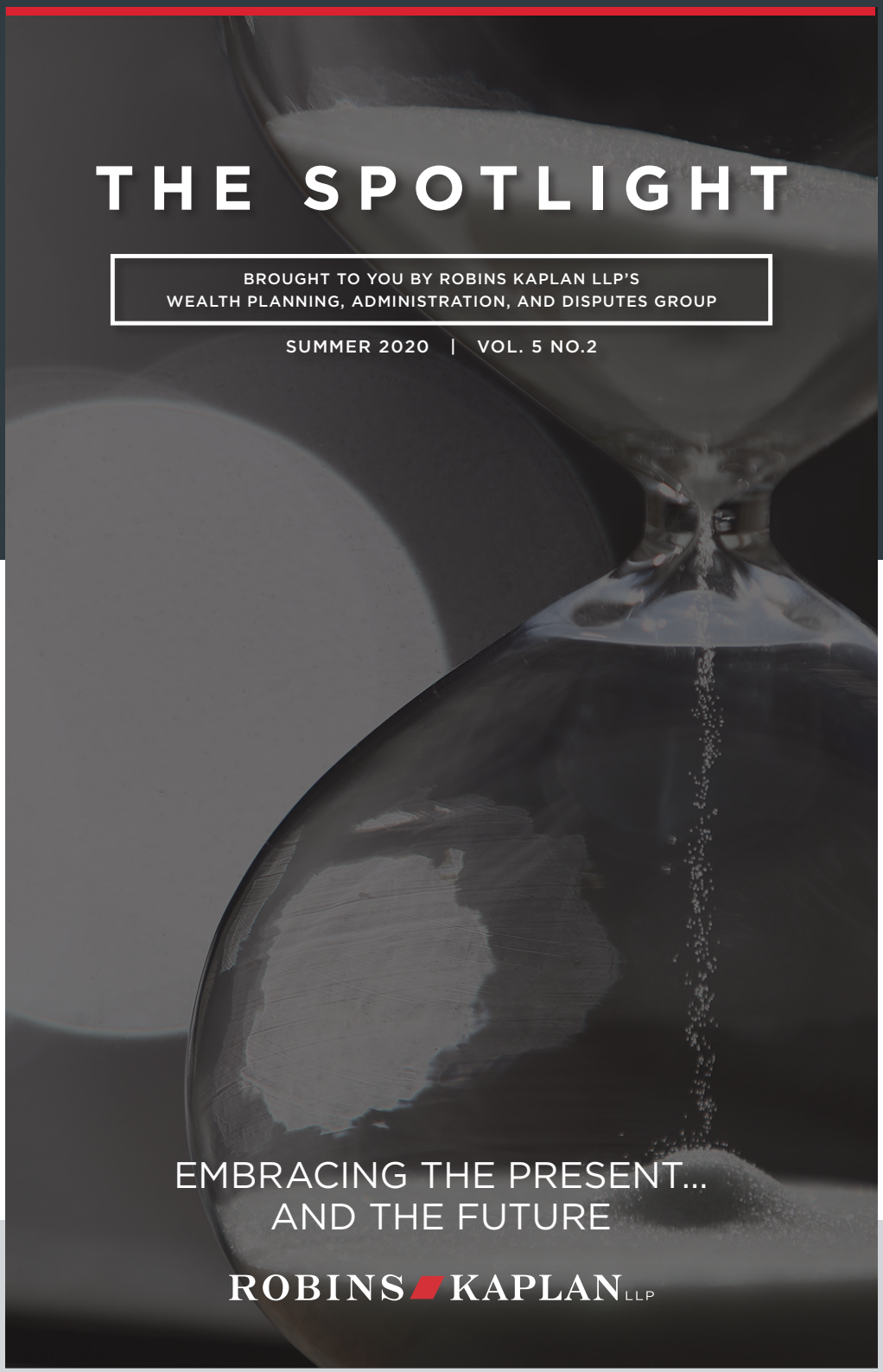
THE SPOTLIGHT
BROUGHT TO YOU BY ROBINS KAPLAN LLP'S
WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP
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EMBRACING THE PRESENT...
AND THE FUTURE
ROBINS KAPLAN LLP

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

WHAT'S A FIDUCIARY TO DO? CONSIDERATIONS FOR PERIODS OF UNCERTAINTY

BY DENISE RAHNE AND TONY FROIO

In the face of complex disruptions of the sort we have recently experienced, new challenges emerge and old challenges are exacerbated. For those who have undertaken fiduciary obligations to others, these challenges can be compounded when striving to meet duties to individuals experiencing anxiety and altered needs, while at the same time balancing your own similar stresses. Under such circumstances, there are familiar considerations that come into new light and may warrant careful thought as one analyzes how to best discharge one's duties to beneficiaries.

ASPIRING TO FAIRNESS IN THE FACE OF INEQUALITY

Fiduciaries have long faced challenges with beneficiaries who equate fairness with an idealized view of equality. Because beneficiaries start in different places and have varied circumstances, these can often be difficult to reconcile to the satisfaction of all beneficiaries. A beneficiary "keeping score" in their respective family accounting book may not appreciate the fiduciary's effort to satisfy what a grantor intended for beneficiaries. One beneficiary's education might be more expensive and right for that person. For another some assistance with starting a small business might be the right justification for a distribution. In the best of times it can quickly devolve into a reactionary game of "if he gets that I should too," despite vastly different life situations.

When stress and uncertainty are heightened, it becomes all the more important to find the right words to harmonize what can seem unequal on the surface. Calm, careful, and well-reasoned analysis communicating to all of the beneficiaries why some thrive on apples while others require oranges may help de-escalate a brewing dispute—and if not, a fiduciary will have created a helpful record justifying the exercise of discretion. When preparing such analyses, fiduciaries should also consider their broader audience—including attorneys who might be asked to evaluate a situation at the request of a beneficiary and ultimately any fact finders in the unfortunate, but all-too-common event that the discretion is challenged.

MAINTAINING THE LONG GAME IN THE FACE OF PERCEIVED SCARCITY

The mindset associated with "a bird in the hand is worth two in the bush" can wreak havoc when beneficiaries are feeling uncertain about their individual situations. Where a trust may have been set up to look out for one or more beneficiaries over an extended period of time, shifting societal and economic environments can lead some beneficiaries to say "well, I'd feel a lot better if I had mine in hand right now."

Here a fiduciary's ability to educate about historic trends and the dangers associated with emotional decision making are at a premium. We have many tools at our disposal, including informational town-hall style presentations, regular and consistent written updates, and one-on-one discussions. Those who prudently utilize these and similar tools will certainly have a greater likelihood of helping beneficiaries stay focused beyond present urgencies.

PUTTING A PREMIUM ON COMMUNICATION

Beyond the provision of substantive information, any communication can be a salve in times of heightened anxiety and instability. This is because when a beneficiary is worried and without access to other voices and views, many often imagine the worst. A beneficiary's knowledge that you are thinking about him or her and paying attention to the present realities, even if you lack any immediate solutions or a magic wand, can reinforce the trust and confidence that a fiduciary has worked so hard to build.

In addition, more frequent two-way communication with beneficiaries will provide access to advance intelligence if real or perceived problems are brewing. Even remotely, one can pick up the tell-tale signs of stress or conflict. The value of such communication does come with a cautionary caveat that fiduciaries will not want to be perceived as communicating with some beneficiaries more frequently than others. Combinations of open forums and transparent equal opportunity to schedule one-on-one conversations can help alleviate some of the risk that such efforts later fall into the category of "no good deed goes unpunished."

KEEPING ABREAST OF EXPERTISE OUTSIDE OF YOUR LANE

With major social or economic shifts, the unknowns can be not only deep, but also broad and interlocked with a variety of trends, forces, and industries. Recent months have compelled fiduciaries to quickly develop increased working knowledge, if not expertise, related to everything from global supply chains to the benefits and limitations of various technologies. It can be overwhelming. But fortunately, in our highly connected world, information and training is often but a few clicks away.

Of course, previous challenges in this regard persist and are perhaps exacerbated, including sorting through vast quantities of information and—particularly when it comes to rapidly increasing uses of technology—attendant issues associated with privacy and regulatory compliance. Once again, here a fiduciary does not need anything new so much as to do it differently. Informal virtual conferences and list-services can bring small groups of fiduciaries facing similar challenges together to crowd-source everyone's efforts and get the best information more quickly. If you do not have access to an industry list service, consider researching to find one that seems like a good fit. In addition, consider joining or forming a group that gathers virtually on a regular basis to compare notes and experiences specific to the present challenges. And importantly, there are times when a fiduciary needs to recognize the need to recommend a consultation with outside experts, such as financial consultants and other advisors. Fiduciaries may also consider the value in seeking the assistance of counsel to assist with the coordination and provision of information and/or access to such financial consultants and other advisors.

THE BRAVE NEW WORLD OF VIRTUAL NOTARIZATION

BY STEVE ORLOFF AND MANLEEN SINGH

The COVID-19 pandemic and consequent state and federal guidelines forced people to work from home before they were able to take steps so that they could do so effectively. This new working dynamic presents unforeseen challenges for those who rely on traditional in-person notarizations. Unsurprisingly, one related consequence has been increased interest in and questions about remote online notarization.

Remote online notarization, or "RON," allows the notary to use technology, such as Zoom, Skype, Webex, or Facetime, to notarize a document when the signer of the document is in a different location. The RON movement had a slow start. Virginia was the first state to authorize the use of RON in 2010, and ten years later, in early March of 2020, Wisconsin had become only the 23rd state to do so. Since the onset of the pandemic, the number of states allowing RON has skyrocketed: at the time of submission of this article, 43 states, whether by statute or executive order, have authorized RON.

As can be expected, the landscape of RON across the country can vary widely. As an initial matter, there may be significant differences between states that authorized RON prior to the pandemic or after. For example, states that authorized RON in response to the pandemic are more likely to have such authority expire, such as Massachusetts (3 business days after termination of the governor's March 10, 2020 declaration of a state of emergency) and New York (June 6, 2020). States with pre-existing statutes typically do not have expiration dates, such as Minnesota and South Dakota.

In addition, states have varying substantive requirements to achieve a valid notarization. In Minnesota, for example, the notary must complete a registration with the secretary of state that includes a certification that the notary intends to use communication technology that conforms to the Minnesota statute. In addition, the notary must be physically located in Minnesota and follow a specific protocol for proof of identity.

In South Dakota, a notary can remotely notarize a document so long as the notary has personal knowledge of the person signing the document. Once the document is signed remotely, the notary must sign the original document and

swear to the following in an acknowledgement: (1) the location of the person who signed the document; (2) "[t]hat the notarial act involved a statement made or a signature executed by a person not in the physical presence of the notarial office, but appearing by means of communication technology"; and (3) that she was "reasonably [able] to confirm that the document before the notarial office [was] the same document in which the person made the statement or on which the person executive a signature."

In Massachusetts, both the notary and the individual signing the documents must be located within the Commonwealth. Plus, the video conference during which the documents are notarized must be recorded, and that recording must be retained for 10 years. Further, estate planning documents must be notarized either by an attorney or an attorney-supervised paralegal. But before an attorney in Massachusetts or any other state remotely notarizes any document, they should check with their malpractice carrier first, as some policies specifically exclude RON from coverage.

Even states that do not authorize RON within their state may make allowances for RON performed elsewhere. For example, California citizens may notarize their documents remotely in a state that allows RON. So long as the documents are notarized pursuant to that state's rules and regulations, such documents will be accepted in California.

While more states are authorizing RON, there may be unintended consequences that could lead to problems long after the pandemic is over. Careful attention must be paid to dates when the time comes to administer an estate. For instance, in those states where RON is authorized via executive orders, attorneys and fiduciaries must ensure that the executive order was valid, unexpired, and not rescinded by subsequent state governors when the estate planning documents were notarized remotely. In addition, RON can overlap with other short-term allowances that have been made during the pandemic, such as the extension of expiration dates of driver's licenses if the licenses expire during the COVID-19 emergency. In such situations, notaries may be able to accept expired driver's licenses as proof of identify, but they must stay informed as to when the emergency is lifted, after which, only unexpired driver's licenses would be accepted.

Perhaps most importantly, one of the critical aspects of traditional notarization is the opportunity for the notary to confirm that the individual understands what he or she is signing: that the individual is competent and is not being unduly influenced. With RON, that opportunity is limited, as the individual controls what the notary can and cannot see with videoconferencing technology. While some states require the notary to ask the signer if anyone else is in the room, the notary has no way to verify the truth of the signer's answer.

WHAT COULD BE THE HARM? MINNESOTA'S HARMLESS ERROR STATUTE

BY MATTHEW FRERICHS AND ENA KOVACEVIC

Against the backdrop of a global pandemic, many clients developed a newfound sense of urgency regarding their estate planning, which presented new challenges in light of the attendant health risks and stay at home orders. At the same time, many estate planners went from being largely skeptical of electronic wills to newly appreciative of how such allowances might help them address the challenges that they were facing in properly executing estate planning documents—particularly documents such as wills that require witnesses.

As it became apparent in Minnesota that it would be some time before electronic will legislation could be considered and passed, practitioners became creative and accomplished witnessing and executions that accommodated social distancing and other public health guidance, including executing in larger spaces, sometimes even outdoors (including "drive-by" witnessing and notarization), engaging in deep cleaning of conference rooms, wearing masks and gloves, having testators and witnesses bring their own pens, and utilizing remote notarization. Still, practitioners recognized that such creativity could not address all situations, including individuals with significant health issues and/or those who were isolated in congregate care.

As a consequence, the Minnesota legislature passed a short-term measure—known as the harmless error rule—that would provide some temporary cover. Minn. Stat. § 524.2-503 provides that a document or writing that was not executed in compliance with Minnesota's execution requirements can be treated as if it had been properly executed if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute his or her will, a revocation of a will, an addition to or an alteration of a will, or a partial or complete revival of a formerly revoked will or portion of a will. This section applies to documents and writings executed on or after March 13, 2020, and will sunset on February 15, 2021.

While the harmless error rule was intended to provide some cover, many practitioners found little comfort in a statute that seemed to invite rather than avoid litigation. Accompanying that concern, practitioners began to consider what they might do to at least protect a client's intent when circumstances required reliance on the temporary legislation. Currently eleven states besides Minnesota have codified some form of harmless error rule.[1] In the face of the present uncertainty, looking at precedent from some of these jurisdictions does provide some guidance.

Extrinsic evidence of the decedent's own action as evidence of his or intent represents a consistent theme in the case law. In *In re Estate of Stoker*, 122 Cal. Rptr. 3d 529, 532 (Cal Ct. App. 2011), for example, the court found clear and convincing evidence that the decedent intended to revoke his 1997 will because he destroyed it by urinating on it and burning it. In *In re Estate of Wiltfong,* 148 P.3d 465, 469-70 (Colo. App. 2006), the court found the decedent's statements to others and the language of an associated letter to be determinative the decedent's intent.

Logically, the absence of action can be problematic, as in *In re Prob. of Will & Codicil of Macool*, 3 A.3d 1258, 1264-66 (N.J. Super. Ct. App. Div. 2010), where the court held that the proponent of an unsigned document did not meet the standard because the decedent died one hour after leaving her lawyer's office and did not have a chance to review a draft of the will and assent to its contents as required by the New Jersey statute. Contradictory actions can also present impediments to meeting the standard, as in *In re Estate of Hand*, 73 N.E.3d 880, 884-86 (Ohio Ct. App. 2016), where the court found that there was not clear and convincing evidence that the decedent intended a love letter to be his will in part due to the fact the decedent also used LegalZoom to prepare a will around the same time.

Third-party testimony has also been analyzed by courts, with unsurprising attention given to the credibility of the witness. Compare, for example, *In re Estate of Palmer*, 2007 SD 133, ¶ 19, 744 N.W.2d 550 (2007), where the court considered witness accounts as extrinsic evidence relevant to the decedent's intent but found that the evidence lacked credibility, with *In re Estate of Ehrlich*, 47 A.3d 12, 18 (N.J. Super. Ct. App. Div. 2012), where the court admitted an unsigned document to probate and where the decedent acknowledged "the existence of the Will to others to whom he expressed an intention to change one or more of the testamentary dispositions."

These examples suggest a few things. First, in a situation where reliance on the statute may be inevitable, the worst option may be to take no steps to document the testator's intent. Related, having the testator take available contemporaneous actions, such as making a video or audio recording, writing a letter or notes documenting his or her intent, and making consistent statements to credible and independent third parties regarding his or her wishes, may ultimately prove effective. In addition, practitioners should keep in mind that the need to rely on the statute can and probably should be limited to the hopefully small percentage of clients who execute in the relevant time frame and then pass away or lose capacity shortly thereafter. Where proper statutory execution was not achieved, due considerations should be given to re-execution and/or self-proving affidavits when circumstances allow.

1 Hawaii, Michigan, Montana, New Jersey, South Dakota, Utah, California, Colorado, Ohio, Virginia, and Oregon.

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Denise Rahne and Steve Orloff co-chair the Wealth Planning, Administration, and Disputes Group. Denise's practice focuses on disputes involving estates, trusts, fiduciaries, shareholders, and closely-held corporations. On those matters, Denise counsels corporate and individual clients facing a wide variety of active and potential litigation, including settlements, summary judgments, trial, and other litigation proceedings. Steve's practice focuses on handling complex problems that can accompany high net worth individuals including succession planning in family business. Steve helps clients navigate challenges when disputes occur, through extensive subject matter proficiency in the complicated system of laws and regulations that control end-of-life wealth distribution.

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