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ROBINS KAPLAN LLP

REWRITING THE ODDS

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LEGISLATIVE UPDATE: FOCUS ON MINNESOTA

BRITTANY N. BOREN AND SETH A. NIELSEN

The 2016 Minnesota Legislative session showcased important developments related to trust and estate laws. The most notable were contained within HF2515/SF2328, which sought several modifications to Minnesota's probate code. Specifically, the bill proposed provisions that would:

- Raise the intestate share of a decedent's spouse, a surviving spouse's entitlement to personal property, and the value of an estate that can be collected by affidavit.
- Allow the Court to modify estate instruments in certain circumstances, including to conform such instruments to the transferor's intentions.
- Allow the Court to modify estate instruments to achieve the transferor's tax objectives.

Other noteworthy legislation considered includes:

- SF476 to extend the power of a fiduciary to manage digital assets.
- HF2072 to provide for a transfer-on-death of vehicle and watercraft titles.
- HF1372 to permit the creation of "pet trusts," or trusts to provide for the care of an animal.

These provisions, with the exception of transfer-on-death of vehicle and watercraft titles, were incorporated into HF1372 and passed the House and the Senate. The bill was signed by Governor Dayton on May 22, making Minnesota the last of the 50 states to allow pet trusts. The transfer-on-death vehicle and watercraft title provision was incorporated into the supplemental budget bill, HF 2749, which was signed by Governor Dayton on June 1. Other legislation that did not make it to the Governor may be taken up again in 2017 – and we will be watching.

STOP! IN THE NAME OF LOVE

LAWRENCE A. FARESE AND MICHAEL A. PRICE

The shocking scenarios faced by families, estate planning attorneys, and trust officers can sometimes rival the plot of a *Lifetime* network movie. But there is nothing scripted about how to address egregious conduct of an adult child attempting to "protect" an elderly parent from other family members in the name of "love."

While guardianship proceedings are often used and abused by family members as both a sword and shield in such situations, such proceedings should be avoided. The Florida Legislature has gone so far as to tailor statutory provisions to provide that a guardian should not be appointed if sufficient alternatives exist. Accordingly, trust officers and estate planning attorneys should be aware of the preventive and remedial measures available to avoid unnecessary guardianship proceedings, including the drafting functions illustrated by the following scenarios.

> **Scenario One**—An elderly Husband, residing in Florida, executes estate planning documents which appoint his second Wife as his Health Care Surrogate ("Advance Directive") and Durable Power of Attorney ("DPOA"). After experiencing symptoms associated with dementia, he flies to Massachusetts to visit his Daughter from a prior marriage. Upon recognizing her father's symptoms, the Daughter embarks upon a clandestine scheme and holds her father hostage while he executes a new Advance Directive and DPOA appointing his Daughter as agent and establishing his domicile in Massachusetts. Could such unforeseeable conduct have been avoided and how could the Wife proceed in Florida?

A "forum selection" clause could be included in the Husband's estate planning documents which indicate that Florida courts are his chosen forum to administer any guardianship proceedings. The provision could be substantiated with facts, such as the length of time the Husband has resided in Florida, the availability of familiar doctors, and the support system the Husband maintains in Florida.

The Wife could file an Emergency Petition to Appoint Limited Temporary Guardian Seeking Instructions. The Petition could provide the factual basis regarding the kidnapping of the Husband and request that an Emergency Temporary Guardian be appointed by the Florida Court with instructions to work with a private investigator to find the Husband, return him to Florida to be examined for competency, and if determined to lack capacity, set aside the newly signed Massachusetts documents.

Scenario Two—A forty-nine year old Daughter, and resident of Florida, files a Petition to Determine Incapacity and Petition to Appoint Guardian for her Mother, also a Florida resident. While the guardianship proceedings are pending, a Sibling flies to Florida and persuades the Mother to come to Michigan for a vacation. After arriving in Michigan, the Sibling files a voluntary guardianship Petition in Michigan on behalf of the Mother and gets appointed as her guardian. What actions could the Mother's estate planning attorney have taken, and how can the Daughter proceed in Florida?

Similar to *Scenario One,* a "forum selection" clause could be employed in drafting the Mother's DPOA or other instruments. Additionally, the Mother, while competent, should select a pre-need guardian in her DPOA should guardian becomes necessary. Finally, the relationships between an estate planning client and his or her family should be reduced to writing in the drafting attorney's notes. To ensure harmony within the family unit is maintained, the estate planning attorney must be aware of potential red flags raised by the client about those persons close to him or her with volatile and unpredictable tendencies.

The Daughter could contest the voluntary guardianship in Michigan on the grounds of the Mother's lack of capacity and the court's lack of jurisdiction over a Florida resident. Simultaneously, the Daughter could move to seek an Emergency Temporary Guardian with instructions to return the Mother to Florida to continue with the Florida guardianship proceedings. The costs to family members to wage such jurisdictional wars are often prohibitive, which can lead to an unjust result by attrition. Thus, careful planning while parents are fully competent is essential.

Scenario Three—A Florida couple has been married for five years. The Husband has five Children from a prior marriage, all of whom do not care for the Wife. All five Children work on the West Coast and regularly communicate their dislike for the Wife to the Husband. After a fall with resulting brain damage, the Husband's health has been in decline causing Wife to admit him into an assisted living facility. In frustration, the Children file a Petition to Determine Incapacity and Petition to Appoint Guardian in Florida alleging that the Wife's actions are not in the Husband's best interest and requesting an Order of Incapacity and Appointment of an Independent *Professional* Guardian.

When the guardianship action instituted by the petitioners is based on conclusory allegations or on pure difference of opinion, the Wife may have good grounds to seek an early dismissal of the proceedings. Further, other alternative measures, such as a DPOA, Advance Directive, Designation of Preneed Guardian, and Revocable Trusts, may suffice. One Florida court summed up the preference for a preneed guardian best by stating "the statutory standard requires more than a finding that a designated preneed guardian is lacking in interpersonal and social skills. Although the preneed guardian had a 'bull-in-the-china-closet approach to caring for' the ward, the ward 'may have dearly wanted a loving husband (no one disputes they love each other) aggressively advocating for her as she enters a life/health care environment that can be daunting.'" *Koshenina v. Buvens*, 130 So. 3d 276 (Fla. 1st DCA 2014).

The awesome responsibility of protecting another individual's legacy encompasses difficult decisions. By maintaining ongoing communications with clients to ensure their estate plan reflects their intentions, the dangers associated with unpredictable behavior of family members can be mitigated. In turn, the efficacy of estate planning attorneys and trust officers will rise.

MINNESOTA TAKES UP DECANTING: WHAT WE CAN AND CANNOT LEARN FROM WINE[1]

DENISE S. RAHNE

Of the features of Minnesota trust law ushered in with the Minnesota Trust Code, the decanting provisions have arguably caused the most stir. This may be due to the distinctive pizazz inherent in a concept drawn from Dionysian heritage. It may equally be due to its pragmatic appeal. Either way, decanting has emerged as one of the easiest ice breakers for those whose professional practice touches on traditional trusts.

Decanting is ultimately an enabled exercise of power by a trustee, and so you will not find the decanting provisions alongside the majority of the Minnesota Trust Code in Chapter 501C. Instead the governing provisions are located in a revised version of Chapter 502 which governs powers of appointment. True to its name, this is a tool by which a trustee may, under certain circumstances, either fix or breathe new life into a trust instrument.

HOW MUCH CAN WE LEARN FROM WINE?

A 2012 *New York Times* "Food Section" article on decanting aptly quoted: "For most of wine-drinking history, decanting was standard procedure. To avoid a mouthful of sludge, wines were habitually decanted, leaving the sediment in the bottle." It is a somewhat apt analogy. Decanting is and should be a procedure for leaving the unwanted—the metaphorical "sludge"—in its original bottle: here the original trust.

As with wine, however, distaste varies by the view of the individual. And it is here that application of the wine analogy unravels. If as a gracious host you unnecessarily decant your middling Malbec, the worst that may happen is being the focus of your guests' mockery. But if you decant a trust without thoughtful intention, the consequences to you and your clients might well be more costly.

And so questions of who, what, when, and why very much come into play. Each should be examined as we cautiously experiment with this new tool with which we have been presented.

WHO CAN DO WHAT?

Minnesota's decanting statute purposefully sets forth two tracks: one for trustees with unlimited discretion and one for trustees with less than unlimited discretion. *Compare* Minn. Stat. 502.851, subd. 3 and subd. 4. The distinction is important in terms of the nature of the trust decanter—the new "appointed" trust.

There are two important considerations on this front. First, if you are going to decant you obviously need to pick the right track. Second, there is the unavoidable ghost of retroactivity. Minn. Stat. 502.851, subd. 17. For some beneficiaries, it will be apparent that any proposed action was not contemplated by the settlor. As a result, no matter how carefully a trustee proceeds, there will be beneficiaries for which the process feels inherently wrong. This risk becomes greater when one is reaching or justifying powers only contemplated for trustees with unlimited discretion. Select carefully and strongly consider the more conservative track if there is ambiguity or doubt as to your choice of track.

WHAT...CAN AND CANNOT BE ACCOMPLISHED?

Presuming that one has the appropriate authority, trustees under either track may:

- Lengthen the trust term;
- Act without regard to the need to invade the principal of the trust; and
- Impact later discovered assets if the decanting explicitly addresses all assets.

Trustees with unlimited discretion may also change beneficiaries, potentially change the distribution standard, and act broadly with regard to present and future members of any identified class of beneficiaries. In contrast, trustees with limited discretion must stay within a proverbially more limited decanter. Specifically, trustees with limited discretion must:

- Maintain reciprocity between original and new beneficiaries;
- Maintain distribution standards;
- Limit additional discretion to an extended term; and
- Ensure the inclusion of present and future members of any identified class of beneficiaries.

WHAT...MUST A TRUSTEE DO?

The Minnesota Trust Code explicitly outlines that an authorized trustee "has a fiduciary duty to exercise the [decanting] power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances." Minn. Stat. 502.851, subd. 9. To many practitioners this represents an unnecessary reminder. It may, however, emerge as a legal counter-weight to the also explicit power of a trustee to "exercise the power to appoint in favor of an appointed trust under subdivision 3 or 4 whether or not there is a current need to invade principal under the terms of the invaded trust."

Trustees must also adhere to the notice provisions as set forth in Minn. Stat. 502.851, subd. 11. Unsurprisingly, the notice requirement includes the provision of the instrument exercising the power, and both the previous "invaded" trust and the newly drafted "appointed" trust(s). As a practical matter, trustees should consider when to first provide notice to interested parties. It may be prudent to provide earlier notice of the intended action and attendant purpose, so that buy-in can be partially or fully achieved before providing fully-drafted legal documents to unsuspecting parties.

WHEN AND WHY MIGHT YOU CONSIDER THIS?

Ultimately, decanting may be uniquely suited to at least two situations:

1. Multiple beneficiaries or sets of beneficiaries with widely varied circumstances: In such a situation, this tool may allow you to decant into separate trusts for separate beneficiaries with trust terms suitable to each varied situation.

2. Older trusts where there are circumstantial changes not anticipated by the settlor: In such a situation, this tool may allow you to decant into a more modern trust that better addresses the present reality, whether that be familial, legal, or related to tax implications.

While not exhaustive, these are two areas where a trustee might entertain decanting as a practical and proactive means to better serve trust beneficiaries and possibly avoid legal wrangling with regard to the execution of the original trust.

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1. As promised in our Spring 2016 article by Matthew Frerichs, this article is the first in a series of efforts to delve further into various aspects of the Minnesota Trust Code.

PROTECTING TRUST ASSETS FROM CREDITORS WITH SPENDTHRIFT PROVISIONS

LISA L. BEANE

Spendthrift provisions in trusts are a useful way to provide for beneficiaries who might have difficulties managing assets that would otherwise be distributed in a lump sum. By restricting a beneficiary's ability to transfer trust assets, the settlor can provide income or other benefits to a beneficiary and prevent the principal of the trust from being seized by creditors of the beneficiary.

Minnesota law interprets spendthrift provisions liberally and with very limited exceptions. Minnesota courts have long recognized spendthrift provisions as an extension of the rights of the property owner, who may confer the benefits of the property on anyone the owner chooses, even to the exclusion of creditors and others. *See In re Moulton's Estate*, 233 Minn. 286, 291, 46 N.W.2d 667 (1951). All that is necessary to create a spendthrift trust under Minnesota law is clear intent "to impose restrictions on both voluntary and involuntary transfers of a beneficiary's interest." Minn. Stat. § 501C.0502(a) (2015). No particular language is required.

Even when a trust instrument contains a spendthrift provision, disputes can arise over the scope of its application. The Eighth Circuit Bankruptcy Appellate Panel recently considered a case in which a beneficiary of a trust that contained a spendthrift provision tried to exclude her interest in the trust from her bankruptcy estate. *Thompson-Rossbach v. Doeling*, No. 15-6012 (B.A.P. 8th Cir. Dec. 2, 2015). The debtor's bankruptcy estate had received the distributions to which the debtor was entitled under the terms of the trust. The debtor argued that those distributions should be protected from the bankruptcy because the trust included a spendthrift provision. But the spendthrift provision provided that "any principal distributable to any beneficiary by reason of having attained a specified age shall be fully alienable by such beneficiary after attaining such age." Because the debtor had attained age 21 before the bankruptcy petition was filed, the terms of the trust made her share of the trust principal distributable to her and alienable by her. The court concluded that the debtor's distributions were not subject to the spendthrift provision and were properly part of the bankruptcy estate.

A spendthrift provision, therefore, is effective only to the extent that it prevents transfers of the beneficiary's interest. Once trust assets are distributed to a beneficiary, the trustee can no longer protect those assets from creditors or control the manner in which they are used. To be sure, a settlor seeking to give beneficiaries some income from trust property will not be able to ensure that every dollar will be protected from the beneficiary's creditors. But attorneys drafting spendthrift provisions should be sure that the scope of the restrictions placed on the transfer of trust property are broad enough to effectuate the settlor's intent to protect the property from the beneficiaries' creditors.

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