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LINDA SUZZANNE GRIFFIN, P.A.

LeGacy Planning... For Every Family... For Everyone

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Dear Friends of the Firm,

This is our firm's annual newsletter updating your knowledge on various legal issues. I want to thank you for your referrals and continuing business.

As always, 2019 has been a busy year as I continue to be a member of the executive council of the Florida Bar Real Property and Trust Law Section ("RPPTL") and serve as the Vice-Chair of the Budget Committee. I continue to volunteer at Clearwater Marine Aquarium ("CMA"), as a board member (secretary), dive team member, and rescue team member (10 years!)

Kit continues to be busy as she celebrates her sixth year with our firm. She is now President of the Pinellas County Estate Planning Council and Clearwater Bar Foundation. She completed the Certification of Collaborative Law, is working on her Mediator Certification and continues to serve on the Board of Directors of the Clearwater Bar Association. She is also a 2017 graduate of the Florida Fellows Institute of the American College of Trust & Estate Counsel ("ACTEC") and a member of the Florida Bar Probate Rules Committee.

Our firm's practice concentrates in the areas of estate planning, wills, revocable and irrevocable trusts, estate tax planning, charitable trusts, probate, and trust administration. Even though we do not practice in other areas of law, such as personal injury (slip/fall, nursing home negligence, wrongful death and medical malpractice), corporations, family law, bankruptcy, elder law, collections, criminal law or real estate, IF YOU NEED A REFERRAL, PLEASE CONTACT OUR FIRM.

Kim is our Florida Registered Paralegal and will be celebrating four years with us in January 2020. Kim is happily married to her high school sweetheart and they have a 11-year-old son. Her hobbies include painting, making jewelry, and relaxing at home with her family.

Our Office Manager, Heather, will be celebrating six years in April 2020. When not helping our clients in her excellent manner, Heather enjoys boating and traveling with her husband and is an avid reader.

Please welcome Kara, to Client Relations. Kara is married to her high school sweetheart and has 2 grown daughters. They have lived all over the US and are now happily settled in Pinellas County.

Teddi Bear turned six, and Paddington Bear (a/k/a Paddi), almost three, continue to greet our clients daily. For those of you who are allergic to dogs, both dogs are hypo-allergenic. Of course, if you are not fond of dogs, they will be happy to stay with our staff during your visit. Follow Teddi & Paddi on Instagram @TeddiBearLSG. Teddi is now at the Master Level in AKC Agility, has many titles and keeps her mommy in shape!

We hope you find this newsletter informative. To schedule an appointment, please contact our office. We are open Monday - Thursday 8:30am - 5:00pm and closed on Fridays. Our appointment times vary depending on the day. For your convenience our firm accepts American Express, Visa, MasterCard and Discover. You can always view our website, www.lawyergriffin.com, for current and new information, subscribe to our blog, or follow us on social media.

We hope you have a wonderful holiday season!

Sincerely,

The Intersection of 529 Plans and Trust Law... Do They Collide or Work in Tandem?

In the recent Iowa case of Alberhasky v. Alberhasky, a trustee changed the beneficiary of a 529 Plan created with trust funds. The primary issue was whether the trustee violated his fiduciary duty for changing the 529 Plan beneficiaries.

For those unfamiliar with 529 Plans, these plans are authorized under Section 529 of the Internal Revenue Code (the "Code") and are qualified tuition programs. Contributed funds can be used for educational expenses for the beneficiary. Educational expenses are broader than prepaid plans and include tuition, fees, books, supplies, and equipment needed for enrollment.

Funds contributed to a 529 Plan are treated as a present interest gift even though it may not benefit a child or grandchild until the future. Funds in the 529 Plan are not included in the donor's estate for federal estate tax purposes. Further, the donor can "front load" or make a gift in one year for 5 times the annual exclusion (currently 5 times 15,000). Income tax is not due on the increase in the value of the funds. However, if the funds are improperly withdrawn before use for qualifying educational expenses, then penalties and income taxes will apply. Many states, including Florida, have their own 529 Plans.

Against this backdrop, in Alberhasky, grandmother, Allie, created an Iowa trust for children and grandchildren (the "Trust") in 2000. Allie's son, Rod, had 2 children, Max and Grayson.

Rod and his wife divorced in 1999 prior to the date of the creation of the Trust. Apparently, as the court noted in a footnote, "Max chose to live primarily with his mother, while Grayson chose to live with Rod."

In 2010, the Trust funded a 529 Plan in Iowa with Max as the named beneficiary. The Trust also created 529 Plans for 3 other grandchildren.

Allie died in 2011 with Rod and Rod's sister, JoEllen taking over as co-trustees.

In 2012, Rod modified the 529 Plan removing Max as the beneficiary and replacing him with Rod's other son, Grayson. It is unclear from the facts whether Rod acted alone as trustee or if he and JoEllen acted as co-trustees.

Max brought a lawsuit against Rod for changing the beneficiary of the 529 Plan. Max argued that the change of beneficiary from Max to Grayson was a breach of Rod's fiduciary duty as a co-trustee. Generally, a donor of funds to a 529 Plan can change the beneficiary to another beneficiary, provided the beneficiary is a member of the family as defined in the Code. Iowa's 529 Plan permitted such a change. However, Max argued that because the 529 Plan is a trust asset, Rod is governed by fiduciary duties imposed under the Iowa trust code.

Rod moved the court to dismiss Max's action as he had no standing and the Iowa trust code had no application to these facts as this was a 529 Plan under Iowa law and the 529 Plan was not subject to the Iowa trust code.

The lower court found for Rod and Max appealed the decision to the Iowa Court of Appeals. The appellate court determined that the lower court did not properly analyze the Iowa trust code to determine its applicability to the 529 Plan created with trust assets. The court cited Susan T. Bart's ACTEC Journal article..."If a trust is the account owner, the trustee is bound by the terms of the trust and has a fiduciary duty to the trust beneficiaries." The court determined that Max's motion should not have been dismissed and remanded the case for further proceedings to apply the Iowa trust code and determine whether the fiduciary duty had been breached.

ADVICE: *This author has not seen a trustee create a 529 plan through a trust. Normally, the 529 Plan is created with funds from a parent or grandparent directly for education for their children or grandchildren. The donor takes advantage of the 5 year front loading gift tax exclusions and the estate tax exclusion. If a trustee considers creating a 529 Plan, then any change of beneficiary may be a breach of fiduciary duty by favoring one beneficiary over another. Query, if a beneficiary of a 529 plan created in a trust agrees to have another named, is that a gift from the original named beneficiary? If you do want to provide that a trustee can create a 529 plan, then put such power in the trust document.*

DING DONG.... Will the Stretch IRA Be Dead?

Many individuals own an individual retirement account ("IRA") with a named beneficiary. Under current law, if the beneficiary is a designated beneficiary, then, when the owner dies, the designated beneficiary must take at least a minimum required distribution ("MRD") in accordance with the Single Life Table. The designated beneficiary may take more distributions than the MRDs but must take at least the MRD.

In most circumstances, unless the IRA is a Roth IRA, distributions from the IRA are taxable. Spreading distributions as provided in the Single Life Table is favorable because the designated beneficiary does not have to pay income tax all in one year. They can pay the income tax as they receive the MRDs. Further, assets remaining in the IRA before distribution grow tax free until the MRDs are paid.

For example, Bill names his daughter, Julie as beneficiary of his IRA. He dies at age 80, with an IRA of $500,000 as of December 31 of the year he dies. His daughter is required to take an MRD the year after Bill's death when she is 40. Under current law, Julie would look at the Single Life Table and find her remaining life expectancy of 43.6. Julie must take $500,000 divided by 43.6 or a $11,467.89 MRD. She can take more but she must take at least the MRD. For each subsequent year, she reduces the divisor by 1 so in the second year after Bill's death, she must take the value of the IRA as of the December 31 of the prior year divided by 42.6 and so on for each year thereafter. If Julie only takes the MRD, the income tax payable is over the years she takes the distributions. This is known as the "stretch" IRA.

Many argue that the intent of the IRA stretch is to benefit the IRA owner, Bill in the example, not children and grandchildren.

Proposed legislation, "Setting Every Community Up For Retirement Enhancement Act of 2019" (the "SECURE Act" or the "Act") passed the U.S. House of Representatives with a vote of 417-3 in 2019. Currently, the Act is stalled in the Senate. As this author understands, Ted Cruz and his constituents, want 529 plans to apply to home schooling, the version of which was dropped from the Senate version of this legislation.

So why is the SECURE Act so important to you and your clients? For most individuals, the stretch for IRA distributions payable to a beneficiary will be dead because most beneficiaries will have to take their distributions from the IRA over 10 years.

The following are a few of the important provisions of the Act:

- Three tiers of IRA beneficiaries- the eligible designated beneficiary, the designated beneficiary and the beneficiary who is neither an eligible designated beneficiary or a designated beneficiary.
- The eligible designated beneficiary continues to benefit from the current stretch.
- The designated beneficiary uses a new 10-year distribution period (note that the distribution does not have to be made ratably over 10 years but the IRA has to be paid out at least by 10 years).
- Beneficiaries other than eligible designated beneficiary or a designated beneficiary apply either the 5 year rule or the "ghost" life expectancy depending on whether the owner dies before or after his or her required beginning date ("RBD"). If the owner dies after his RBD, then the owner's life expectancy (as noted in the table because obviously in "real life" there is zero life expectancy as the owner has died) can be used, hence the "ghost" life expectancy.
- Eligible designated beneficiaries are surviving spouses, disabled or chronically ill individuals, individuals who are not more than 10 years younger than the owner, minor children (OF THE OWNER OF THE PLAN) but only until they reach the age of majority.
- RBD changes from the 70 ½ age to age 72.
- No age restriction on contributions to IRAs.
- Effective date is for those dying after 12/31/2019 NOT the time the trust is created if the owner has created an accumulation trust or conduit trust to be the beneficiary of the IRA.

Assume a trust is a "see through" accumulation trust. A charity is a remainder beneficiary and the lifetime beneficiary is an adult child (under the proposed law, a designated beneficiary with a payout over 10 years). Under current law, the trust "fails" as a "see through trust" designated beneficiary because a charity is the remainder beneficiary and the payout would either be the remaining life expectancy of the owner or 5 years. If the owner dies after the owner's RBD, the remaining life expectancy of the owner may be longer than 10 years. Which rule would apply? The 10 years, or the owner's remaining life expectancy under the tables?

ADVICE: *Keep a close eye on this legislation. Currently, the Act is effective for those owners dying after 12/31/2019 NOT for trusts created before 12/31/2019. Thus, if passed this year there is a VERY small window to plan for this Act, especially if a beneficiary of an owner's IRA is a conduit or accumulation trust. Query... is this wise legislation knowing that individuals are not saving and these inherited IRAs may be necessary for the next generation's retirement?*

Child Support Claim Takes Precedence Over Interest in Special Needs Trust

In Alexander v. Harris, Harris (Father) is a sole beneficiary of a special needs trust (Trust) established when he was minor through a product liability action. According to an order for enforcement of past due child support, Father was injured in a severe car accident, burned over 80% of his body and lost limbs. His mother brought a case against Ford Motor Company and Ken Marks Ford and received a settlement on behalf of Father.

Father, when he was a minor and through his guardian, funded a life time annuity through the Trust for the sole benefit of Father. Experts for the mother (Mother) seeking child support from Father determined that the Trust is a first party trust created pursuant to federal law. Under Florida law, a first party trust, even if the trust contains a spendthrift provision, is not protected from creditors.

The lower court determined that Father has no control over the Trust, no ability to compel the trustee to disburse funds and does not personally receive benefits because distributions are made directly to 3rd parties for his benefit. The lower court dismissed the first party trust argument, relied on the spendthrift provision, and ruled for Father.

Mother appealed and argued that, even if the Trust is not a first party trust, the spendthrift provision is unenforceable against a child support claim under Florida law. The appellate court cited Bacardi v. White and Berlinger v. Casselberry in finding that a spendthrift provision is unenforceable against a beneficiary's child support claim. As Mother had exhausted all other methods to enforce a child support order, the court allowed a continuing writ of garnishment against the discretionary disbursements made by the trustee from the Trust.

Father argued that such a writ of garnishment will disqualify Father from public assistance under federal law. The court could find no legal basis for that argument and determined that Father should not be ineligible for public assistance if the assets are transferred for the benefit of Father's child. The payments from the Trust, while not paid directly to Father, are for the benefit of Father (through the child support).

The court further confirmed Berlinger v. Casselberry in finding that "Florida has a public policy favoring spendthrift provisions in trusts and protecting a beneficiary's trust income; however it gives way to Florida's strong public policy favoring enforcement of alimony and support orders."

ADVICE: *This decision is not surprising because of the precedent of the cases cited above. This case further confirms that if your client is insistent about avoiding creditors, such as child support or alimony, Florida is not the state to create such a trust. Such trusts should be created in a state with state statutes that protect trusts from a beneficiary's child support and alimony. Nevada is one of those states and a recent Nevada case confirms such result.*

Win-Win Plan For Charities and Taxpayers in 2019

In 2019, the Tax Cuts and Jobs Act provides a new standard deduction which has doubled from $12,700 for a married couple in 2017 to $24,400 in 2019. Thus, as most taxpayers will not itemize their deductions, and instead will use the standard deduction, they will lose the benefit of taking an itemized deduction for charitable gifts.

Thus, assume that Mary and Bob want to benefit her favorite charity. Normally, if Mary withdraws $15,000 from her IRA (assuming that it is not a Roth IRA), she will pay income tax (and a possible penalty if under age 59 ½) on the distribution. If she distributes the $15,000 to the charity, then she will not get the benefit of the charitable deduction because their standard deduction ($24,400) exceeds the charitable contribution of $15,000.

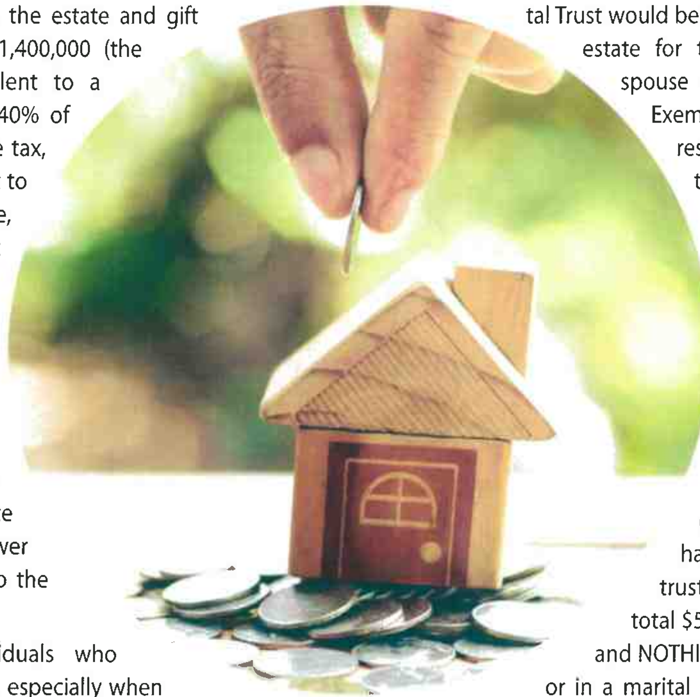
However, Mary is over 70 ½. The Code has provided for a win-win situation. Mary can make a qualified charitable distribution ("QCD") up to $100,000 from her IRA directly to her favorite charity.

Mary does not have to report the distribution as income and she still gets the benefit of her standard deduction. The net effect is that the QCD allows Mary the benefit of a charitable deduction, even though she cannot itemize her expenses.

Further, if the withdrawal is made BEFORE Mary otherwise receives her minimum required distribution ("MRD") from the custodian, this QCD can "count" towards her MRD.

ADVICE: *Consider a QCD early in the year so that the MRD is not inadvertently paid to you prior to the QCD. You can NOT receive the MRD and THEN give it to charity and qualify for the QCD. If you receive the IRA distribution and then make the payment to the charity, the income will be includable in your income and the charitable payment could only be deducted if you itemize expenses.*

Do Your Estate Planning Documents Reflect Your Desires?



With the recent increase in the estate and gift tax exemption amount to $11,400,000 (the "Exemption Amount"), equivalent to a credit amount of $4,560,000 (40% of $11,400,000) against the estate tax, VERY few estates will be subject to the federal estate tax. Of course, Congress could have a different idea and that amount could be reduced with future elections. Further the amount automatically reverts to the $5 million Exemption Amount (plus an inflation factor), equivalent to a credit amount of $2 million (40% of $5 million) against the estate tax, in 2026. Nevertheless, fewer and fewer people are subject to the federal estate tax.

Unfortunately, many individuals who used to be subject to estate tax, especially when the Exemption Amount was only $600,000 or $1 million, have not reviewed their documents in many years. Further, with the enactment of portability, these documents may be outdated and can cause headaches at the death of one spouse.

Prior to portability, practitioners generally created a trust for each spouse so that each spouse could take advantage of each of their Exemption Amounts. Usually a Family Trust (or sometimes called an A or B trust) was funded with the Exemption Amount (for example $600,000) with the spouse being a beneficiary but not having complete control (distributions based on health, education, maintenance and support in reasonable comfort) and the balance would be distributed into a marital trust or outright to or for the benefit of the surviving spouse.

In the above scenario, if a decedent's estate was valued at 1.5 million, via a formula, $600,000 (the Exemption Amount) would fund the Family Trust and $900,000 would fund the marital portion. As the marital portion was fully deductible and the exemption was fully utilized, no estate tax would be incurred at the date of the first spouse's death. Then, upon the surviving spouse's death, the Marital Trust would be included in the surviving spouse's estate for tax purposes and the surviving spouse would be able to use their own Exemption Amount. Because of the restrictions on the spouse's rights in the Family trust, the Family Trust and its appreciation would NOT be included in the surviving spouse's estate for estate tax purposes.

Against this background, as the Exemption Amount increases, the marital portion becomes smaller unless a change in drafting occurs. For example, assume in 2019 a spouse has 5 million in their trust and the trust is drafted as noted above. The total $5 million will fund the Family Trust and NOTHING will go outright to the spouse or in a marital trust. While the Family Trust can be used for the surviving spouse's benefit, the surviving spouse does not have complete control which may be something that was not anticipated at the time of the drafting.

A surviving spouse is often quite surprised that they will not receive the monies outright. What is worse is that they have to "account" to their children or stepchildren, as the trustee must comply with Florida law by notifying the qualified beneficiaries of the existence of the trust and sending a copy of the trust agreement to the beneficiaries if the beneficiaries request a copy of the trust. To make matters worse, unless waived, an annual accounting of the Family Trust must be provided to the qualified beneficiaries. While the accounting can be waived, many surviving spouse's resent having to report to their children or worse, a stepparent having to report to their stepchildren. A recipe for disaster.

With portability and the ability to use a predeceased spouse's unused Exemption Amount without the necessity of completing and funding a separate trust, all documents should be reviewed. In many cases the existing trusts may still be utilized, but, in many cases, estate planning can be simplified.

ADVICE: *Take time to review your documents and make sure you understand the general consequences of the documents. If you do not understand, then have your attorney explain the documents. Many times this author has met with clients who have documents and they are shocked and surprised as to what happens at their death. They may have changed circumstances, forgotten what they did before or just did not understand at the time of the original meeting. Many clients are intimidated by attorneys and do not ask all the questions they have.*

Is Ignorance REALLY Bliss?... Not When Signing a Will

Many individuals do not understand the importance of the procedure of signing a will and/or a trust and may get frustrated when required to go to their attorney's office to sign their documents. Many ask "why can't I just go to the bank and do this" or "I am out of town. Can't you just mail them to me and I will go to a bank here". It is extremely important the signing is done under the review of the attorney or their assistants in accordance with Florida law.

A recent case, Bitetzakis v. Bitetzakis, illustrates what happens when the signing is not done properly.

George passed away in January of 2017 and his grandson, Greg, was appointed personal representative. Greg filed the will and petitioned for the will to be admitted to probate. George's daughter Alice, responded to the petition, stating that the will had not been signed in accordance with Florida law.

At the hearing, evidence was presented regarding the actual signing. George, his wife and 2 witnesses, Tom and Santiago, gathered in George's kitchen to sign. Tom and Santiago both signed as witnesses at George's request. Interestingly, the statute does not require that the witnesses sign AFTER they see the testator sign but, of course, best practice would do so.

George then started to sign and completed his first name (normally he signed using his first and last name), but at his wife's direction, discontinued signing because his wife believed that George's signature HAD to be notarized.

The next day George went to a notary and, rather than take the will, George signed a self proving affidavit in the presence of a notary. Tom and Santiago's signatures were not on the self proving affidavit.

The lower court determined that the will was prepared in accordance with Florida law and that the "testator's intent is evident by his starting to sign and he only stopped signing his last name when his wife mistakenly told him that he needed a notary". Further "the fact that he went to a notary...shows his intent that this be his last will and testament albeit he had a notary...notarize his name on-on[sic] the wrong document."

On appeal Alice argued that the will did NOT conform to Florida law as the decedent did NOT sign at the end of the will and the later signature on the self proving affidavit was not sufficient to rectify the signature. The appellate court agreed with Alice.

The appellate court determined that the evidence did not establish that George signed his name at the end of the will as is required by Florida law. Quoting Black's Law Dictionary, a signature is "one's handwritten name as one ordinarily writes it" and the "handwriting of one's name in one's usual fashion".

While Florida law allows a person to sign by making a mark, the court determined that the signing of George's first name was not the equivalent of making a mark as there was no evidence that George intended the signing of his first name to be a mark to serve in place of his signature. Rather the decedent intentionally stopped signing.

Thus, the appellate court found for Alice and determined that the will was not properly signed. Under Florida law, if there is no valid will, then the intestate statute will apply. Apparently, as Alice brought this lawsuit, Alice will inherit more if the will is found invalid. Unfortunately, this may have been exactly what George wanted to avoid. A costly mistake for a signing error.

ADVICE: *If you supervise signing of wills, then use the same procedure each time. It is easy to forget the simple act of signing properly when discussing the documents and making sure documents are drafted properly. Also make sure that the witnesses, the testator, the testratix or the notary do NOT leave the room while signing. If you are an individual who is frustrated that you can not sign these documents yourself, then this case illustrates the importance of the procedure and ignorance of the law is not a defense. Unfortunately, if George intended to cut out or reduce Alice's share, then his intent was not accomplished. Remember also that the testamentary aspects of a revocable trust MUST be signed with the same formalities of a will. Maintain the same procedure with a trust signing as most trusts have testamentary provisions.*

Make Sure You Notice ALL Qualified Beneficiaries!

If you are a trustee or represent a trustee in a trust administration, then it is important to determine the qualified beneficiaries and the trustee's duties to qualified beneficiaries.

In Hadassah v. Melcer, Sylvia Gelt created a trust in 1989. Upon her death, the trust created a Credit Shelter Trust (the "Trust") which benefited her husband during his life and then, at his death, her 3 daughters. Sylvia died first and her husband died in 2016. The Trust provided that, upon a daughter's death, the remaining trust assets of the deceased daughter are held for the other daughters and then, upon the last daughter to die, certain charities are beneficiaries.

The trustee of the Trust wanted to resign and, in the court proceeding, gave notice to the daughters AND the charities. The daughters filed a summary judgement arguing that the charities were NOT qualified beneficiaries and thus, not required to receive notice as a qualified beneficiary under the Trust Code.

A qualified beneficiary includes a beneficiary who would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

The daughters argued that, under the terms of the Trust, at one of the daughter's deaths, the assets are distributed to the trusts for the other daughters and thus, the charities would not be entitled to distributions. The lower court agreed with the daughters.

The appellate court determined the lower court's interpretation of the statute was "contrary to the plain language of the statute" as the statute contemplates the "simultaneous termination of the interests of the distributees", not the termination of only one of the distributee's interest.

Upon the termination of the last to die of the daughters, the charities ARE beneficiaries. Under the clear reading of the statute, the charities are qualified beneficiaries because the charity WOULD be a distributee upon termination of all of the interests of the other distributees.

ADVICE: *As soon as the trustee is appointed as trustee, the trustee must determine the qualified beneficiaries so those beneficiaries are properly informed. If the trustee does not provide notice and accountings (unless waived) to the qualified beneficiaries, then an action can be brought against the trustee.*

Prenuptial Agreement Waiver of Elective Share... Effective to Waive an Elective Share Provision in a Trust Document?

Many family lawyers prepare prenuptial agreements providing that each spouse waives their elective share rights as provided under Florida Law. Generally the elective share right is 30% of the decedent's elective estate.

In Wilson v. Wilson, as Trustee of the Paul C. Wilson Living Trust, Marilyn and Paul Wilson signed a prenuptial agreement (the "Agreement") in 2011 prior to their marriage. The Agreement included provisions for both a waiver of the elective share and the ability to make a testamentary devise to the other spouse.

In 2013 and 2014, Paul signed a trust and trust amendment, respectively, with a provision that property "be set aside from the property of this trust... as is necessary to satisfy the Wife's elective share ....provided the requirements ...

are satisfied and a timely election is filed."

Not surprisingly, after Paul's death, Marilyn timely filed an elective share election and the trial court struck the election as the elective share election had been waived pursuant to the Agreement signed by Marilyn. The appellate court agreed.

The narrow issue was whether the elective share election was valid or whether the Agreement precluded such election, even though the Agreement provided that Paul could make a testamentary devise to Marilyn.

The appellate court reviewed the Agreement and determined that the Agreement only allowed a "testamentary gift by will or codicil" and determined that the Agreement "unambiguously waived the wife's elective share". The court noted that "[w]here a contract is clear and unambiguous, it must be enforced pursuant to its plain language." Further, the Agreement could be modified only by a writing signed by both parties.

The creation of the trust by Paul could not modify the Agreement as it was not signed by both parties . Further, any testamentary gifts by will or codicil would not invalidate any provisions of the Agreement.

ADVICE: *When meeting with a client, be sure that you ask about a prenuptial or post-nuptial agreement and, if the couple has such an agreement, READ IT CAREFULLY. Draft your documents to reflect the terms of such an agreement. Be aware of possible misinterpretations in your documents if the provision conflicts with the prenuptial or post-nuptial agreement. If the court finds such agreement invalid, then the surviving spouse will be able to make an elective share election. Thus, in drafting, consider drafting a provision which provides that, if the prenuptial or post-nuptial is invalid, the elective share election must be satisfied by an elective share trust instead of an outright distribution.*

FBAR Penalties...Not Even Death Is An Escape!

United States "persons" are required to file a Foreign Bank Account Report ("FBAR") indicating their financial interests in and/or signatory authority over a foreign bank account by June 30 of each calendar year if the foreign financial account is in excess of $10,000.

The civil penalty for a willful violation to file is the greater of $100,000 or 50% of the amount in the unreported account and the penalty must be assessed within 6 years of the violation. Further, the US Government must commence a civil action within 2 years of the later of the date the penalty was assessed or the date any judgment becomes final in any criminal action.

In US v. Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld, Steven established a Swiss foreign bank account in 1993. Steven never reported such account, nor the interest or dividends from such account.

On September 30, 2014 (within 6 years of 2008) the Internal Revenue Service ("IRS") assessed a civil penalty against Steven for failure to file the FBAR in 2008 in the amount of $614,300 (1/2 of the balance in the account of $1,228,600). Steven never paid the penalty.

Steven died in Florida on August 21, 2015. The IRS had no knowledge of the death. While Steven had a will, no estate was opened in the Florida probate court. On September 29, 2016, (within 2 years of the assessment), the US Government sued Steven to reduce the penalty to a judgment and sent the complaint to the last known address of Steven.

On October 27, 2016, Robert's attorney notified the IRS that Steven had died and the IRS filed an amended complaint on December 14, 2016 and included the estate and Robert as a defendant.

The Defendants moved to dismiss the complaint.

The court found that the penalty did NOT abate upon death. "[A] need to reimburse the Government for its loss through fraud and for its expenditures in discovering and uncovering fraud survives the life of the discovered defrauders." In a final parting thought the court noted that "[d]eath may be an avenue of escape from many of the woes of life, but it is no escape from taxes".

ADVICE: *This case illustrates the importance of making sure that all prior taxes have been paid and that all taxes of a decedent are paid after death. The FBAR penalties are severe and if you or your client have not reported foreign accounts, it is imperative to discuss with a knowledgeable tax attorney to not only deal with the civil penalties but to avoid criminal sanctions for purposely avoiding the payment of the penalties and filing of the reports.*

Retirement Benefits Received in a Divorce? Are They Protected From Creditors in Florida?

Under Florida law, retirement benefits, including IRAs and inherited IRAs ("Retirement Benefits") are exempt from creditors. However, what happens in a bankruptcy proceeding?

Under a recent United States Supreme Court case, Clark v. Rameker ("Clark"), IF a state uses the federal bankruptcy exemptions, inherited IRAs are NOT exempt from creditors in a federal bankruptcy proceeding.

Relying on Clark, a federal bankruptcy court in a recent Minnesota case, In Re. Lebakken v. Sieloff and Associates, P.A., determined that, because the debtor used federal bankruptcy exemptions, Retirement Benefits awarded pursuant to a divorce settlement were NOT exempt from bankruptcy creditors. The rationale is that Retirement Benefits are generally exempt for the wage earners that actually earned the retirement benefits. Retirement Benefits received because of a divorce are not "retirement funds" of the spouse that received the Retirement Benefits only because of the divorce.

As Florida uses the state bankruptcy exemptions, Clark is not controlling in a Florida bankruptcy proceeding. However, are IRAs received as part of a divorce proceeding exempt from a Florida bankruptcy proceeding?

The Florida statute currently provides that the "interest of any alternate payee under a qualified domestic relations order is exempt from all claims of any creditor". A qualified domestic relations order ("QDRO") is obtained to transfer qualified benefit plans, subject to ERISA, to a spouse in a divorce proceeding without adverse tax consequences. Thus, Retirement Benefits received pursuant to a QDRO are exempt in a Florida bankruptcy proceeding.

However, a QDRO is inapplicable to IRAs or inherited IRAs. Thus, the current statute is unclear as to whether IRA benefits received are exempt from creditors in a Florida bankruptcy proceeding.

The IRA Committee of the Real Property Probate and Trust Law ("RPPTL") Section of the Florida Bar has proposed legislation to clarify that IRAs received in a divorce are exempt from creditors in a bankruptcy proceeding.

ADVICE: *Prior to filing bankruptcy in Florida, carefully review the statute and confirm that your exemptions are valid. If the debtor has received IRA Retirement Benefits in a divorce, then discuss with the bankruptcy attorney whether the position should be made on the bankruptcy filing whether these Retirement Benefits are exempt. Keep an eye out for the new Florida legislation.*

COMMUNITY PROPERTY... Helping a Client Who Moves From a Community Property State Is Not as Easy as You Think...

Community Property is a concept which Floridians are not well acquainted. There are 9 community property states. The concept of community property is that, during a marriage, even if property is titled in an individual name, the spouse has a 50% interest to such property. Although Florida is not a community property state, a recent case sheds light on issues every planner and individual need to understand if they move to Florida from a community property state.

In the case of Johnson v. Townsend, Husband died on January 21, 2015, Wife was appointed personal representative on March 19, 2015 and Wife published the notice to creditors on March 31, 2015. Thus, the 3 month period for filing a claim was June 30, 2015. The absolute bar to filing a claim was 2 years from the date of death or January 21, 2017.

On September 6, 2017, Wife filed a "Petition to Determine and Perfect Surviving Spouse's Community Property Interest in Estate Assets" (the "Petition") to confirm her 50% community property interest in certain investment assets acquired and titled in the Husbands name while they were domiciled in Texas, a community property state. Under the Florida Uniform Disposition of Community Property Rights at Death Act (the "Florida Community Property Act"), upon the death of a married person, 50% of community property is property of the surviving spouse and such property is NOT subject to testamentary disposition by the decedent.

Husband's daughters filed an objection, arguing that the Petition was actually a claim and was not filed within the proper time period. Wife argued that her interest was not a claim as defined in the Florida Statutes and the Florida Community Property Act did not define a period of time within which to bring her action and, even if her interest was a claim, such an interest fell into the "trust exception" and "lien exception" of the probate code deadlines.

The lower court held for the daughters and the appellate court affirmed the lower court.

The appellate court determined that the community property interest was a claim, the claims period barred the claim, and that the exceptions did not apply.

The court dismissed the "trust exception" as Wife relied on a case, Quntana v. Ordono, which predates the probate code and interpreted a statute that was repealed in 1974 as part of the probate code which was enacted in 1976. A later case, Scott v. Reyes, clarified that the "trust exception" only applies when the decedent holds property on behalf of the actual owner either in an express trust or some other clearly defined means. The court held the "trust exception" did not apply to these facts.

The court also dismissed the "lien exception" as Wife showed no evidence that her interest satisfied the statute and Wife showed no authority for her argument that her interest gave rise to an equitable lien.

After ruling for the daughters, the court certified a question to the Florida Supreme Court the following question of great public importance.

"Whether a surviving spouse's vested community property rights are part of the deceased spouse's probate estate making them subject to the estate's claims procedures or are fully owned by the surviving spouse and therefore not subject to the estate's claim procedures?

ADVICE: *If you move from a community property state, then property, if any, that was purchased or otherwise obtained in that state will be subject to a spouse's community property rights under the Florida Community Property Act. Attorneys should specifically ask whether clients have lived in a community property state. If changing estate planning documents, then the Florida Community Property Act could affect such transfers. Individuals should also confirm with their community property state attorney any rights they may be giving up. For example, Bob and Joan are married and have lived in Texas for 30 years and all of their assets are community property. They then move to Florida and Bob wants to provide a percentage to his wife and a percentage to his children from a prior marriage. Bob needs to be aware of the Florida Community Property Act and that Joan actually owns 50% of that property from Texas. They need to consider how that interest works into the estate plan and whether they want the Florida Community Property Act to apply or not.*

Bits & Pieces . . .

our travels

Linda enjoyed another great live aboard dive in Cuba!

our pets

Teddi Bear & Paddington Bear – both enjoy Agility Trials (Linda enjoys them, too!)

tasty.com

recipe

3-ingredient Strawberry Icebox Cake

Ingredients for 9 servings

5 cups sweetened whipped cream
11 large rectangular graham crackers
3 cups strawberry, chopped

PREPARATION

Spread a thin layer of whipped cream in a square glass baking dish. Layer graham crackers on top, then cover with a layer of whipped cream. Sprinkle 1/3 of the strawberries on top, then layer with cream again.

Repeat steps 2 and 3 until no more ingredients remain. (The top layer should be strawberries and should not be covered with cream.)

Refrigerate for at least 3 hours.

Enjoy!

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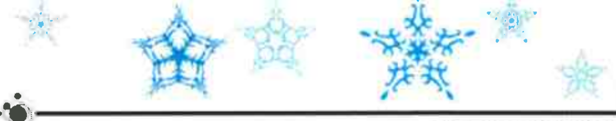

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MISSION STATEMENT

To honor God by being of maximum service to our fellow man by providing legal services with wisdom, integrity, professionalism and excellence.

Have a Blessed and Healthy Holiday Season!

HOLIDAY OFFICE SCHEDULE:

Dec. 24th at noon through Jan. 2nd: Closed for Christmas through New Year's Holiday

A Few Last Thoughts . . .

Important Projected 2020 Numbers

Annual Gift Exclusion – $15,000

Estate & Gift Tax Applicable Exclusion – $11,580,000

GSTT Applicable Exclusion – $11,580,000

You don't have to wait for our once-a-year newsletter!

Now you can get helpful information by subscribing to our blog. Go to **helpwithestateplanning.com** and sign up using your email address. Periodically our blog is updated on a wide variety of topics. You can also read our past posts on the home page.

Navigator's are available!

The Planner's Navigator & The Survivor's Navigator are both available now! Purchase in office or on Amazon.

We want to hear from you!

Do you have a suggestion for an article?
Email **heather@lawyergriffin.com** to let us know.

ADVICE: *If Linda Suzzanne Griffin, P.A. is holding your original documents in safekeeping, please be sure to keep our office updated with your current address. If you plan to permanently move out of the state of Florida, please contact our office for information on how you can take your original documents with you.*

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