stake in a real estate dispute, my impression is that clients in a nasty divorce get far more upset than a General Counsel steering the corporate ship through a legal dispute worth thousands or several million more.

Upset clients whose lives are exploding and who are worried not just about money but about children, custody and visitation can and do ask their lawyers to do all sorts of things to gain the upper edge. Some of those things we can do, and others we cannot.

When we tell clients we are unable to attempt a particular course of action, the reason is usually one of professional ethics or illegality.

### **‘YOU WANT ME TO SAY WHAT?’**

Even lawyers who hire us to help them gather facts can get carried away. We were once asked to find out the identity of a woman who was occupying a particular apartment in New York. She had just moved in and thus databases did not yet have her name linked to that address. She lived in a building guarded by an alert and protective doorman, so

**Philip Segal** is a New York attorney and the founder of Charles Griffin Intelligence, a New York firm specializing in fact investigation for lawyers. He spent 19 years as a journalist with *The International Herald Tribune*, *The Wall Street Journal*, *The Economist Group*, and NBC News, among others. After earning a degree at Yale Law School, he completed his legal studies at the Benjamin Cardozo School of Law, where he taught fact investigation for three years. He can be reached at philip@charlesgriffinllc.com.

walking in and reading the lobby board was out of the question.

“Just pretend you’re a postal inspector,” said the lawyer who hired us. I was polite about it, but was forced to point out that he had just asked me to break several federal and state laws, as well as to violate both his and my rules of professional ethics. (*n.b.*: even if I had not been a lawyer, lawyers are not allowed to instruct their agents to violate ethical rules on their behalf!)

While I was pretty sure there is a federal statute about impersonating a postal inspector, I knew for certain that New York has a statute against criminal impersonation. It carries a penalty of up to four years in prison. Consequently, our firm will not impersonate government officials — or anyone else, for that matter: no pretend journalism, no fake opinion poll or made-up head-hunting firm.

Even if your state has no law against criminal impersonation, it has ethical rules governing lawyers. Making an untrue statement is prohibited in all 50 states, and obtaining information by pretending to be a reporter for *The Wall Street Journal* or an auditor at Ernst & Young is simply not something an ethical lawyer is permitted to do.

Pretending to be someone you are not is a form of pretexting, and pretexting is behind a lot of illegal activity that touches on the jobs we are asked to do. If we are asked to find out how much money someone has in their bank account, to get someone’s cell phone records or medical records, our response is usually the same: If you get that information by pretending to be the holder of the account or the person whose medical records you are going after ...

### **‘THAT’S ILLEGAL’**

Most of our clients do not want to break the law, but I am sure the occasional person who does not call us back after such a conversation is able to find an investigator willing to break the rules. They may be able to fool Verizon or Bank of America into coughing up information that ought to remain private. But it is not worth the risk if they get caught and

and become subject to professional discipline or are prosecuted.

### **‘THIS IS A RECORDING’**

Sometimes, even when an action *appears* to be legal, the facts can alter the situation. You then throw in ethical restrictions, and what was previously a clear-cut picture becomes murky. A case in point involves recording phone calls. Many lawyers know that state law is divided into two groups with regard to recording phone calls. In the “one-party” states, just one of the two parties on a phone call needs to be aware that recording is happening. In “two-party states,” both parties on the call need to be aware.

We had a client who wanted us to find out the identity of a man with a particular cell phone number. Based on some of the man’s responses when we called him, we had a fairly good idea of who he was, but the client wanted greater certainty. He asked us to record the phone call.

Since we and the phone holder were both in one-party states, there should have been no problem, correct? Not so quickly. We found that the suspected subscriber to the cell phone had a weekend house in a two-party state. What happens if you call a number and the call is received in a different jurisdiction (in this case, a two-party state?) The state where the call is received is the one that governs.

Furthermore, even if a taped call is legal, it may not be ethical. Many U.S. courts have expressed skepticism or downright hostility to the idea of lawyers taping phone calls. In New York, where we operate, the bar has tended to bless recorded phone calls only when personal liberty is at stake. While crucially important to the client, finding out who may be having an affair with his wife does not qualify as personal liberty. We persuaded the client to come and listen live when we made the call.

### **PINGING NOT ALLOWED**

Cell phones were at the root of another ethical/legal problem we had recently: A wayward husband was

*continued on page 4*

# Snooping

*continued from page 3*

doing everything he could to evade service of process, including hiding out with his parents (who pretended never to have heard of anyone with the same name as their son). We knew that the man was still paying his cell phone bill because his message still played when we called it. Our client got a tip that the man was in jail in North Carolina, so we asked an investigator there to visit the three county jails most likely to be housing our man. We came up empty, when the investigator suggested “pinging” the husband’s cell phone.

We politely declined, and here is why: “Pinging” (using a cell phone signal to locate the phone itself) is not allowed without a court order. It is not a matter of ethics, but rather federal statutes (The Telecommunications Act of 1996 imposes a duty on carriers to keep customer information confidential, and the Telephone Records and Privacy Protection Act of 2006 specifically applies to cell phone location information).

Many investigators might have friends at the phone company to do the job, but that does not make it legal.

## WHERE IS THE CAR?

One area of increasing interest that forces us to keep close check on court decisions involves GPS tracking of vehicles. The same technology that allows pinging of cell phones (but restricts it without a court order) allows you to figure out where a particular car is at any time. Clients are increasingly interested in exploring the use of tracking devices. However, consider the following:

- In some states, putting a tracking device on a car is legal if the person placing it shares ownership of the car.
- In others, consent is required of all owners before placing the tracking device on the car.
- But even if you are able to evade criminal charges, you might still run up against a civil suit for invasion of privacy.

We recently talked to a group of investigators who happily slap trackers on cars on a regular basis. They were upset to hear our news that there is a bill pending in the New York State Senate to make it illegal to place GPS trackers on cars, as these are deemed in the bill to be another form of “digital stalking.” The New York Court of Appeals (the state’s highest court) recently held that an employer’s attaching a GPS

***‘Pinging’ (using a cell phone signal to locate the phone itself) is not allowed without a court order.***

device to an employee’s car needs no search warrant, but the search must still be reasonable. The U.S. Supreme Court does not speak to the issue when private citizens place the tracking device, but decided that the government needs a warrant to do so (*U.S. v. Jones*, 132 S. Ct. 949, 565 U.S. \_\_\_ (2012)).

What all of this means in a matrimonial context is unclear. I would guess that tracking a car to find a missing child or even to monitor what happens when a child is in the other parent’s custody would be OK, but tracking to prove adultery may not be. The bottom line is that to be completely safe, it would be wise never to track a car in a matrimonial context without the permission of the car’s title holder. Otherwise, at least be aware of the softening ground on which you may be treading.

## MIRRORING THE HARD DRIVE

The authority to monitor is also a big issue when it comes to electronic evidence. The best information in a matrimonial case usually comes from inside the marital home in the form of paper receipts left lying around and, increasingly, from the drive of a shared computer.

The word “shared” is key. Spouses are often eager to grab a home computer (or let us in to take a mirror image of the drive when the other spouse is not home). That can be

OK, but only if the person giving us access to the computer is authorized to do so. We have begun inserting language into our engagement letter that makes clients warrant that they have authority to view any electronic device they hand us. Grabbing your husband’s work computer paid for by his company is not allowed. You could run afoul of the federal Computer Fraud and Abuse Act, originally intended to apply to cases with a compelling federal interest, but now governing ordinary computers and smart phones too.

The issues get tougher. For example, you provide the computer you are authorized to provide, but there appears to be proprietary business information on it — e.g., marketing strategies for a business the husband operates. Disclosure of these strategies would give his competitors a major advantage. What should you do? Let him know you have the information and risk a lawsuit with alleged damages to his business?

Our normal advice is this: If you have authority to use the computer, take a copy of the hard drive but do not look at it. Bag it and tag it to preserve good chain of custody, and then let a judge decide what you can look at. The judge may tell you that most of the business information is out of bounds but may give you access to the personal information to which you are entitled. It can take longer, but you will almost certainly avoid a professional ethics inquiry if things take a nasty, confrontational turn.

One final bit of advice we give clients: Even if you get access to a password on the computer to which you have access, that does not mean you have permission to tap into a person’s e-mail account. Doing so could violate the Stored Communications Act, which forbids the impersonation of another by communicating via the Internet.



The publisher of this newsletter is not engaged in rendering legal, accounting, financial, investment advisory or other professional services, and this publication is not meant to constitute legal, accounting, financial, investment advisory or other professional advice. If legal, financial, investment advisory or other professional assistance is required, the services of a competent professional person should be sought.

# Grandparents

continued from page 1

learn, are suffering the recent loss of their father in different ways. What do you tell the client? Can she resist the grandmother? Should she offer visits in the meantime? Will the court mandate visits over her objection?

This article focuses on analyzing the rights of a fit parent, and explains the New York statutory scheme that provides a grandparent with a qualified right to visitation.

## THE FIT PARENT

The starting point for this analysis is to appreciate the rights of a fit parent and the circumstances that must be present before the State is allowed to intrude upon family life and require a parent to do something she does not want to do.

The U.S. Supreme Court has held: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The constitutional protection of the rights of a parent has been found to reside within the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. *Stanley, supra*, at 651.

The hypothetical client in this case is clearly a "fit parent," in that she is competent and capable. A parent's right to make significant decisions concerning the custody of her child is constitutionally protected, and the state may not interfere in a fit parent's right absent "extraordinary circumstances." The latter are defined by the U.S. Supreme Court as "grievous cause or necessity." See *Matter of Bennett v. Jeffreys*, 40 NY2d 543, 545-546

**Barry Abbott** is a partner at Mayerson Abramowitz & Kahn, LLP. **Alton L. Abramowitz**, a senior partner at the firm, is President of the American Academy of Matrimonial Lawyers and Vice Chair of the Family Law Section of the New York State Bar Association.

(1976), citing the Court's decision in *Stanley v. Illinois, supra*, at 655.

Examples of circumstances of "grievous cause or necessity" include acts of commission or omission by a parent that seriously affect the welfare of a child, the preservation of the child's freedom from serious physical harm, illness or death, or the child's right to an education and the like. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213-215; *Pierce v. Society of Sisters*, 268 U.S. 510, 535.

The courts have cautioned the State against interfering unless circumstances justify intervention; to that end, the State must not interfere with a parent's right to make decisions merely because it could make a better decision. In response to that caution, the legislature has enacted a statutory scheme that provides standards that the State must adhere to and due process of law for parents whose rights have been interfered with by the State. Examples include the limits placed on the State before it may intervene on behalf of children allegedly neglected by their parents prior to court intervention (see the Social Services Law) and before judicial intervention on behalf of children allegedly neglected by their parents (see Article 10 of the Family Court Act), among others.

## A QUALIFIED RIGHT TO SEEK VISITATION

Given the primacy of a parent's right to make decisions concerning her child's care and custody, a grandparent's "right" to visitation over the objection of a parent is a qualified one. A grandparent may seek visitation through the New York Supreme Court (under Domestic Relations Law (DRL) Section 72) or the Family Court (under Family Court Act (FCA) Section 651). The statutes, which are identical, require that a petitioning grandparent meet his first burden by establishing that he has a right to be heard — a threshold requirement — in order for the court to consider the grandparent's request for visitation in the "best interests" phase of the litigation.

To satisfy the standing requirement, a grandparent must first plead and prove that either one or both of the child's parents have died or, in the

absence of that tragic circumstance, that there are other circumstances — in fact "extraordinary circumstances," see *Bennett, supra* — where "equity would seek to intervene." These "extraordinary circumstances" play a role in the argument for standing when both parents are alive, as well as in the proof that a grandparent must provide the court in the "best interests" phase of the litigation in order to rebut the presumption in favor of a fit parent who has decided not to allow access or agree to an imposed access schedule.

The first possible basis for standing — the death of a parent — is easily proven, but the second is not: Under what circumstances would "equity seek to intervene" when both parents are alive? Courts of this State have intervened where a "special relationship" existed between the grandparent and the child, which relationship exceeded what is accepted as the typical, or perhaps traditional, grandparent relationship. These "special relationships" must entail characteristics and responsibilities that a parent normally enjoys with his or her child. Examples include extended periods of time in which the child lived with the grandparent, and the like.

To illustrate, in *E.S. v. P.D.*, 8 NY3d 150 (2007), the grandmother was found to have a special relationship with her grandchild that gave her standing to seek visitation over a parent's objections (although standing was achieved by virtue of the death of a parent). Evidence showed that the grandmother essentially took over the mother's household and child-rearing duties while the mother lay ill and dying. Following the mother's death, the father invited the grandmother to continue to help out with these chores and with the care of the now four-year-old grandchild. This she did for three and a half years.

The court noted, "During that time, grandmother comforted, supported and cared for the motherless child. She got him ready for school, put him to bed, read with him, helped him with his homework, cooked his meals, laundered his

continued on page 6

---

## Grandparents

*continued from page 5*

clothes and drove him to school and to doctor's appointments and various activities, including gym class, karate class, bowling, soccer, Little League baseball and swimming class. She arranged and transported him to away-from-home or supervised at-home play dates; she took him to the public library and introduced him to the game of chess. From 1998 through 2001, the child and father spent entire summers at grandmother's home in East Hampton, where the child's maternal first cousins and other family members were frequently present as well."

By the fall of 2001, the father and grandmother's relationship had be-

come strained, apparently due to the grandmother's tendency to be permissive with the child, while the father wanted to be more strict. He felt the grandmother was imposing her child-rearing philosophy on him, undermining his authority and coming between him and his son. In February 2002, the father abruptly evicted the grandmother from the house while the child was away on a play date. For approximately two months afterward, he forbade any contact between the boy and his grandmother, then began allowing short supervised visits and occasional phone calls.

The grandmother sought judicial intervention after what she described as the "last straw," when she was kept waiting for four hours for one of these scheduled visits. She

commenced a proceeding pursuant to DRL § 72 and Family Court Act § 651 for an order granting reasonable visitation with the child. The father opposed the grandmother's motion, and cross-moved for an order prohibiting the grandmother from having any contact with the child.

The Court of Appeals found that the grandmother had established "an extraordinarily close relationship [with the child] during the nearly five-year period that she lived with him and [father]." *E.S., supra*, at 157.

The court went on to consider the factors in making a best interests determination, including the presumption in favor of the fit parent's wishes. We will discuss these subjects in the second part of this article.



---

## Obamacare

*continued from page 2*

The exchanges in the marketplace are meant to make shopping for insurance policies easier and include more transparent price information. However, in light of the many different variables effecting an individual's cost for medical insurance under the Act, the actual costs are still hard to ascertain, and thus, it may be hard to calculate the impact on alimony, equitable distribution, and even child support. Accordingly, language should be considered in Agreements that leave open this issue for future review. But the question remains: How specific do attorneys have to be in addressing health insurance costs?

### ADDRESSING MEDICAL INSURANCE ISSUES

In addressing the medical insurance issues, the following considerations should be addressed when determining whether a spouse should purchase medical coverage under the Act:

1. Divorcing couples and courts will have to decide what tier to purchase. There are five tiers of coverage provided by the Act: bronze, silver, gold, platinum and catastrophic (catastrophic plans have very high deductibles and essentially provide

protection from worst-case scenarios, like a serious accident or extended illness). All offer the same set of essential benefits, but the out-of-pocket costs differ, with bronze plans having the lowest monthly premiums and higher out-of-pocket costs and vice versa for the platinum plans. The percentage of care that plans will cover average: 1) 60% Bronze; 2) 70% Silver; 3) 80% Gold; 4) 90% Platinum.

2. The effect of the subsidies in the law on the individual's obligation to pay for his/her insurance is complicated by the fact that spousal support is taxable income for recipients and tax-deductible for payers.

3. Another subsidy that will need to be factored into calculations is the government tax credit toward insurance coverage. In negotiations, an ex-spouse payer may argue for lower support payments where a spouse does not have workplace-based insurance, and is thus eligible for subsidies. The dependent spouse's eligibility for a subsidy would decrease his or her need for spousal support provided by the former spouse where the government may fill the financial gap in the dependent spouse's ability to pay for insurance. It is unclear whether alimony will be required to take the place of the government subsidy for the dependent spouse.

Divorce Agreements should reflect the fact that there is a non-quantifiable financial obligation for medical insurance coverage associated with every divorce case. This may require language such as the following:

It is understood that the medical insurance industry is undergoing change and the ramifications are unknown, including the availability and cost of COBRA coverage. Before either party relies on COBRA coverage they need to speak with a medical insurance expert. The parties agree to the extent possible they will work together to be sure they each have coverage and that the children's coverage is in their best interests. Each party has been advised to speak to medical insurance experts to obtain advice as to issues relating to coverage. The parties have been advised that counsel to the extent utilized do not provide advice as to issues relating to medical insurance coverage.

The cost of the medical insurance and an itemization of the out-of-pocket requirements should be spelled out in the agreement as well, so they are clearly enunciated in the event they are modified.

*continued on page 7*

## PRACTICE TIP

### Tax Liabilities

Divorce can often devolve into economic warfare. For some people, tax issues — through neglect, naiveté, or as a result of an asset liquidation or distribution ... create tax liabilities for which they were unprepared. As a result, it is not uncommon for divorce litigants to require tax liability mitigation.

It was with this in mind that I skeptically listened to a radio commercial for the IRS's "Fresh Start" tax relief program. The celebrity pitchman was extolling the virtues of this program on behalf of a tax relief company. My initial response to this ad was that it was probably a predatory program, but after doing some research, I learned that it is a legitimate program offered by the IRS. The basic premise of the program is to give delinquent taxpayers (including small businesses) an incentive to enter into an offer in compromise with the IRS to pay their back-taxes.

When taxpayers are delinquent on their taxes, the normal process is for

the IRS to issue a Notice of Federal Tax Lien at which point they have 10 days to satisfy the liability before a tax lien is filed against them. 26 U.S. Code § 6321 specifically states that, "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount ... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Tax liens are detrimental to credit ratings and could be carried on a credit score for up to seven to ten years. The lien can only be removed by the IRS upon the satisfaction of the liability, but it will not repair the damage to the individual's credit score.

The Fresh Start Program is valuable because it accomplishes three things for the taxpayer: 1) The amount of delinquent taxes owed before a Notice of tax lien is raised from \$5,000 to \$10,000. Once the taxpayer has enrolled in a direct debit installment agreement, the Notice of Federal Tax Lien is withdrawn. Any tax lien that has been

entered can be requested to be withdrawn, as well; 2) Taxpayers owing up to \$50,000 can make monthly installment payments for up to 72 months. Taxpayers owing more than \$50,000 or those who require more than six years to repay their liability remain eligible and have to provide some additional information. 3) The IRS's established Offer in Compromise program is expanded and given flexibility in analyzing a taxpayer's ability to pay, therefore, creating more opportunities for delinquent taxpayers.

This program is extremely worthwhile for eligible taxpayers. The IRS is interested in collecting as much tax as they can and this program demonstrates their willingness to place people in reliable repayment plans based on their available cash flow. This program is far from a scam and warrants consideration by attorneys and tax professionals.  
— Aaron Weems, Fox Rothschild



### Obamacare

*continued from page 6*

Attorneys need to be sure that they are not leaving their clients vulnerable for future costs they cannot afford. Medical insurance in general and the costs of uncovered medical care must be sufficiently negotiated in cases. Practitioners need to add it to the computations when the amount of alimony is determined.

The Act also will affect equitable distribution of closely held corporations because the cost of medical insurance coverage may affect the value of a business. Increased costs in medical coverage for employees could reduce the value of a business. The Act provides that all employers, regardless of size, are now prohibited from dollar caps on lifetime benefits, imposing unreasonable dollar caps on annual benefits, rescissions of coverage, waiting periods of more

than 90 days, elimination of pre-existing condition exclusions, and requiring coverage of a specified set of preventative services.

Overall, the Act increases the total number of people covered by employer-sponsored insurance. The Small Business Health Options Program (SHOP) Marketplace creates the exchange for small businesses to provide qualified health plans to their employees. Businesses with fewer than 25 full-time employees making less than \$50,000 per year may qualify to obtain healthcare tax credits. To qualify for the small business healthcare tax credit, employers must pay at least 50% of their full-time employees' premium costs. Starting in 2014, the tax credit is worth up to 50% of employers' contributions toward employees' premium costs, up to 35% for tax-exempt employers, as per the Health Insurance Marketplace.

### THE EFFECT ON BUSINESS VALUATION

The extent to which employer-spending may change per person insured as per the Act is unclear. The potential business costs associated with the costs of insurance, or the extent to which any increase in an employer's health insurance costs will be offset by decreases in wages or other benefits, is not known. However, all these factors may affect the value of a business that is being evaluated for purposes of equitable distribution. It may also affect the salary paid to an owner or owners if the costs of medical insurance actually wind up being significantly more or less. Some companies may not have had the obligation to pay medical insurance coverage and now have that obligation.

The greatest impact will be on businesses with at least 50 full-time  
*continued on page 8*

# Obamacare

continued from page 7

employees. The Act requires such business to provide insurance for the employees, creating an overall increase in spending. This cost will be particularly high for companies that currently do not provide any sort of medical insurance for its employees and are thus enrolling into an insurance program for the first time.

The cost of medical insurance coverage may need to be addressed by a forensic accountant conducting a valuation of a business to determine the impact. One question is, what was the company paying before and what is it paying now? If the company is paying more, it will be an additional line item expense that will have to be factored in the divorce, or if the coverage results in a savings for the business, then the value of the business may go up.

## POST-DIVORCE

For post-divorce cases, what happens if the dependent spouse accepted an alimony award based on what the cost of insurance premiums were at the time, or what s/he thought the cost would be, and his/her costs actually increase because s/he is not entitled to benefits under the Act? Or even worse, what happens if his or her existing coverage is cancelled and s/he requires certain medical treatments that were covered privately but are not available under the Act? How many practitioners separately address medical insurance costs? Litigants receive an amount of support that is not broken down in components that address all possible medical expenses or scenarios.

Accordingly, at the time of the divorce, the payment for medical insurance coverage is unpredictable as is whether such payment will significantly change over time. In New Jersey, *Lepis v. Lepis*, 83 N.J. 139 (1980), allows for a modification based upon a change in circum-

stances. The problem then becomes whether such a change in payment qualifies as a change in circumstances to constitute a basis for a modification to alimony. To apply for modification, there would have to be a showing that medical insurance has drastically increased and this was not considered as part of the alimony determination as was determined to be at a lower amount. Additionally, the change in cost must not have been foreseeable. All these issues must be addressed in an application, assuming that the Agreement did not provide for a waiver of any future modification based upon changed circumstances.

Therefore, as court applications are heard, judges will need to consider, where there is no waiver of a change in circumstances as a basis to seek a modification of the support obligations (a *Lepis* waiver) in an Agreement, whether the increased or decreased costs of medical care are sufficient to trigger a review of an existing alimony obligation. Clearly, there needs to be recitation in an Agreement of the cost of medical insurance coverage so that there can be a modification later if the costs change post-judgment. It may be hard to establish what the anticipated medical costs were at the time of the divorce, that they were specifically contemplated and that they have now changed. What if coverage is no longer available privately and the coverage under the Act is not as "rich" in terms of benefits or treatment as the previous coverage? What about deductible or uncovered care? If a former spouse becomes ill should s/he be entitled to seek to have his/her spouse pay for out of network care or uncovered treatments? Practitioners may want to focus on some of these issues and have language added to Agreements or incorporated into Court Orders specifically addressing the costs of medical insurance coverage for these various scenarios and the conditions that may warrant

modification of an alimony award to cover previously, not negotiated medical expenses.

Alternatively, under some circumstances, for example, a Divorce from Bed and Board in New Jersey, may allow for parties to be divorced except that they may continue to be on each other's medical insurance coverage. Since medical insurance coverage is changing, great care needs to be utilized in obtaining a Divorce from Bed and Board instead of a Final Judgment of Divorce. Under the Act, the Divorce from Bed and Board may not be accepted by various medical plans despite the parties' reliance on the coverage.

An Agreement without a divorce may allow for continued medical insurance coverage so long as there is no issue with the fact that the parties will be living in different locations. The parties can always obtain a Final Judgment of Divorce in the future. If the parties remain married, and rely on an Agreement and not a Judgment of Divorce, issues regarding what happens in the event of the death of a party need to be fully addressed. It would presumptively be the intention of the parties to waive any rights to inherit from the other. Such waivers need to be spelled out fully in an Agreement. The right of election disappears if the parties are living separate and apart whether or not they are divorced pursuant to the statute.

## CONCLUSION

At this point, the cost of medical insurance, the implementation of the Affordable Health Care Act, and what it means to litigants going through a divorce need to be addressed, to the extent that they can. Matrimonial attorneys would be well advised to refer their clients to an insurance expert to calculate the cost of medical insurance coverage so that a correct number is utilized and that Agreements are drafted to take into account the greatest number of contingencies and possibilities.



To order this newsletter, call:  
1-877-256-2472

On the Web at:  
[www.ljnonline.com](http://www.ljnonline.com)