THE SPOTLIGHT

BROUGHT TO YOU BY ROBINS KAPLAN LLP'S
WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP

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THE FUTURE OF THE FIDUCIARY

ROBINS KAPLAN LLP

REWRITING THE ODDS

WELCOME TO THE SPOTLIGHT

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The Spotlight is the result of ongoing collaboration between our national trial practice and estate planning groups, with the goal of providing a forum to discuss the latest news and other issues impacting the trusts and estates community. Whether you are a trustee, beneficiary, trust officer, attorney, financial advisor, or other professional in this area, we hope that you will find this newsletter interesting, informative, and perhaps at times even a bit entertaining.

As leaders and teachers in the field of wealth planning and administration, our attorneys have built a reputation for excellence in meeting the needs of individuals and organizations from basic to complex testamentary planning. We counsel individuals and business owners in all aspects of estate planning and business succession, providing them with peace of mind and reassurance that their legacy is in the best of hands.

Furthermore, should a conflict arise, our wealth disputes attorneys are well positioned to resolve the matter with thoughtfulness, creativity, and compassion. Our national reputation for litigation excellence includes wins in the fiduciary arena for trustees and fiduciaries, personal representatives, beneficiaries, guardians, and conservators. Whether litigating fiduciary matters, inheritance issues, or contested charitable donations, we help clients cut through confusion to find a path to resolution.

Is there a topic affecting your practice that you would like us to discuss in an upcoming issue of the Spotlight? Let us know at TPentelovitch@RobinsKaplan.com.

– Denise S. Rahne and Steven K. Orloff

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INSIDE THIS ISSUE

ERA OF 'ART' — THE IMPACT OF ASSISTED REPRODUCTIVE TECHNOLOGY IN ESTATE PLANNING

BY SARAH J. KHOURY

With the ever-changing landscape of the family unit in the United States, the role of Assisted Reproductive Technology ("ART") is increasing. ART has made parenthood possible for individuals and couples who are unable to reproduce naturally. The most common ART procedures include artificial insemination, in-vitro fertilization, and surrogacy. According to the C.D.C., ART accounts for approximately 1.8% of all infants born in the United States.[1]

With the increase in the use of ART, two significant challenges have arisen in the context of estate planning: (1) how to define parentage and descendants for legal purposes; and (2) how to determine who can control the disposition of stored genetic material. Complicating matters, these issues can occur at any time, since it is now possible for a person to genetically reproduce after death by using ART.

DEFINING DESCENDANTS AND CHILDREN

Generally, if a parent-child relationship exists, absent a showing of contrary intent, the law presumes that a non-marital child or an adopted child is part of the class of "descendants" or "children" in a will or trust. Thus, non-marital and adopted children are treated in the same manner as biological children for purposes of inheritance.[2]

The use of ART can result in complicated determinations of who is included in the classes of "descendants" or "children" due to the possibility that more than two individuals hold a parenting role. This has led to the creation of three categories of parentage: (1) biological or genetic parentage (contributing the genetic materials for the conception of the child); (2) gestational parentage (carrying and bearing the child); and (3) functional parentage (raising the child following the birth).

It is important that estate planning documents address all three categories of parentage. If a client wants to provide for children for which the existence of a legal parent-child relationship is unclear, such children should be specified by name in the documents and be included in the definitions of "descendants" and "children" to avoid future controversy. Further, if a surrogate is used, the necessary steps should be taken post-childbirth to guarantee the intended parents become the child's legal parents and that the surrogate's rights are terminated (*e.g.,* via adoption proceedings or petition listed on the child's birth certificate).

GENETIC MATERIAL AS PROPERTY

There is little legislation or case law addressing the custody and disposition of stored genetic material, and the legislation and laws that exist are inconsistent. The Uniform Parentage Act of 1973 ("UPA") was enacted to provide the legal framework for establishing parent-child relationships and to provide guidance on issues related to embryo ownership and genetic testing.[3] The American Bar Association has also adopted the Model Act Governing Assisted Reproductive Technology to address issues left unresolved by the UPA.[4]

Generally, the decision to use, destroy, or donate stored genetic material is in the hands of whomever controls the material. This is typically determined in a contract with a storage provider. However, if unclear, these contracts can lead to problems with the disposition of genetic material in the event of death or divorce. The law remains unsettled in this area. Some courts have emphasized the intent to discard the material as established in the storage provider contracts, and some courts have found that forced procreation violates public policy. In such a landscape, estate attorneys should consider the following questions when preparing estate planning documents for clients who have stored genetic materials:

In the event of incapacity, who can make decisions with regard to stored genetic material? Can the stored material be subsequently implanted? And in whom?

Upon death, what happens to the stored genetic material? Can the survivor have it implanted? And in whom? Is the resulting child a beneficiary of the estate?

What happens to the stored genetic material in the event of a relationship ending?

What should happen to the stored genetic material if there is no longer a desire to use it?

Estate planning attorneys should also review all storage provider contracts if a client has stored genetic material.

POSTHUMOUS REPRODUCTION

Posthumous reproduction involves using embryos or gametes that were frozen during an individual's lifetime after his or her death. Legislation related to the inheritance rights of posthumously conceived children from a deceased parent's estate varies drastically amongst jurisdictions, if addressed at all. If a client has frozen genetic material, estate planning documents should define what constitutes consent to ensure a deceased parent's estate is not inadvertently required to provide for a child that was not intended to be treated as such. This is especially important when an individual wishes to consent to posthumous use of genetic material in the context of anonymous sperm donation and a child is subsequently born. Providing a specific timeframe in which a posthumous child must be conceived or born can alleviate potential estate administration issues resulting from posthumous use of genetic material, such as determining the party entitled to inherit.

CONCLUSION

With the many technological advances possible through the use of ART comes even more uncertainty among jurisdictions about the legislation surrounding ART and about its impact on an estate plan. Estate planning attorneys must be intentional not only in ensuring their planning documents reflect the intent of their clients, but also that they contemplate the complexities in determining parentage and the disposition of stored genetic material.

1 *See* Centers for Disease Control and Prevention, 2016 Assisted Reproductive Technology Report at 6, 56 (April 2019), https://www.cdc.gov/mmwr/volumes/68/ss/pdfs/ss6804a1-H.pdf.
2 Some jurisdictions rely on the laws in effect at the time of the document's creation, rather than current interpretations of the law.
3 *See generally* UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017). Three states have adopted the most recent 2017 update. Ten states have adopted the 2002 version, in whole or in part.
4 AMERICAN BAR ASSOCIATION, SECTION OF FAMILY LAW, SECTION OF SCIENCE AND TECHNOLOGY LAW, COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY, Report to the House of Delegates, https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/art/resolution-111.pdf.

IN CRYPTOCURRENCY WE TRUST (OR DO WE?)

BY ENA KOVACEVIC AND DEANNA THOMPSON

"Cryptocurrencies: everything you don't understand about money combined with everything you don't understand about computers."[1] Most people have heard of bitcoin, but there are thousands of cryptocurrencies.[2] The technological underpinnings of cryptocurrencies are intricate and powerful, making cryptocurrencies secure; however, the anonymity, novelty, and lack of predictable regulation all create a degree of risk. Fiduciaries and estate planners should be aware of the advantages and drawbacks to cryptocurrencies in order to advise their clients on this growing phenomenon.

Cryptocurrencies utilize blockchain, which is a record-keeping technology in which a database (the "chain") maintains a series of time-stamped records (the "blocks"). This ledger of accounts and transactions is both public and decentralized.[3] Thousands of separate computers in the blockchain network all verify each transaction before it enters the chain, at which point the transaction becomes publicly available. Each computer in the blockchain network has its own complete copy of the blockchain. As a result, in order to manipulate the information in a blockchain, a hacker would somehow need to hack every computer in the blockchain network concurrently. That impossibility makes cryptocurrencies incorruptible

Despite the technological certainty, investing in cryptocurrencies is incredibly risky. Beside the fact that some of the thousands of cryptocurrencies have turned out to be pyramid schemes,[4] cryptocurrencies' lack of intrinsic value, lack of regulatory oversite, and lack of sizeable markets make investments extremely volatile and risky.

For an additional complication, while it may be tempting to think of cryptocurrency as just another type of money, like cash, the IRS has taken the position that, for tax purposes, cryptocurrency is property, *not* currency. That is, "[g]eneral tax principles applicable to property transactions apply to transactions using virtual currency."[5] This means that the transfer of cryptocurrency, such as converting cryptocurrency to dollars, might require payment of a capital gains tax.[6]

Accordingly, placing cryptocurrencies in a trust, especially an irrevocable trust, might help provide stability, avoid losses, and minimize taxes. Because (among other factors) there are fewer overall investors in cryptocurrency markets, cryptocurrencies are more susceptible to short-term losses.[7] However, if cryptocurrencies generally trend upward in value over time (which most who invest in cryptocurrencies adamantly believe), the cryptocurrency passes to the beneficiary free of estate or gift tax.[8] This could neutralize the short-term volatility of cryptocurrency while taking advantage of its benefits. For example, the security and transparency of cryptocurrencies mean that any unauthorized transfer of cryptocurrency (such as by a recently terminated executor) is instantly traceable.[9]

Of course, other legal issues will arise from creating cryptocurrency trusts. For example, given the short-term volatility of cryptocurrency, a testator will need to decide whether a variety of different assets should fund the trust (allowing an executor to satisfy their duty to diversify) or to forgo the usual protection that stems from a trustee's duty to diversify.[10] Further, cryptocurrency is still in its infancy, and many legal issues, especially tax issues, have yet to be addressed.

Cryptocurrency can present practical challenges for a fiduciary as well. If cryptocurrency is held anonymously, a fiduciary might not know about it, which would exclude it from the estate's overall value. Currently, Minnesota is one of 36 states to adopt the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA").[11] This act provides some guidance for fiduciaries to gain access to a grantor's digital assets.[12] Still, RUFADAA addresses only a handful of issues and cannot predict what future problems will arise as cryptocurrency evolves and matures.

As cryptocurrencies grow in popularity, the benefits of putting cryptocurrencies in trusts will likely expand. Fiduciaries and estate planners need to be prepared to ask clients about their digital assets and manage those assets to meet their clients' goals.

1 John Oliver, *Last Week Tonight* (Mar. 11, 2018).
2 *All Cryptocurrencies*, Coinmarketcap.com (2018) https://coinmarketcap.com/all/views/all/.
3 Michael J. Casey & Paul Vigna, The Truth Machine: The Blockchain and the Future of Everything (2018).
4 Gareth Jenkinson, *Bitconnect Ponzi Scheme – No Sympathy From Crypto Community,* Cointelegraph (Jan. 18, 2018), https://cointelegraph.com/news/bitconnect-ponzi-scheme-no-sympathy-from-crypto-community.
5 I.R.S. Notice 2014-21, IR-2014-16 (Apr. 14, 2014).
6 Parker F. Taylor, Vanessa A. Woods, and Jack Tannenbaum, *Estate Planning with Cryptocurrency*, 33 Prob. & Prop. Mag. 23 (2019).
7 Arthur Iinuma, *Why Is the Cryptocurrency Market So Volatile: Expert Take*, Cointelegraph (Feb. 27, 2018) https://cointelegraph.com/news/why-is-the-cryptocurrency-market-so-volatile-expert-take.
8 Parker F. Taylor, Vanessa A. Woods, and Jack Tannenbaum, *Estate Planning with Cryptocurrency*, 33 Prob. & Prop. Mag. 23 (2019).
9 *Id.*
10 *Id.*
11 Minn. Stat. § 521A.01 (2018).
12 *See* Minn. Stat. § 521A.07 (2018).

2019 YEAR IN REVIEW

BY DENISE S. RAHNE

The year 2019 brought us new and ongoing developments, some modern and some mundane, ranging from future-looking contemplation of electronic wills to persistent questions related to taxes.

ELECTRONIC WILLS

Sixteen years ago, Nevada took the leap into the world of electronic wills when it adopted NRS 133.040. If Nevada legislators thought they would have immediate company, they miscalculated. That said, 2019 suggests potential belated momentum in other states. Following 2018 legislation in Indiana providing for the viability of electronic wills, this year legislation authorizing digital signatures took effect in Arizona. In addition, this year Florida passed its Electronic Documents Act, which will take effect on January 1, 2020. The law allows electronic signing, witnessing, and notarization of wills and other estate planning documents with a series of attendant safeguards. This year also saw activity in New Hampshire and Virginia, where electronic will bills were introduced but none became law.

CALIFORNIA CONSUMER PRIVACY ACT

For anyone who holds or administers assets for California residents, 2019 has likely been a time of preparation for the January 1, 2020, effective date of the California Consumer Privacy Act of 2018. Some commentators have compared this legislation to stringent European compliance obligations. Among other things, California's legislation includes new disclosure requirements, robust consumer rights, training obligations, provisions for data portability, and penalties for noncompliance related to a California resident's personal information possessed by a business. Personal information is defined broadly and includes information that identifies, relates to, describes, is capable of being associated with, or could reasonable be linked, directly or indirectly, with a particular consumer or household.

KAESTNER AND *FIELDING*

This year saw the long-awaited U.S. Supreme Court decision in *North Carolina Department of Revenue v. Kaestner 1992 Family Trust*.[1] This dispute involved a trust established for the benefit of children who originally resided in New York. Subsequently, the trustee divided the trust into three trusts, and the beneficiary of one of these trusts, Kimberley Rice Kaestner, resided in North Carolina for a short time, from 2005 through 2008. Ms. Kaestner's brief residence in North Carolina was the only contact with North Carolina, and she had no right to any distributions and did not receive any while she resided in North Carolina.

North Carolina taxes trust income that is for the benefit of a resident of the state, even if the resident received no income from the trust, had no right to demand it in the relevant tax year, and could not count on ever receiving it. The issue before the U.S. Supreme Court was whether the Due Process Clause prohibits states from taxing trusts based solely on the residency of the trust's beneficiaries. While limiting its holding to the specific facts of this case, the U.S. Supreme Court unanimously affirmed the N.C. Supreme Court's ruling that the state could not tax the income of a trust based solely upon the presence of a contingent in-state beneficiary.

A dispute watched with equal interest, *Fielding v. Commissioner of Revenue,*[2] was the subject of a writ of certiorari at the time of the *Kaestner* decision. In *Fielding*, the Minnesota Supreme Court analyzed whether a "rational relationship" existed between the income subject to tax and the protections and benefits conferred by the state. Minnesota relied on the facts that the grantor was a Minnesota resident, the trust documents relied on Minnesota law, all the assets of the trusts were in Minnesota, and the underlying business was in Minnesota. The trusts claimed that the connections were not sufficient, noting that no trustee had been a Minnesota resident, the trusts had not been administered in Minnesota, the trust records had been maintained outside of Minnesota, some of the trusts' income was derived from investments with no direct connection to Minnesota, and three of the four trust beneficiaries resided outside of Minnesota.

The Minnesota Supreme Court agreed with the trusts, finding that the contacts were either irrelevant or too attenuated. Days after deciding *Kaestner*, the U.S. Supreme Court turned down the opportunity to hear the case, leaving practitioners to parse the guidance that can be gleaned from the Minnesota Supreme Court's decisions.

AND ... ARETHA FRANKLIN

When Aretha Franklin died last year, it was widely believed that she did not have a will. Earlier this year, three handwritten documents found in her home set up a family fight in a Michigan court between, predictably, the family members who would benefit most if she were intestate and those who would benefit under the putative will or wills.

If Franklin is found to be intestate, her estate will be divided in four equal parts to her four sons. The handwritten versions, however, do not specifically provide for the oldest son, who may have special needs, but instead seemingly instruct the other three sons to “oversee his needs.”

Sabrina Owens, Franklin’s niece, was originally named the estate’s personal representative, purportedly based on Franklin’s well-known wishes given Owens’ business experience. The youngest brother, Kecalf Franklin, has been most active in the effort to have the wills authenticated, and he has also petitioned the court to replace Owens and appoint himself as the personal representative. The dispute implicates a significant revenue stream related to future business deals while, ironically, there is some evidence that the legal battles are themselves interfering with the prosperity to be had from such deals.

1 No. 18-457, 588 U.S. ___ (U.S. Jun. 21, 2019).

2 916 N.W.2d 323 (Minn. 2018).

THANK YOU FOR JOINING US: WEALTH PLANNING, ADMINISTRATION, AND DISPUTES CLE

On September 12, 2019, Robins Kaplan LLP hosted its annual Wealth Planning, Administration, and Disputes CLE, this year titled “The Future of the Fiduciary.” Stephanie Donley, a philanthropic advisor with the Minneapolis Foundation, spoke about philanthropic giving and donor-advised funds. Professor Naomi Cahn from George Washington University Law School delivered the keynote address regarding demographic and legal trends that will shape the industry in the next 20 years. Bill Kambas and Jim Dougherty of Withers Bergman, Jeff Roby of U.S. Bank, and Stacey Slaughter from Robins Kaplan participated in a panel discussion on avoiding fiduciary litigation in the age of AI and fintech, moderated by Tim Billion from Robins Kaplan. The event concluded with another round of the popular “Ripped from the Caselaw” game, led by Denise Rahne and Matt Frerichs of Robins Kaplan.

Many thanks to those who attended and participated in the event, including the remote participants in our Boston office. We look forward to another great event next year!

MEET OUR ISSUE EDITOR:

TIMOTHY BILLION

Tim Billion practices primarily in Robins Kaplan's Business Litigation Group and has represented clients in a variety of disputes, including trust and fiduciary litigation, contract and fraud claims, earn-out disputes, employment disputes, class action lawsuits, personal injury claims, constitutional litigation, and criminal proceedings. Tim is adept at guiding clients through every state of litigation from initial case assessment and development to trial and post-judgement briefing and appeals. He also has experience resolving disputes through negotiation, mediation, and arbitration. He can be reached at TBillion@RobinsKaplan.com.

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