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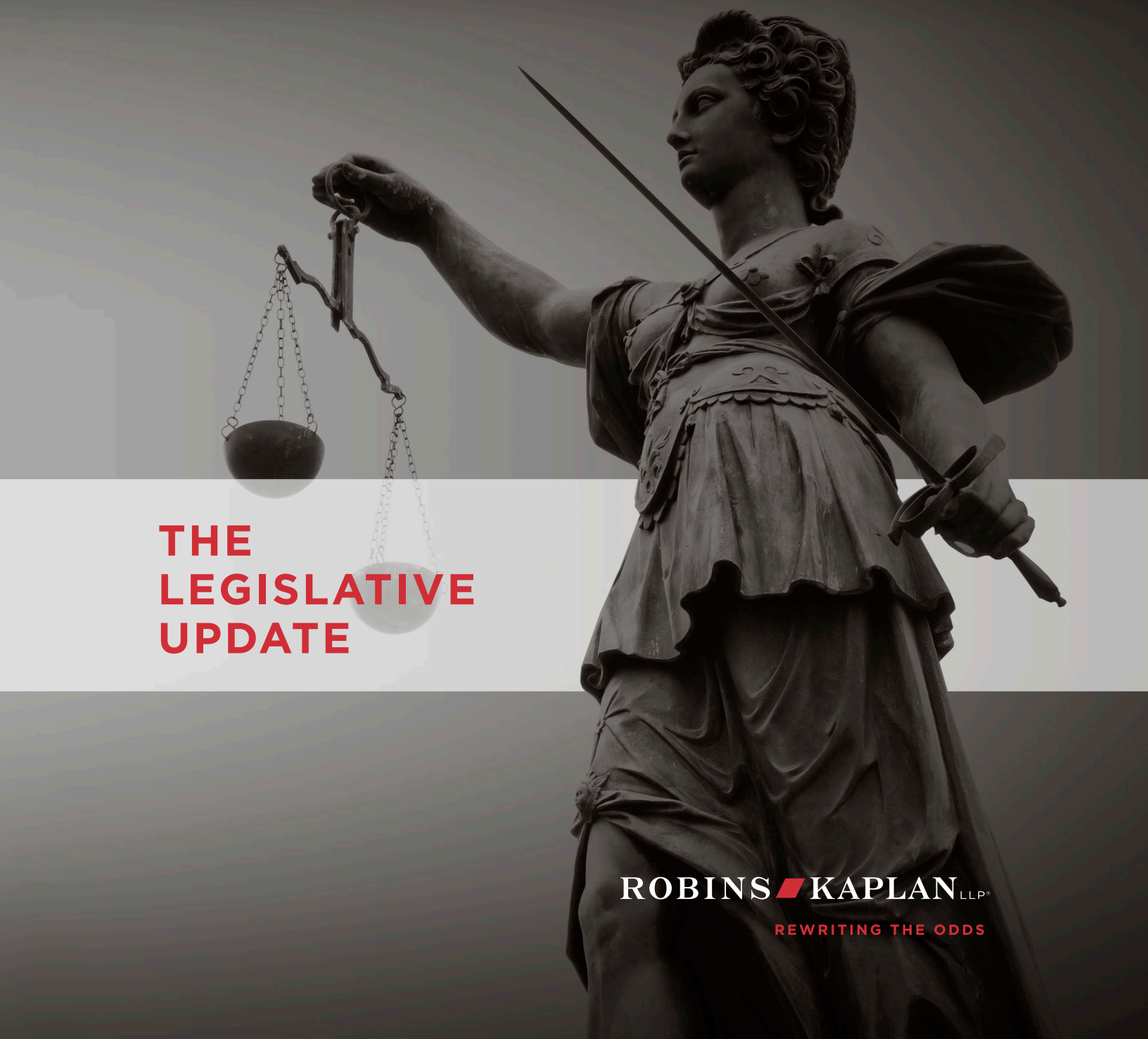

THE LEGISLATIVE UPDATE

ROBINS KAPLAN LLP®

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INSIDE THIS ISSUE

WHO HAS PRIVITY IN NEGLIGENT ADMINISTRATION CLAIMS?

CRAIG WEINER AND SHIRA SHAPIRO

Proposed Legislation in New York Seeks to Allow Negligent Administration Claims Against Estate Planning Attorneys – Courts Nationwide Still Divided Over Who Has Privity to Do So

This past February, New York Assemblyman Jeffrion Aubry sponsored a bill (No. A04532) to allow beneficiaries or distributees of a will to bring a negligence claim against the attorney who administered it. The bill was referred to the judiciary committee but was not put to a vote in the 2017 legislative session. This year was not the first time this bill was sponsored in New York—and it likely will not be the last. Indeed, other states have grappled with this and similar issues, typically focusing on the interplay between the doctrine of privity and who has standing to bring such claims.

PRIVITY

The doctrine of privity prevents any person from seeking to enforce a contract, or sue on its terms, unless he or she is a party to that contract. In the past, this doctrine has protected estate planners against malpractice claims by executors or other representatives—who are not the beneficiaries—of an estate. In recent years, a majority of states began transitioning away from this safeguard for estate planners, often allowing negligence claims before the client's death.

MAJORITY VIEW

Just last month, the Minnesota Court of Appeals found that an executor or trustee of an estate had standing to bring a legal malpractice claim against the estate planning attorney. In *Security Bank Trust Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd.,* No. A16-1810, 2017 Minn. App. LEXIS 62 (Minn. Ct. App. May 15, 2017), the estate attorney did not inform the client that his estate would be subject to a generation-skipping tax. Even though the negative tax consequences were not realized until after the client's death, the Court held that the executor or trustee of the estate had standing to bring a legal malpractice claim that *accrued during the decedent's lifetime*. While the Court did not determine the question of negligence, the estate still had standing because the decedent suffered "some damage" when trusting his attorney's advice. Minnesota's ruling joined the majority view that, as long as the negligent estate planning occurred during the decedent's lifetime, a malpractice claim can survive the death and be asserted by an estate's executor.

Similarly, in 2010 the New York Court of Appeals decided *Schneider v. Finmann*, 933 N.E.2d 718 (N.Y. Ct. App. 2010). The Court held that an executor may maintain a legal malpractice claim for estate losses resulting from negligent estate planning representation. The decedent in *Schneider* had relied on his attorney's advice to purchase a $1 million life insurance policy, transfer it between different businesses over the years, and then subsequently transfer the policy back to himself. Because of the policy transfers, the proceeds were included in the decedent's estate. The Court held that privity existed between the estate executor and estate planning attorney, allowing the estate to "stand in the shoes" of the decedent to maintain a legal malpractice claim on the estate's behalf. The Court, however, clearly differentiated a claim brought by an estate's executor, versus a claim brought by a beneficiary. The Court made clear the beneficiary—unlike the executor—*does not* have privity with the estate planning attorney that would allow a legal malpractice claim.

MINORITY VIEW

A minority of states, including Alabama, Virginia, Maine, and Kansas, require strict privity for malpractice actions commenced against estate planning attorneys.[1] Under strict privity, damages in a legal malpractice claim based on negligent estate planning do not accrue until *after* the decedent's death. Thus, no privity exists between the estate planning attorney and the estate's executor to maintain a malpractice claim.

PRACTICAL CONSIDERATIONS

While no estate planning attorney should act negligently in the administration of a client's estate, it is important to understand how the courts view the issue of privity regarding negligence claims. For example, whether or not the court in one's jurisdiction recognizes privity may affect the statute of limitations for such claims. Executors of an estate should also carefully review the estate planning advice a decedent received during his or her lifetime to determine whether any legal malpractice claims exist and should be pursued.

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1. *See, e.g., Rutter v. Jones, Blechman, Woltz & Kelly,* P.C., 264 Va. 310, 568 S.E.2d 693 (Va. 2002); *Jeanes v. Bank of Am., N.A.,* 295 P.3d 1045 (Kan. 2013); *Robinson v. Benton,* 842 So.2d 631, 637 (Ala. 2002); *Nevin v. Union Trust Co.,* 726 A.2d 694, 701 (Me. 1999); *Noble v. Bruce,* 709 A.2d 1264, 1275 (Md. Ct. App. 1998); *Simon v. Zipperstein*, 512 NE.2d 636 (Ohio 1987); *Lilyhorn v. Dier,* 335 N.W.2d 554 (Neb. 1983).

TRANSFERRING FIREARMS THROUGH ESTATES

SHERLI FURST AND ALEXANDER NEWMAN

Two states took a look at the topic of firearms[1] as estate assets this recent legislative season. This article will examine those proposed bills, as well as how practitioners can use a trust to simplify the transfer process.

GUN TRUSTS

As with other assets, many complications relating to transfers of firearms between individuals can be mitigated by passing ownership to a trust. A "gun trust," a revocable trust specifically designed for the ownership and transfer of firearms, serves to facilitate the transfer of firearm ownership and can enhance privacy. However, these trusts do not circumvent firearm ownership laws, so if an individual cannot lawfully own a firearm directly, that individual also cannot legally own one through a trust.

Typically, a firearm is made an asset of the trust, and one or more trustees each may lawfully own the gun without triggering the transfer requirements of local or federal law. The trust can also name beneficiaries, allowing firearms to be passed down in the event of death or if an owner becomes unable to legally own a firearm (following a felony conviction, for example).

In 2016 federal regulations were amended to expand the definition of "responsible person"—the person or entity required to undergo a background check—to include a trust, partnership, association, LLC, or corporation, in addition to an individual. 27 CFR § 479.11.

Drafters should be aware of specialized considerations for gun trusts. For example, the trust must provide for circumstances such as a trustee or beneficiary becoming disqualified from legal ownership of a firearm.

Further, practitioners must be aware of additional requirements imposed by local laws in states where either the decedent or any beneficiaries reside. To illustrate, some specifics of New York and California law—and proposed changes to those laws—follow.

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NEW YORK

Under current New York law, an executor may possess a decedent's firearm for up to 15 days and, if unable to properly dispose of it within that time, must deliver the firearm to law enforcement officials for safekeeping. Those officials may hold it for up to a year, and if the executor is unable to find a lawful recipient during that time, officials are mandated to destroy the weapon. N.Y. Penal Law § 265.20(f).

A 2013 New York law added a requirement that a list of any firearms must be filed with the surrogate's court in any estate proceeding. N.Y. Surr. Ct. Proc. Act Law § 2509. A pending bill, addressing a gap created by that 2013 law, would amend the penal code to allow transfer of legally registered firearms to a decedent's immediate family—defined as a child or spouse—through intestacy or as a beneficiary of the estate. A06941, S2775, 2017–18 Session (N.Y. 2017).

CALIFORNIA

Under California law, most firearm transfers must take place through a licensed firearms dealer. Cal. Penal Code § 27545. One exception to that rule allows "transfer of a firearm by gift, bequest, intestate succession, or other means" between individuals if the transfer is "infrequent" and between "members of the same immediate family." Cal. Penal Code § 27875(a). A similar exception allows inheritance of an out-of-state firearm from "an immediate family member by bequest or intestate succession" without conducting the transfer through a dealer. Cal. Penal Code § 27875(b).

The phrase "immediate family member" is defined as either a "[p]arent and child" or "[g]randparent and grandchild." Cal. Penal Code § 16720. A pending bill, S.B. 299, 2017–18 Session (Cal. 2017), would expand the two exceptions from the dealer requirement noted above by removing the phrase "immediate family" and replacing it with a list of relationships: "parent, child, sibling, grandparent, or grandchild," whether "related by consanguinity, adoption, or steprelation."

1. The word "firearm" is often a term of art. This article refers to firearms generally, but practitioners should check the statutory definition in their jurisdiction and under federal law.

MINNESOTA TRUSTS AND ESTATES LEGISLATIVE UPDATE

STEVE BRAND AND BRITTANY BOREN

The 2017 Minnesota Legislative Session, which ended in a special session after legislators failed to agree on the budget, produced a few noteworthy trusts and estates-related changes. Despite the way the 2017 session ended, the trusts and estates-related legislation we tracked largely moved through the legislature without incident.

The legislature considered two bills related to agricultural estates. The first, which passed, was HF22, which eliminates a previous (and unnecessary) reporting requirement for agricultural land held in revocable trusts. For the exemption to apply, the trust must remain revocable, and the settlor or the settlor's spouse must be the primary beneficiary of the trust. Prior to the bill's passage, failure to file the report constituted a gross misdemeanor and could result in a $500 civil penalty and a lien on the land being farmed. An additional piece of legislation related to agricultural estates was considered, but, as part of the hotly disputed tax bill, was not passed. The bill would have allowed married farm couples to retain agricultural homestead status despite splitting their property into two trusts, thereby remaining eligible for the qualified farm property estate tax exemption.

The legislature also revised the rules related to residency determinations. Under the new law, found in the Tax Bill (HF1) passed at the eleventh hour of the special session, the location of an individual's professional advisors cannot be used as a factor in determining residency. The professional advisors specifically included in the language of the bill include the individual's attorney, CPA, and financial advisor. Also excluded from consideration by the bill is the location of a financial institution where the individual applies for any new type of credit or opens or maintains any type of account. The bill applies to tax years beginning after December 31, 2016.

The estate tax bill that was eventually signed did not raise the Minnesota estate tax exemption to match the federal exemption. Under the new law, Minnesota's estate tax exemption will increase only marginally and is not set to match the federal exemption. Instead, the exemption amounts have been raised as follows:

- $2,100,000 for estates of decedents dying in 2017
- $2,400,000 for estates of decedents dying in 2018
- $2,700,000 for estates of decedents dying in 2019
- $3,000,000 for estates of decedents dying in 2020 and thereafter.

The law is effective retroactively, so for any decedent who died in 2017, the new exemption amount will apply. Developments in this area should be followed closely, as the Governor has stated that he disagrees with any changes to the estate tax and will cut this item from the tax bill if he manages to convene a special session.

ATTORNEY BIOS

SHERLI FURST

Sherli Furst concentrates her practice in media and entertainment litigation, business and commercial matters, and estates, trust and fiduciary litigation. Ms. Furst provides insight, analysis, and advocacy for complex business and financial industry disputes. With an in-depth understanding of the complicated system of laws and regulations that control various fiduciary obligations, end-of-life wealth distribution, and property and asset valuation, she can skillfully navigate the disputes involving complex fiduciary, financial, and intellectual property issues. Ms. Furst can be reached at SFurst@RobinsKaplan.com.

BRITTANY BOREN

In addition to litigating trust and estate cases, Brittany Boren focuses her practice in financial litigation and business and commercial matters. Ms. Boren understands that trust and estate disputes can be emotionally charged and works to intimately understand not only the interplay of legal issues but also the emotional components that are often just as critical to positive resolution. Ms. Boren's primary goal in resolving any dispute is to create a solution that delivers on all aspects of a client's personal, business, and financial needs. Ms. Boren can be reached at BBoren@RobinsKaplan.com.

BISMARCK
1207 West Divide Avenue
Suite 200
Bismarck, ND 58503
701 255 3000 TEL

LOS ANGELES
2049 Century Park East
Suite 3400
Los Angeles, CA 90067
310 552 0130 TEL

NAPLES
711 Fifth Avenue South
Suite 201
Naples, FL 34102
239 430 7070 TEL

SILICON VALLEY
2440 West El Camino Real
Suite 100
Mountain View, CA 94040
650 784 4040 TEL

BOSTON
800 Boylston Street
Suite 2500
Boston, MA 02199
617 267 2300 TEL

MINNEAPOLIS
800 LaSalle Avenue
Suite 2800
Minneapolis, MN 55402
612 349 8500 TEL

NEW YORK
399 Park Avenue
Suite 3600
New York, NY 10022
212 980 7400 TEL

SIOUX FALLS
101 South Main Avenue
Suite 100
Sioux Falls, SD 57104
605 335 1300 TEL

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