Charter Member

Montgomery County Estate Planning Council

MCEPC Founded 1962

NEWSLETTER

Summer/Fall 2021, Issue 61

Greetings from our President

Bode Hennegan

I hope you're enjoying these last days of summer and spending time with friends and family. In my initial newsletter to you, I want to express that it is my honor to serve as the MCEPC president for this upcoming year.

After input from the membership and much debate, the board has decided to move forward with in person meetings this fall. We recognize that everyone's comfort level is different with in person gatherings. We encourage you to join us in a way that works best for you. Our cocktail hour from 5:30-6:30 is a time for catching up with one another and networking. For this optional portion of the meeting, we request that you wear a mask. The dinner and presentation will take place between 6:30-8:00. The room will be set up to spread the attendees out as much as feasible. We request, that you wear a mask when not eating or drinking. If you do not feel comfortable with the networking portion of the evening, you are welcome to join us for just the dinner and presentation.

Please note that we have moved our monthly meeting day to Wednesdays. This was in response to the William Penn Inn no longer open on Monday nights.

The second big change is that while we love the William Penn Inn and our history of dinners there, we will begin exploring "mixing up" our meeting locations. In October, we will hold our meeting at Boardroom Spirits in Landsdale. This is a more casual location, that includes an outdoor space, and in addition to our speaker for CE credits, we will have a mixology lesson .

The MCEPC schedule is as follows:

Wednesday, September 22, 2021, "Elderly Exploitation – Epidemic or Exaggeration?" @ William Penn Inn, 5:30pm
Wednesday, October 20, 2021, "Socially Responsible Investing" @ Boardroom Spirits, 5:30pm
Wednesday, November 17, 2021, we hope to be at the William Penn Inn but this will depend on the everchanging situation with COVID.

What won't change is our quality programing and the opportunity to network. We are planning a lot of new thought-provoking sessions throughout the year.

On behalf of the board, we are looking forward to seeing you in person and a great 2021-2022 program year. We can't wait to get started!

Best,

Bode Hennegan
President and Founder
Life Managers & Associates
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In This Issue:

WELCOME NEW MEMBERS AND THANK YOU TO OUR REFERRING MEMBERS!!

April Charleston, Esq.—Membership Chair

We extend a warm welcome to our newest members as well as a big THANK YOU to our members who referred them! Please continue to spread the word about the great benefits of MCEPC membership – education, networking, camaraderie!

David Birnbaum, Esq., Howland, Hess, Guinan, Torpey, Cassidy, O'Connell & Birnbaum, LLP

Thomas A. Boulden, Esq., Timoney Knox, LLP

Bess Collier, Attorney, Feldman & Feldman LLP

Zahia Dolenti, Asset Planning Services, Ltd.

Patrick Egan, Egan Real Estate LLC

Scott Levin, Asset Planning Services, Ltd.

Chloe Mullen-Wilson, Attorney, Heckscher Teillon Terrill & Sager, P.C.

Jesse Pantano, CFA, CFP®, Clarfeld Citizens Private Wealth

New Member Spotlight

Meet new member Scott Levin, JD, MBA, CFP®, ChFC®, CAP®

Scott Levin is a Wealth Planning Associate at Asset Planning Services, Ltd. He began his career in the financial services industry in 1997, following several years working in tax preparation, planning, and research with a CPA firm. In addition to more than 20 years of personal financial planning experience, Scott has engaged in all facets of estate planning at the Federal and State level.

Scott is a 1989 graduate of The Pennsylvania State University where he earned a Bachelor of Science degree in Accounting. He then attended Villanova University, where he received a joint JD and MBA degree.

In 1998, Scott earned the CFP® certification from the Certified Financial Planner Board of Standards. In 2001, Scott received the Chartered Financial Consultant (ChFC®) certification, and the Chartered Advisor in Philanthropy (CAP®) in 2003, both from the American College. He adheres to the Code of Ethics and Professional Standards of Practice set by the CFP Board of Standards.

Scott has been married to Stacey since 1996, and they have two children. He is active in the Rescue Community assisting to promote the adoption of dogs and cats from shelters and rescues. Scott has coached baseball and basketball for many years, and both he and Stacey are patrons of the arts.

A Fresh Look at Revocable Trusts Through the Pandemic's Eyes

Kim V. Heyman, J.D., LL.M.

Revocable trusts have always presented an interesting option to me as a will substitute – I do not think they are necessary for everyone, but many times they provide a flexible alternative to the use of a will by itself (this assumes that the expense to the client of having a lawyer draft a revocable trust and pour-over will is not significantly more than that same lawyer drafting a will by itself). When I practiced law in New York, we regularly drafted revocable trusts and pour-over wills and assisted clients with transferring all (or almost all) individually owned non-retirement assets to the newly created trusts. In New York, especially New York City, even if there was an expense to funding a revocable trust, clients appreciated the benefits of avoiding probate. That was usually the primary motivation, but not just to avoid the probate fees themselves. Clients were interested in ease of continued administration after their deaths, without the delays that probate could cause.

That client motivation changed when I moved to Pennsylvania. When working as a lawyer with Pennsylvania clients, I would tell them that they need not be concerned about probate in Pennsylvania because it was not particularly time consuming and probate fees were relatively low. I continued to advise the use of revocable trusts for certain clients for several reasons, including the following:

1. <u>Out-Of-State Real Estate:</u> If clients own out-of-state real estate either individually or jointly, I would advise the use of revocable trusts. To avoid ancillary probate (a second probate) in the jurisdiction in which the real property is located, individually owned property could be transferred to a trust after it was created, and any jointly owned property could be transferred to one or both of the clients' revocable trusts immediately, if avoidance of probate is deemed more beneficial than the creditor protection provided by joint ownership, or at some other time in the future (preferably before the death of the second-to-die joint owner).

2. <u>Management of Assets During Disability and Immediately Following Death:</u> While a power of attorney usually is used to manage assets during any disability, a revocable trust offers greater certainty that assets will be managed continuously as the grantor intends. The grantor may want to include additional details regarding the administration of certain assets, for example, a closely held business, that would not be included in a power of attorney. Furthermore, provisions regarding compensation, appointment of successors and co-trustees and removal and replacement authority are other important powers readily includable in a revocable trust document. If a client does not currently wish to transfer assets, to maintain flexibility, it is important to consider granting an agent under a power of attorney the authority to transfer assets to a revocable trust, at least one created by the principal (if the client is uncomfortable with granting broader gifting authority to the agent).

3. <u>Immediately Available Assets for Dependents:</u> It may be desirable for a revocable trust to own at least certain assets, including those that could provide immediate liquidity for the grantor's spouse or other dependents upon her death or disability. This type of funding would be especially important if the spouse, individually or jointly with the decedent, does not own any cash or investment accounts, or if the decedent did not have life insurance on her life (which would provide income-tax-free liquidity shortly after death) or, in the case of disability, life insurance with a long-term care rider (which would provide income-tax-free cash for a specified period of disability).

4. <u>Avoidance of Probate:</u> If a revocable trust owns all individually owned, non-retirement assets during the grantor's lifetime (other than those assets with a transfer on death designation, which raise their own concerns beyond the scope of this article), probate may be avoided altogether. Even if not all assets are transferred to a revocable trust prior to death, those assets that are transferred will be under the trustee's control immediately upon the grantor's death. A pour-over will is important in case any assets are not transferred during lifetime, which may be known or unknown to the grantor during her lifetime.

Sometimes as part of the planning process, I would estimate probate fees for clients. I once told a client avoiding probate would save his estate approximately $400,000 in fees, but even that did not motivate him to transfer all his assets to his revocable trust. For most advisors and clients, avoidance of probate was not a driving factor in the decision to create and fund a revocable trust. Clients were not interested in the perceived inconvenience and hassle of transferring assets, and of course some transfers, such as real estate, may be subject to transfer taxes, depending upon the terms of the revocable trust. Then came COVID-19 and the shutdown of everything, including the Registers of Wills (referred to herein individually as "Register of Wills" or "Register" and collectively as "Registers of Wills" or "Registers").[1] In the pre-COVID world, for the most part, once probate papers were prepared, an executor could go to the Register of Wills to probate a will and receive letters testamentary (also referred to as "short certificates") appointing him as

Revocable Trusts—cont.

executor.

Unfortunately, since the lock down, clients and estate lawyers have experienced delays, nightmares and near misses while trying to probate wills and move forward with estate administration. Most executors wish to obtain authority to sell assets (especially in a volatile environment) as quickly as possible. While much time was spent fielding calls of frustration from clients, at other times lawyers gave thanks for those estates lucky enough to avoid disaster.

For example, I heard the story of a grandmother who moved into a nursing home just weeks before her death. Her agents under her power of attorney transferred her house to her revocable trust and listed her house. The house sold almost immediately, just weeks before the grandmother's death. Because the property was owned by the trust, the trustee was able to execute the contract of sale shortly after her death, without worrying about when letters testamentary would arrive.

But then there were others who were not so lucky. For example, a lawyer told me a story about probate in Philadelphia County. Her paralegal provided a Federal Express envelope to the Register for the return of the short certificates. Unfortunately, rather than use the provided envelope, the Register's office sent the short certificates through the U.S. mail. The short certificates were not just delayed, they were lost in the mail. To add insult to injury, the Register's office told the paralegal that she would have to wait three weeks before requesting replacement certificates, just to be sure they did not show up!

While sadly COVID-19 continues to infect and kill many people each day, we are lucky in that much of life has resumed to a semblance of normalcy. However, as one wise person said to me, the "COVID ripple" continues to be felt. As an example of that effect, she told me of an estate she probated in Philadelphia County, which was delayed for almost three months after the decedent's death. The certificates arrived shortly thereafter, but when they did, the executor's name was listed incorrectly. It took three months to have the corrected letters reissued (and even that was only after persistent follow-up and the mention of potential liability).

Sometimes time is of the essence in estate administration. In addition to having to pay the Pennsylvania inheritance tax and the Federal estate tax within nine months of death, an estate may receive a 5% discount if the Pennsylvania inheritance tax is paid within three months of a decedent's death. Usually, this prepayment is made with estate assets. A lawyer told me about an estate where a decedent passed away at the end of June of this year. The earliest date for probate of the estate is at the end of September. The family of the decedent does not have independent means to make the prepayment. Without the executor being appointed (and receiving letters showing he is authorized to act on the estate's behalf), nothing can be done to make the prepayment. That is akin to a 5% penalty for something over which the executor has no control.

Almost none of us could have foreseen what happened because of the pandemic. However, now that we have experienced a lock down, we know what is possible. Given this experience, I think we are now obligated to inform clients not only of the benefits of using a revocable trust, but also the risks of not using a funded revocable trust.

With the possibility of a future disruption, whether another shut down from COVID-19, a new pandemic, a major cyber-attack on state governments or something we cannot even fathom - we should encourage our clients to fund revocable trusts to best protect their families. Even though doing so will not result in tax savings, and may involve some upfront expense, in an everchanging environment the ability to be nimble and responsive is paramount.

[1]

As I am no longer practicing law, the stories in this article are samples of experiences I have heard from a few lawyers and paralegals and do not come from an exhaustive study of probate in our area. I recognize that COVID-19 probate experiences have differed among law firms, and disruption and delay of the process has been different for some depending upon the Register of Wills where probate occurred. The purpose of this article is not to malign any Register of Wills. I do recognize that the Registers faced many hurdles during the lockdown, not least of which was the impact of the unrest last summer on the Philadelphia Register of Wills.

Kim V. Heyman is a Principal at Rose Glen, LLC, where she focuses on advising high-net-worth individuals and families on wealth transfer planning and life insurance review and acquisition. Before joining Rose Glen, LLC, Kim was a partner in a boutique wealth and personal planning law firm where she specialized in advising ultra-high-net-worth families on estate, gift and generation-skipping transfer tax issues, philanthropic structures and special needs planning. Ms. Heyman has written articles and spoken locally and nationally on estate planning, charitable planning and trust and estate administration topics. She sits on the Board of the PEPC, and she is the Vice-Chair of the Trust and Estate Practice Group's Committee on Emotional and Psychological Issues in Estate Planning of the American Bar Association's Real Property, Trust and Estate Law Section. Ms. Heyman also serves on the Board of Congregation Beth Am Israel and on her local election board.

McAleer Highlights Division Regarding the Fiduciary Exception to the Attorney-Client Privilege

Richard L. Holzworth, Esquire and
Amanda K. DiChello, Esquire

Attorney-client privilege is one of the oldest and most widely recognized principles of American jurisprudence. Generally, communications between an attorney and a client providing or seeking legal advice are privileged from disclosure to third parties, with certain exceptions. In the context of estate and trust litigation, disputes over the production of attorney-client communications are uniquely complex because they frequently implicate competing public policy goals and the fiduciary obligations of estate and trust administrators.

The fiduciary exception limits fiduciaries in their ability to assert attorney-client privilege in response to a beneficiary's request for information. State and federal courts are divided on whether to adopt the fiduciary exception and, if adopted, how the exception should be applied. Some federal circuit courts, for example, have expressly adopted the fiduciary exception in the context of employee benefit plan administration, but not in the context of estate and trust administration.

At the state level, many courts have declined to adopt any version of the fiduciary exception, while others have applied the exception to varying degrees. In some jurisdictions, such as Florida, the state legislature has addressed the issue by statute.

Pennsylvania Ruling

The Pennsylvania Supreme Court was recently asked to address the question of whether the fiduciary exception is recognized in the Commonwealth.

In *In re: Estate of William K. McAleer, Deceased*, the specific question before the state high court was "whether the attorney-client privilege and the work product doctrine may be invoked by a trustee to prevent the disclosure to a beneficiary of communications between the trustee and counsel pertaining to attorney fees expended from a trust corpus."

Unfortunately, the justices could not reach a majority decision on this question, splitting 3-3, with one justice abstaining. The absence of a clear decision has left fiduciaries, beneficiaries and the attorneys who represent them continuing to debate when (if at all) fiduciaries can withhold privileged communications and work product.

The Challenge to Counsel Fees

The *McAleer* case involved William K. McAleer's revocable living trust established for the benefit of his son and two stepsons, with his son named as trustee. Following McAleer's death, the trustee filed a first and partial accounting of his administration of the trust in the Allegheny County Court of Common Pleas, Orphans' Court Division. The stepsons, as beneficiaries of the trust, filed objections challenging certain aspects of the trust administration. The trustee retained two law firms to represent him and, after two years of litigation, the Orphans' Court ultimately dismissed the stepsons' objections.

The trustee then filed a second and final accounting, which indicated that he had incurred approximately $124,000 in attorneys' fees during the course of the litigation. The stepsons filed a second round of objections, challenging the trustee's payment of his trustee commission and attorneys' fees from the trust. The Orphans' Court froze further disbursements for fees and commissions and permitted the parties to conduct discovery on the stepsons' objections.

The stepsons sought the billing invoices of the trustee's counsel as part of the discovery process.

The trustee argued he had no obligation to produce law firm invoices because the information is protected by attorney-client privilege, and produced heavily redacted invoices in response to the stepsons' discovery requests. On the stepsons' motion to compel unredacted invoices, the Orphans' Court judge determined that the trustee did not present any facts to support the privilege claim and directed him to produce the unredacted billing records.

In reaching this decision, the Orphans' Court judge summarized Judge R. Stanton Wettick's decision in *Follansbee v. Gerlach* and interpreted the *Follansbee* case as requiring a trustee who obtains legal advice from an attorney relating to the trust to share that advice with the beneficiaries. The trustee filed an appeal with the Superior Court of Pennsylvania.

Shifting Burden of Proof

The Superior Court quashed the trustee's appeal in an August 2018 opinion, finding that a trial court order regarding discovery is not an immediately appealable order, and remanded the matter to the Orphans' Court. Despite quashing the appeal in such a way that it need not address the merits of the attorney-client privilege issue, the Superior Court went on to find it was "constrained to agree with the trial court" conclusions that the trustee failed to establish that the attorney invoices were privileged and that the trial court record lacked any evidence to support his position.

Fiduciary Exception to the Attorney-Client Privilege—cont.

The Superior Court recognized that disputes over the disclosure of communications allegedly protected by attorney-client privilege involve a shifting burden of proof. The party invoking the privilege must initially provide facts showing that the privilege has properly been invoked. Then the burden shifts to the party seeking disclosure to produce facts showing that the disclosure does not violate the privilege or that some exception applies.

Significantly, the Superior Court found the trustee did not file objections to the discovery requests and further found that the record contained no facts to support the privileged nature of the legal invoices. Therefore, the Superior Court found that the trustee did not carry his initial burden of establishing the attorney-client privilege at the trial court level. And because the Superior Court agreed with the Orphans' Court that the trustee failed to carry his initial burden, the Superior Court did not reach the second step of the shifting burden analysis, which requires beneficiaries to establish that the materials sought in discovery are not privileged or that some exception applies.

The Superior Court's opinion did include a brief discussion of the Restatement (Third) of Trusts and the Pennsylvania Supreme Court's 1974 decision in *Estate of Rosenblum*, but it did not offer a detailed analysis of *Follansbee*. Specifically, the Superior Court explained that the state Supreme Court concluded in *Rosenblum* that Section 173 of the Restatement (Second) of Trusts restates Pennsylvania common law in that the "right of access to trust records is an essential part of a beneficiary's right to complete information concerning the administration of the trust."

The Superior Court cited Section 82, comment f, of the Restatement (Third) of Trusts, which Judge Wettick relied upon, in part, in the *Follansbee* decision. This comment to the Restatement states: "A trustee is privileged to refrain from disclosing to beneficiaries or co-trustees opinions obtained from, and other communications with, counsel retained for the trustee's personal protection in the course, or in anticipation, of litigation (e.g., for surcharge or removal)."

In applying these general principles, the Superior Court took into account the fact that the trustee did not establish that the redacted information in the law firm invoices related to communications with counsel retained for purposes of the trustee's personal protection in the course of or in anticipation of litigation. Therefore, the Superior Court said it was "left to conclude that the information contained in the attorney invoices qualifies as communications subject to the general principle entitling a beneficiary to information reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights under the trust."

No Consensus on Privilege

On appeal to the Pennsylvania Supreme Court, the justices unanimously concluded that the Superior Court erred in quashing the trustee's appeal. However, the justices were split 3-3, with Chief Justice Max Baer abstaining, on the central question of whether a trustee can invoke the attorney-client privilege and the work product doctrine to withhold from a beneficiary communications between the trustee and counsel pertaining to attorneys' fees paid from the trust.

Since the state high court did not reach a consensus on whether the privilege may be invoked by a trustee, the Superior Court's "alternative ruling" affirming the Orphans' Court's decision to compel disclosure of the attorney invoices was affirmed by operation of law.

It must be noted that for a Pennsylvania Supreme Court opinion to be precedential, a majority of justices who participated in the case must join in the opinion. A judgment of affirmance by an equally divided court (as is the case with *McAleer*) is not a precedent.

While some courts have considered plurality opinions and the opinions of evenly divided courts to have some persuasive value, it is nevertheless important to recognize that *McAleer* produced three different views on whether a fiduciary can assert the attorney-client privilege in response to requests for information from beneficiaries.

Three Opinions

First, Supreme Court Justice David N. Wecht authored an opinion, in which Justices Debra Todd and Kevin M. Dougherty joined, advocating for a "categorical" application of the fiduciary exception. While Justice Wecht's opinion relied heavily on *Follansbee* and the Supreme Court's decision in *Rosenblum*, it diverged from the Superior Court's holding as well as *Follansbee* in a material way. Justice Wecht's opinion rejected the Restatement (Third) of Trusts, Section 82, comment f, stating that it "would increase uncertainty with regard to disclosure disputes in probate matters rather than diminish it […]."

Justice Wecht's opinion found that beneficiaries like McAleer's stepsons should be entitled to examine the contents of all communications between the trustee and counsel where counsel is paid with funds from the trust. But to the extent that trustees wish to maintain the confidentiality of their communications with counsel, Justice Wecht would find that "Pennsylvania law already offers a simple solution: do so

Fiduciary Exception to the Attorney-Client Privilege—cont.

at your own expense."

Second, Justices Christine Donohue, Sallie Updyke Mundy and Thomas G. Saylor rejected the fiduciary exception to the attorney-client privilege. In an opinion authored by Justice Donohue and joined by Justice Mundy, this faction of the Supreme Court concluded that reliance on *Follansbee* to support the fiduciary exception is misplaced and disagreed with both Justice Wecht's and the *Follansbee* court's analysis of *Rosenblum*. Justice Donohue explained that in *Rosenblum* "[t]here is no indication that the trustee asserted any claims of privilege and the Court did not adopt, or even consider, the adoption of a fiduciary exception to the privilege." Justice Donohue also noted that *Follansbee* relied on an outdated version of the Restatement of Trusts and involved a third-party subpoena served on the fiduciary in the context of civil litigation.

Furthermore, Justices Donohue and Mundy rejected the position set forth in Justice Wecht's opinion that a trustee is not entitled to confidential advice from counsel unless he pays for the expense out of his own pocket as being an untenable proposition for both the trustee and counsel. Justice Donohue's opinion explained that the "Court should not place obstacles to prevent trustees from seeking confidential legal counsel when faced with [circumstances that exceed the scope of a trustee's expertise] by raising cost as a barrier to responsible administration."

Third, Justice Saylor wrote separately, taking the position that the fiduciary exception is an issue better left to the General Assembly to address. Justice Saylor found Justice Wecht's "approach of admonishing trustees that they may personally shoulder the expense for legal services associated with their official responsibilities to be wholly impracticable, particularly relative to complex matters in which the cost is prohibitive."

Public Policy Concerns

Each of the opinions issued by the Supreme Court in *McAleer* contains extensive discussions of the public policy concerns driving the arguments for and against the fiduciary exception. On one hand, the Justice Wecht faction draws upon general policy objectives such as promoting transparency in fiduciary relationships and ensuring predictability and consistency when it comes to restrictions on attorney-client confidentiality.

On the other hand, Justice Donohue's bloc emphasizes the practical implications of the fiduciary exception. In particular, these justices maintain that fiduciaries will be discouraged from retaining outside counsel, or even agreeing to serve as a fiduciary in the first place, if they would be required to pay legal fees out of their own pockets to preserve their right to communicate freely with counsel. Further, Justice Saylor, in noting that the legislature is better suited to weigh competing public policy interests, also cautions against underestimating the chilling effect that the fiduciary exception would have on fiduciaries' willingness to seek advice of counsel.

Interestingly, most of the justices agree that the identity of the person or entity paying legal fees is a critical element to either side of the debate. The proponents of the fiduciary exception argue that if the trust pays legal fees, it is the equivalent of the beneficiaries footing their own legal bill as well as the fees incurred by the fiduciary.

Conversely, the opponents of the fiduciary exception cite the Rules of Professional Conduct for the proposition that the person paying the legal fees, if not the client, has no right to direct the legal services.

What Now?

While the justices' opinions in *McAleer* offer persuasive value, some of the views expressed materially diverge from the Superior Court's analysis, which was affirmed by operation of law. Thus, beneficiaries, fiduciaries and the attorneys who represent them are left with a Superior Court decision that cites *Follansbee* but offers an interpretation that none of the Supreme Court justices actually endorsed.

Despite practitioners' hope for a definitive opinion from the Supreme Court, the 3-3 split in *McAleer* further highlights the division on the subject and leaves the door open for continued debate absent a future majority decision by the Pennsylvania Supreme Court or legislative action.

Amanda K. DiChello is a Shareholder in Cozen O'Connor's Private Client Services Group in Philadelphia. Amanda is an ACTEC Fellow and also has been recognized in the Best Lawyers in America, Chambers and Partners' High Net Worth Guides. She is the Vice Chair of the Probate Division of the Real Property, Probate and Trust Law Section of the Pennsylvania Bar Association. Amanda regularly speaks and publishes on topics that include wealth and tax planning, fiduciary, trust and estate litigation, and charitable trust and nonprofit issues. She also is the author of atyourbequest.com, a blog that addresses a diverse range of current trust and estate issues.

Richard L. Holzworth ("Rick") is an experienced trial attorney in Cozen O'Connor's Private Client Services practice group. Rick's practice is devoted to fiduciary litigation and representing high net worth individuals and corporate fiduciaries throughout Pennsylvania in estate and trust disputes, including cases involving the validity and interpretation of wills and trusts, breaches of fiduciary duty, and trustee removal and surcharge actions.

It's All About the Words on Paper: No Substitute for Pinpoint Precision When Drafting Estate Planning Documents

Joel S. Luber, Esquire

Real Life Facts. Michael died, leaving two children, Nicole and Seth. Michael's Will was admitted for probate, naming Milius as personal representative. Milius is Seth's mother, but not Nicole's mother. Nicole is the older of the two children. Michael's Will includes these two provisions:

"The references in this Will to my 'son' refer to my son, Seth…[middle and last name included]. The references in this Will to my 'children' and/or my 'issue' shall include my son, Seth … and all children of mine born or adopted after the execution hereof."

"I give the residue of my estate to my issue, per stirpes."

Question: Is Nicole entitled to one-half of her father's residuary estate? [Answer at end of article.]

As you might expect from the title of this article, these facts resulted in a court having to divine Michael's intention, as testator, and produce an answer for the surviving members of his family. This is all one needs to see to appreciate how critical it is to employ clear and precise language when drafting estate planning documents. Query further if the scrivener is accountable, and to whom, when his or her document becomes the topic of litigation. But that is a topic for a different article.

Basic Rules of Construction (Without Citations).

The cardinal rule concerning a decedent's will is the requirement that the intention of the testator shall be given effect unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.

To arrive at a testator's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will. When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible.

Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of having, at least two reasonable interpretations or meanings. Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity when the language appears to be clear but outside evidence would show that there may be more than one interpretation.

In contrast, a patent ambiguity is one which exists on the face of an instrument. A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will. [Hint to the answer of the Question posited above: Court found a patent ambiguity.]

Basic Rule of Drafting Estate Planning Documents.

Never let your document make you famous.

Definitions. For anyone who has ever picked up an agreement in a commercial transaction, you know that either in the first Section, or in an Index, there are a plethora of defined terms soaking up multiple pages. [Last one I picked up there were 12 pages of defined terms.] I include in every will and trust agreement I write an article titled "Construction Provisions," which includes about 18 definitions, and a number of sub-definitions. It is highly recommended that anyone drafting a will or trust agreement do the same. I do this not only to eliminate (or at least minimize as best I can) questions of interpretation, but for three other reasons: (i) to write estate planning documents in English; (ii) to avoid being grouped with lawyers accused of preferring to use eight words when one will do; and (iii) to avoid falling prey to the "foolish [in]consistency [and] the hobgoblin of little minds."

A common example where one word can take the place of eight: "pay to or apply for the benefit of." What do these words mean? How about "distribute?" I include the word "distribute" in my construction provisions to mean just that. Pray tell what happens if a "little mind" picks up the phrase "pay to" in one provision in a will and the phrase "pay to or apply for the benefit of" in another. Did the testator really mean two different things, or did the scrivener do that unintentionally? Another example of one English word taking the place of three legal words – "give, devise and bequeath." I

Drafting Estate Planning Documents—cont.

use the term "leave."

More Examples.

Spouse. With 40% divorce rates in this country for first time marriages (and higher for subsequent marriages), the failure to clearly define "spouse" in any document is a recipe for disaster (and malpractice). My documents use close to a full page to define the terms "spouse," "wife," "husband," "widow," and "widower," and when two individuals shall be regarded as married. Of course, that is not to say that there can be some uncomfortable conversations when representing both spouses when either or both do not see their full name spelled out in the other's document. But what happens when a trust provides for distributions to a child and his or her spouse, and that child later divorces and remarries?

That was the exact issue in the case *Ochse v. Ochse*, decided by a Texas Appellate Court in 2020. Grantor created a trust that authorized the trustee to make distributions to a primary beneficiary, the primary beneficiary's descendants, and the primary beneficiary's spouse. Primary beneficiary divorced his first wife and remarried. The former wife sought a declaration that the terms "primary beneficiary's spouse" and "son's spouse" in the trust agreement solely referred to her because she was the spouse at the time the trust was executed. The current spouse intervened and sought a declaration that the terms "primary beneficiary's spouse" and "son's spouse" applied to her from the date of her marriage to present. The appellate court construed the language of the trust and concluded that it was the grantor's unambiguous intent to identify her son's then "spouse" as a beneficiary to benefit from the trust at the time the trust was executed and declined to redraft the trust to reach a presumed intent to benefit a potential replacement "spouse." Really? If it was so unambiguous, then why did the question end up in court?

Of course the answer and the analysis by the court is not important. The lesson here is this was a dispute that should have never made it into court. For what it's worth, if my definition of spouse, which follows, was included in the Ochse Trust Agreement, it would have gone the other way:

"The term 'wife' means a female who is married to a designated male at the date any distribution is required or authorized to be made to her pursuant to the exercise of any power, right, or discretion granted in this Will, or at any other date when it becomes material to determine her relationship to that male."

And what also is not important here is my definition. The real lesson is: Ask the question. Did the scrivener of the Osche Trust ask his client the question about what happens if his son divorces.

Issue. This one simple word, like spouse, is another disaster waiting to happen. It's almost a trap for the unwary (and no scrivener ever wants to be accused of being unwary). Interestingly enough, in the facts of the case first described above, there was no definition of "issue" in Michael's Will. The Court had to rely on the default definition in its probate code. My definition starts with this:

"The term 'issue' of a designated individual includes each child, grandchild, and more remote legitimate descendant of that individual, taken collectively. That term also means any child, grandchild, or more remote legitimate descendant of that individual, whenever the facts and context require."

This definition then leads to further definitions of afterborns and adoptions and legitimate descendants. In today's world, with frozen embryos, artificial insemination, intra-family adoptions, extra-family adoptions, posthumous adoptions, and adults adopting adults, I am not willing to have my clients rely on some default definition in the Pennsylvania Probate, Estate and Fiduciaries Code ("PEF Code"). But, again, I always ask the questions surrounding these possibilities, and again sometimes it is uncomfortable. Quick aside: Still holding the top spot among famous athletes with multiple children with multiple women is former NBA great and Hall of Famer Calvin Murphy – 14 children with 9 women. I wonder if he has a definition of "issue" in his Will?

Personal Property. Disposing of tangible personal property seems to be the most forgotten part of the average client's estate. Yet it has been my experience that it is the single greatest source of conflict among surviving family members. I have witnessed court battles over this one issue. Robin Williams did an excellent job of planning his estate, but the front page of the Arts section of the February 3, 2015 New York Times reported that his widow and his three children from his two prior marriages were in

Drafting Estate Planning Documents—cont.

conflict over the issue of how his *"cherished belongings that include his clothing, collections and personal photographs"* should be distributed.

Not only is the definition of "personal property" critical, but the division of same more so. There is a general reluctance to include specific items in the Will itself, primarily due to the consequence of needing to procure appraisals after death, which generally leads to greater exposure to estate taxes. The alternative is usually a separate memorandum referred to in the will. But those create uncertainties in terms of enforcement, which is not guaranteed, or the inability to locate the memorandum after date of death and/or destruction or alteration of same by the person who finds it first. There are drafting issues even with the separate memorandum, including clear descriptions and alternative taker if the named beneficiary fails to survive. And, for sure, you never want to allow valuable pieces to fall into the residuary estate, exposing them to sale if there are insufficient other assets to pay expenses of administration and taxes, or to income tax in the hands of the residuary beneficiaries to the extent the estate had distributable net income.

Include. I will end with this word, because it became a point of analysis in the case first described above, and in the Osche case, and as was used in Robin Williams' Will in describing his personal property. When the word "include" is used in any document, without definition, and then followed by any list of objects or persons thereafter, the question of interpretation becomes whether it is intended to be inclusive or exclusive. For example, if used to define children, and a child is not named specifically but others are, is the intention of the testator to include or exclude that omitted named child? Such was the issue in the unnamed case described above. To avoid that question of interpretation, the recommendation is to define the term. My definition makes clear it is to be inclusive, which is as follows (also deriving the benefit of one word replacing eight every time the word is actually used in the document):

"The term 'includes' means 'includes without limitation, and by way of illustration. The term 'including' shall be similarly interpreted."

The collateral drafting lesson becomes then, if your client really is intending to exclude any person who could possibly be considered a natural object of the testator's bounty, include that exclusion specifically in the document and name the person being excluded. [Be careful before adding reasons for the exclusion so as to avoid testamentary libel.]

Conclusion. Clear and precise drafting of estate documents is the lodestar for anyone who accepts an engagement to prepare documents. Be punctilious to the nth degree. Like "the knock" on the door in the recent award-winning film, *Nomadland*, that is the visceral and existential threat to the van dwellers depicted therein, no lawyer wants to receive "the call" the person on the other end of the line asks the question: "What does [fill in the blank] mean in the will you drafted?" Because you know as soon as you hang up that call, your next call is to your insurance carrier. I will avoid the overly dramatic admonition to draft like your life depends on it. But I would humbly suggest that one's professional career may very well be at stake every time you, as scrivener, put pen to paper.

Answer: In the case described above, Nicole was awarded one-half of the residuary estate. The court reasoned that the definitions of "children" and/or "issue" that stated they "shall include my son, Seth …" do not clearly disinherit Nicole. The county court examined definitions of "include", and the appellate court relied on a contract case in which it was presented with the question of whether the word "include," on its own, was expansive or restrictive, and ruled that the generally understood meaning of the word "include" is that it is expansive. There was also a "wipe out" provision in the will that said, "to my heirs at law," under which Nicole would have inherited if Seth and his children did not survive his father. The court reasoned if the testator was really intending to disinherit Nicole, here was his second opportunity to do so, but he did not.

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Ransomware Is Not a Desired App

Steve McKeon "Mac" & John Hoyos, MBA

The popular idiom for someone accessing the internet is called "surfing the web." Hackers are those surfers that are out at 6 am waiting for a perfect wave, immune to the water's temperature. Once they find it, they paddle and push and kick and pop up. They are master riders that live to ride that wave as far as they possibly can – to the point just before it becomes crashed surf on the beach. Then they turn around, paddle out and wait for the next one.

The reality is that many US businesses have been compromised and they don't even know it. That's because many hackers gain access to a system and wait for the perfect wave. Not coincidentally, this is usually the most inopportune time for the business.

Congratulations. You've been hacked. Drop that BBQ chicken leg, tell your friends and family you'll see them in a week, and get to the office now. I mean, do you really think it's a coincidence that JBS was hacked on the Sunday of Memorial Day weekend? Or that Kaseya was attacked the Friday of Independence Day weekend?

This was basically the concept behind the SolarWinds hack, where malicious code was installed in an IT company's update to other IT companies, giving hackers a back door to every company that installed this update. That back door allowed them to install more malware and gain access to lots of customer data and communications for thousands of US business and organizations. There are likely still security breaches that have not been discovered, with hackers waiting for their perfect wave.

Most hacks are not even that progressive, complicated or even well thought out. If you buy into the concept of mankind's inherent laziness, it's not hard to believe that most hacks originate from code created by other hackers and sold on the Dark Web for a small fortune in cryptocurrency – a pittance compared to what the hacker could rake in for ransoming the data back to their rightful owner.

This is ransomware. No, you do not want this on your computer network. Ransomware is not some hot new app that needs to be installed on every computer in your life immediately. Quite the reverse. It's data theft and encryption of the original file followed by sending a note to the victim that they can reach the hacker at this untraceable email address for instructions on payment to get the decryption key.

The concept of taking information or property and holding it for ransom has been around for many years. The manner in which it's been carried out, the tools used, and the amount of prep work required to successfully execute have all changed drastically. It's this last point that has made ransomware attacks so much more prevalent in the past few years.

Yes, you should take steps to protect yourself and your business from this and other cybersecurity risks. But this is not a tutorial on cybersecurity basics.

This is about Blockchain. If cybersecurity is the physical therapy needed to get your business back into gameday shape, Blockchain is the surgery solution.

As Mac tells people, "[y]ou'd have to have the energy of every computer in the world trained on this code at the same time in order to hack it. That's why it's unhackable. The computing power and energy just doesn't exist."

Blockchain is a database, but different from what you may be familiar with databases. With a traditional database, you can put data into your database and store it. You can see it, change it, move it to a different line or delete the line – or even delete the entire database. You can share a copy with others, but they have to log in to your locally stored database (either onsite or in the cloud) if they want to make changes to your database. You own that database.

With Blockchain, nobody owns the database. Every entry is made once and encrypted. The only way to change the entry is if the majority of everyone that has a copy of the Blockchain agrees to change it. Because Blockchain doesn't live in one physical space. It's designed to live in every place where someone has a copy.

Think of it this way. Imagine you wrote a database entry (the block) in a spreadsheet program and the only way anyone could see and verify that entry is that they must be sent a copy of the spreadsheet program itself with each database entry (the chain). Blockchain is not only that, but every database has a unique spreadsheet program that can only read the data entries associated with that program.

But wait, there's more.

Blockchain is not only all the above, but each database entry can be any tangible or intangible piece of information: a transaction, a thought, a musical phrase or any piece of information. Each database can be a contract, a written work, a song or, for the purposes of estate planning, an asset. This is where the concepts of Non-Fungible Tokens ("NFTs") and cryptocurrencies come in to play. Whether the asset is physical or

Ransomware Is Not a Desired App—cont

digital is irrelevant. The value of the asset is determined by what the market is willing to pay for it. Even though NFTs exist within the cryptocurrency environment, each is unique and, consequently may not be traded for equivalent value like cryptocurrency.

Generally, NFTs may be accessed only by using a password or personal key. As stated above, you must provide that information to anyone to whom you wish to allow access. For estate planning purposes, you should consider creating a digital asset plan specifically for NFTs. You should consider to whom and how you wish those assets to pass upon your death. Importantly, you need to determine what information should be made available (and to whom) and if a blanket authorization to access your digital assets is suitable for your fiduciaries.

The level of security provided by Blockchain is what will put ransomware off to the side of the road. When you can't access the data because it's behind an unpickable lock, there's nothing for thieves to ransom. They can still breach the security around it – it's not like you can start leaving sticky notes with your passwords on the bottom of your monitor again – but the item of most value will remain secure. That will discourage the lazy villainous masses and push them to go back to stealing lunch money from school kids. The high stakes heists with elaborate, coordinated plans and big payouts are the only ones that will take place. And those will still have to solve the problem of hacking the unhackable.

Every business will be forced to embrace Blockchain as a secure solution to protect their assets. Basic economic law says that when demand rises and supply remains the same, prices will rise. Ransomware is increasing the demand for Blockchain. The price of Blockchain will rise because the supply of those that can provide Blockchain solutions cannot possibly increase fast enough to keep pace with the demand.

"Get your Blockchain here!"

Steve McKeon ("Mac") is the founder and CEO of MacguyverTech, a custom software development company focused on usability, innovation, and fruitful client relationships. Propelled by over 25 years of experience in the technological world, Mac has combined his passion for people with his love of reverse engineering and ethical hacking to build a company capable of providing unique and fully customized software tailored perfectly to each client's needs. Mac also has a fiery passion for Blockchain technology and has used skillful and creative implementation to set himself up as a leader within an emerging field.

John Hoyos, MBA, is Head of Business Development and Marketing at MacguyverTech. He started his career in sales in the late 90s, equipping custom PC shops across the U.S. with the high-ticket technology of the time - 8MB of ram and 1G hard drives. John has brought his expertise to multiple industries and roles since then, including his own consultancy for the past four years. In his current role, John skillfully facilitates key strategic partnerships and internal and external communication while also assisting Mac in driving forward the future vision for a steadily growing company.

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2021-2022

September 22, 2021—“Elderly Exploitation – Epidemic or Exaggeration?” at William Penn Inn, 5:30pm

October 20, 2021—“Socially Responsible Investing” at Boardroom Spirits, 5:30pm

November 17, 2021

January 19, 2022

February 16, 2022

March 16, 2022

April 20, 2022—joint meeting with BCEPC hosted by MCEPC

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Administrator’s Corner….

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