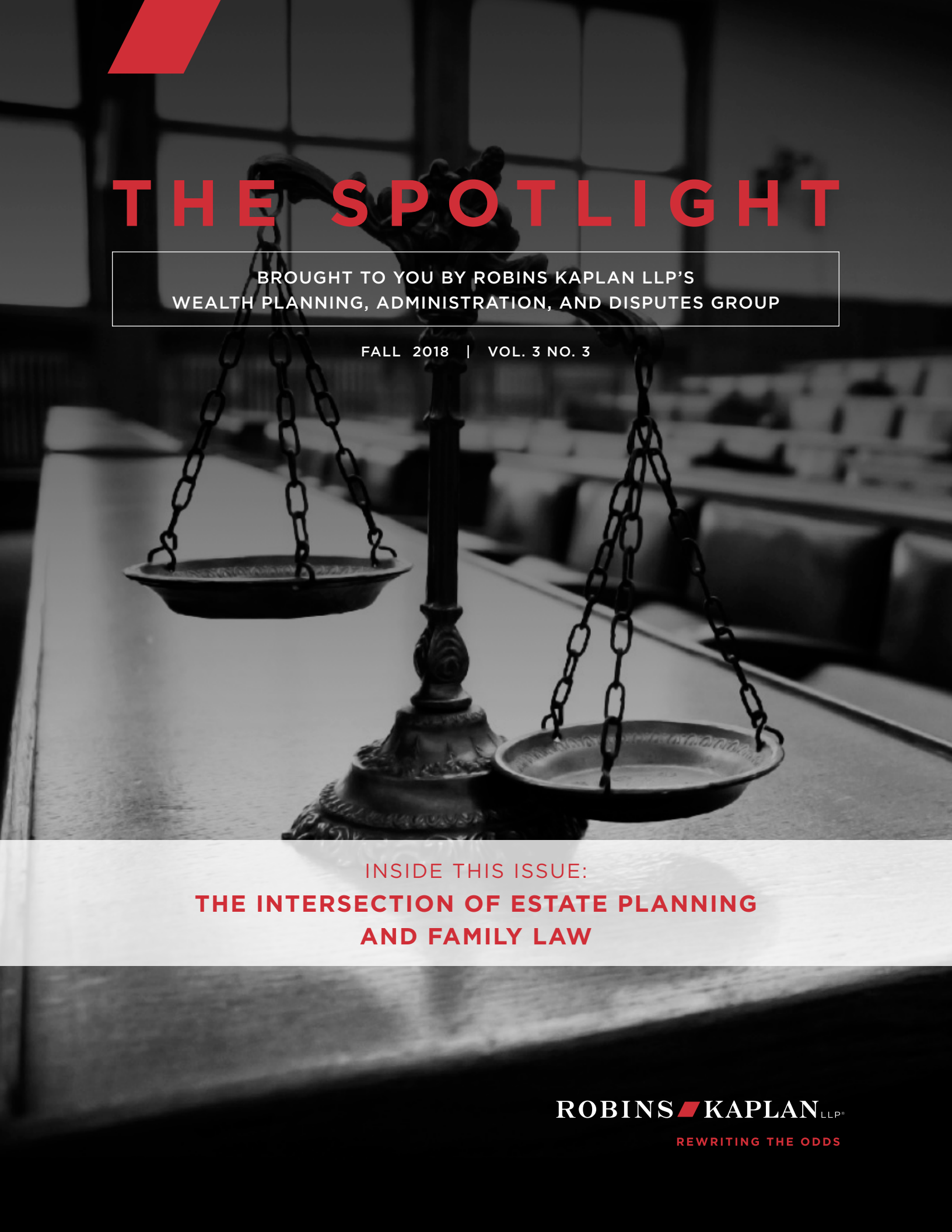

THE SPOTLIGHT

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WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP

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THE INTERSECTION OF ESTATE PLANNING AND FAMILY LAW

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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.

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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 SPosthumus@RobinsKaplan.com.

– Denise S. Rahne and Steve A. Brand

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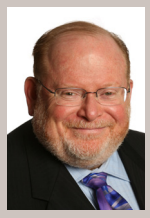

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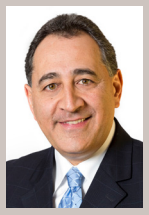

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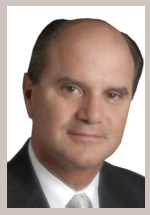

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THE IMPORTANCE OF GUARDIANSHIP PLANNING FOR MINOR CHILDREN

BY REBECCA M. VACCARIELLO AND KEVIN D. MEEK

While most parents of minor children are aware of the importance of naming a guardian for their children in their will, often that is the extent of their planning. If one or both natural parents become physically or mentally incapacitated, or pass away, the proper planning or lack thereof will immediately be evident. While naming a guardian in a will is an important step, parents of minor children should consider additional actions to avoid unnecessary costs or unintended consequences for the minor children's care and custody.

GUARDIAN DESIGNATIONS FOR CUSTODY FOR MINOR CHILDREN

Guardianship planning for minors permits a parent to designate the person who will raise the parent's minor children in the event the parent dies or is otherwise incapacitated. While this naming can be done in a parent's will, in several states, including Minnesota and Florida, a standby or pre-need guardian may be nominated through the preparation and filing of a separate designation. A separate designation — in addition to the nomination in a will — is optimal, because a parent may become incapacitated or unable to care for the minor child before the will reaches probate.

A guardianship designation is an important additional document that can be prepared at the same time as the parents' will or as a simple addition to their estate planning documents. It can be more easily changed and avoids the need to change the will if just the guardian designation requires updates. It also avoids the need to file a will for guardianship purposes and prior to a parent having passed away.

PROBLEMS WHEN DESIGNATIONS ARE NOT IN PLACE

If a parent designates no guardian and no natural parent survives or can care for a minor child, the state can place the minor child into the custody of the state while the courts determine temporary custody. This type of dependency or family court proceeding can be avoided with proper advance planning as detailed below. An uncontested guardianship proceeding is much faster and preferred, because it avoids the possible temporary placement of a child into a foster care setting, in addition to offering the most cost-effective option. Furthermore, the designations can prevent costly and disruptive guardianship battles among surviving family members. In some states, such as Florida, the designation creates a presumption that the named guardian is entitled to serve and be appointed by the court. In Minnesota, courts can approve the designation during the parent's lifetime.

BEST PRACTICES INCLUDE FINANCIAL PLANNING

If parents do not plan for the possibility that they may predecease their children attaining the age of majority, they may also miss the opportunity to take simple steps to cost-effectively simplify their children's financial life. For example, if a natural parent passes away and he or she listed the child as a beneficiary in a will or other non-probate asset, then a guardianship or other court proceedings may be needed for the property of the child, even where the other natural parent is still alive. Legal proceedings could be avoided if funds for a minor child are left to a named custodian relating to a Uniform Transfer to Minors Act account, or in trust for the child. These steps also ensure that parents get to choose the custodians or trustees in control of the funds, rather than a court after the fact.

Appropriate guardianship planning for minors is not necessarily time-consuming or expensive, and incorporating it as part of estate planning can make all the difference in ensuring that the best options have been chosen to cover minor children's personal care and financial matters.

KEEPING A BLENDED FAMILY HARMONIOUS WITH STRATEGIC ESTATE PLANNING

BY JOSHUA B. STROM

The inevitable challenges in blended families are magnified after a spouse dies, and strategic estate planning is therefore even more important within such families. The issues of jealousy and loyalty among parents and stepchildren are often highlighted in the administration of trusts and estates following the death of a spouse. Estate planning provisions should be considered thoughtfully so unnecessary friction can be avoided during that stressful time, and to avoid litigation in the following years.

THE INCREASED NUMBER OF BLENDED FAMILIES

We all know the sad statistic that half of all marriages end in divorce, and unfortunately, second and third marriages are even less likely to succeed. Three quarters of all divorcees get remarried, and nearly two-thirds have children from an earlier marriage. A common reason second and third marriages fail is the difficulties couples face in combining their families. Different parenting styles, questions of a parent's loyalty to his or her stepchildren versus biological children, and rivalries among half-siblings are common challenges for couples who remarry and have children from earlier relationships. Thus, couples who have beaten the odds and successfully blended their families must be vigilant in their estate planning to ensure they do not create problems when one of them dies.

ESTATE PLANNING CHOICES CAN UPSET THE BALANCE IN BLENDED FAMILIES

The common provisions in many basic estate planning documents may not be the best option for many blended families. Consider the following hypothetical: Beau and Caroline married in their late 40s. For each, it was their second marriage. Beau had two boys from his first marriage, and Caroline brought two daughters to the union. It took some time for Beau and Caroline to smooth out the bumps when blending their family, which eventually included four near-adult children, but they defied the odds and enjoyed a long, happy second marriage.

During their marriage, Beau and Caroline were fortunate enough to enjoy fruitful careers, so they established trusts as components of their estate plans. Under his trust, Beau named Caroline the beneficiary who would receive the income from the trust assets for the remainder of her life. Beau then named his biological children as the remainder beneficiaries. Caroline created a reciprocal trust.

Like many trusts, the instruments allowed the trustee to make principal distributions to the beneficiary within the trustee's discretion. In deciding whether to make a principal distribution, the trust instructed the trustee to consider the beneficiary's other assets.

Now, several years after Beau died, Caroline asks the trustee for large discretionary distribution of principal to pay for a new car and to buy a modest cabin. Caroline's trust was heavily invested in real estate holdings that did not turn out as she expected, so her trust is much smaller. Because of her trust's lower assets, her biological children will receive far less after she passes than her stepchildren. Caroline wants to preserve her remaining assets so that she has more to leave to her biological children, given that her trust is now much smaller than Beau's. Beau's children oppose Caroline's request for a principal distribution. The issue creates a rift in the family between the four children and threatens to forever change their relationships going forward. These circumstances could have been avoided had Beau and Caroline simply made all four children equal beneficiaries of both trusts.

THE ROLE OF STRATEGIC ESTATE PLANNING

Real-life scenarios like the above hypothetical story play out every day, and they illustrate how blended families should take special care to ensure that their estate plans do not inadvertently undo the couple's work in bringing the family together during their marriage. Couples—and those who help them with their estate planning and related instruments—should carefully analyze whether they have inadvertently set up opportunities for a surviving spouse to treat his or her stepchildren differently than their biological children. If the family is to remain a blended and cohesive unit well into the future, estate planning should be thoughtfully executed to avoid unintended consequences that can undermine harmonious relationships.

SVEEN V. MELIN: SUPREME COURT HOLDS THAT BENEFICIARY DESIGNATIONS MADE BEFORE MINNESOTA'S REVOCATION-ON-DIVORCE STATUTE DO NOT VIOLATE THE CONTRACTS CLAUSE

BY STEVE A. BRAND AND SHIRA SHAPIRO

The U.S. Supreme Court seldom decides probate matters—let alone Minnesota probate matters, and it has been decades since it decided a case involving the Contracts Clause of the Constitution. A rare blend of these concepts, *Sveen v. Melin*, 201 L. Ed. 2d 180 (2018) is thus doubly momentous. Under *Sveen*, revoking an insured's designation of a former spouse as a life insurance beneficiary, made before the enactment of Minnesota's revocation-on-divorce statute,[1] does not violate the Contracts Clause.

THE UNDERLYING FACTS AND LOWER COURT DECISIONS

While married, Mark Sveen designated his wife, Kaye Melin, as primary beneficiary of his life insurance, and his two children from a prior marriage as contingent beneficiaries. Four years later, Minnesota enacted a statute that now automatically revokes designations of ex-spouses as life insurance beneficiaries.[2] When the couple divorced in 2007, Sveen did not change the designation of Melin as his primary beneficiary.

After Sveen's untimely death at age 46, his children and Melin made competing claims for the life insurance proceeds. The federal district court ruled in the children's favor. The Eighth Circuit Court of Appeals reversed, holding that the policyholder could "rely on the law governing insurance contracts *as it existed* when the contracts were made."[3]

THE ARGUMENTS BEFORE THE U.S. SUPREME COURT

On appeal to the Supreme Court, the Sveen children argued that the automatic-revocation law did not violate the Contracts Clause, which precludes states from impairing the obligations of private contracts, because it did not "impair" the life insurance company from performing its obligation under the contract—to pay *any* beneficiary. The Sveen children also relied on the presumption that most divorcees do not intend to keep ex-spouses as beneficiaries. The children further defended the statute as merely Minnesota's authority to regulate divorces.[4]

Melin argued that Minnesota's law violated the Contracts Clause because it automatically erases the beneficiary from a life insurance contract, and the Contracts Clause forbids any state law that impairs the obligations of contracts. Challenging the presumption that divorcees cut *all* ties, Melin identified various reasons many insureds may want ex-spouses as beneficiaries, including—and perhaps most critical—to provide for the couple's children.[5]

Fourteen national women's rights organizations submitted an amici brief in support of Melin. These amici argued that revocation-on-divorce statutes disparately harm women, who are often more financially vulnerable in divorce proceedings. They also disputed the presumption that divorcees want to sever all financial ties as "obsolete," failing to reflect modern relationships and families. Collaborative divorce statutes and the proliferation of no-fault divorce in many states render divorce less contentious today, more amicable, and cooperative.[6]

THE U.S. SUPREME COURT DECISION

Justice Kagan authored the 8-1 decision, ruling that revocations of beneficiary designations made before the statute's enactment do not violate the Contracts Clause because they do not "substantially impair" the preexisting contractual relationship. The Court found that the statute reflected a policyholder's intent and did "no more than a divorce court." The Court also found that Minnesota's law was a default—not mandatory—rule, which a policyholder "can undo in a moment." The Court, like the Sveen children, relied on the presumption that divorcees do not want ex-spouses as beneficiaries.[7]

The Court neither addressed the gender arguments opposing Minnesota's law, nor the argument regarding the collaborative undercurrent of our changing society. Indeed, the recent abundance of social commentary and research on millennials, those born between 1982 and 2000, supports the premise that collaboration is *essential* for that generation. Significantly, millennials are expected to outnumber baby boomers in 2019[8] and are currently receiving the boomers' "great wealth transfer" of an unprecedented $30 trillion. Millennials' preference for cooperative relationships will therefore likely become the norm, affecting and shaping generations of beneficiaries and heirs to come.

POTENTIAL IMPLICATIONS OF THE HIGH COURT'S DECISION

While the gender and societal issues underlying *Sveen* remain unresolved, *Sveen* makes clear that previously made beneficiary designations to former spouses are not set in stone in Minnesota. This case could also be cited in other states for analogous situations affecting similar revocation-on-divorce statutes and other statutes with automatic triggers that affect estate planning that could be found to implicate Contracts Clause issues.

It is critical to discuss beneficiary designations when counseling estate planning clients and certainly with those facing divorce. Minnesota clients who want to maintain their ex-spouses as beneficiaries must act affirmatively, and, in some cases, *pre-divorce*. The designation should be included in the resolution of the divorce case pursuant to the statute and may require a court order. Absent a confirmatory step, the statute will likely automatically revoke designations and divest individuals from their estate planning wishes.

Even those who want to sever ties should not rely solely on the statute's "automatic" nature, because, depending on the specific documents involved, they could be subject to statutory exceptions. All individuals in states with revocation-on-divorce statutes or other statutes that trigger automatic changes to beneficiary designations should confirm with their counsel that their estate plans will continue to work as intended, despite divorce or other life changes, and despite any changes in the laws of their state.

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1. Minn. Stat. § 524.2-804, subd. 1.
2. Exceptions to this general rule exist if the life insurance designation is provided for in a pre-divorce non-trust governing instrument, court order, marital property contract, or retirement plan. *Id.*
3. *Metro. Life Ins. Co. v. Melin*, 853 F.3d 410, 413 (8th Cir. 2017) (quoting *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991) (emphasis added)).
4. *See* Petitioners' Brief, at 31-32, 39-54 (Jan. 22, 2018).
5. *See* Respondent's Brief, at 15, 33-36, 54-55 (Feb. 21, 2018).
6. *See* Amici Curiae Brief of The Women's Law Project, et al., at 10-21, 25-26 (Feb. 28, 2018).
7. *Sveen v. Melin*, 201 L. Ed. 2d 180, 183, 188-89 (2018).
8. Richard Fry, Pew Research Center, *Millennials projected to overtake Baby Boomers as America's largest generation* (Mar. 1, 2018), http://www.pewresearch.org/fact-tank/2018/03/01/millennials-overtake-baby-boomers/.

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A member of Robins Kaplan LLP's Wealth Planning, Administration, and Disputes Group in our office in Naples, Florida, Rebecca M. Vaccariello focuses her practice in the areas of probate, trust, and guardianship litigation, in addition to handling uncontested guardianships and counseling fiduciaries in non-litigation settings. Rebecca practiced in New York for 13 years prior to relocating to Florida in 2012. She has represented clients through every stage of litigation in New York and Florida state and federal courts and is admitted to practice before the United States Supreme Court. Rebecca was recently accepted into the Florida Fellows Institute of the American College of Trust and Estate Counsel (ACTEC) and was sworn in as president of the Collier County Women's Bar Association. Rebecca is active in a number of leadership roles in the community and was the Legal Aid Society's Attorney of the Year for 2017, was awarded the Leader in the Law Award from the Florida Association for Women Lawyers in 2016, and is a 2013 graduate of the Leadership Collier Foundation's Growing Associates in Naples (GAIN) class. Rebecca can be reached at RVaccariello@RobinsKaplan.com.

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