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GRIFFIN & VAN PELT, P.A.

Legacy Planning...For Every Family...For Everyone

Volume 12, Issue 12

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, 2021 has been a busy year as Linda continues to be a member of the American College of Trusts and Estates Counsel ("ACTEC") the executive counsel of the Florida Bar Real Property and Trust Law Section ("RPPTL") and serves as the Vice-Chair of the Budget Committee. Linda continues to volunteer at Clearwater Marine Aquarium as a board member, Secretary, Rescue Team, and Dive Team member.

Kit continues to be busy as she celebrates her eighth year with our firm. She is now the Immediate President of the Pinellas County Estate Planning Council, a Co-Chair for the Probate Section of the Clearwater Bar, a member of the Probate Rules Committee for the Florida Bar and a member of the Executive Council for the Florida Bar RPPTL Section. She has also joined several subcommittees for RPPTL and is a Vice Chair for RPPTL's Legislative Update Committee. In September, Kit was appointed to serve upon the Sixth Judicial Circuit Grievance Committee, a committee tasked with reviewing ethical conduct of attorneys. Kit volunteers for several legal aid organizations and, in October, she was honored as a Community Law Program Pro Bono Hero.

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 with an A.A.S. in Paralegal Studies and will be celebrating six years with us in January of 2022. Kim is happily married to her high-school sweetheart. They have a son who is in middle school. Her hobbies include painting, making jewelry, and relaxing at home with her family.

Our new Certified Paralegal and Client Coordinator, Jennie, began working at the firm in August 2021. Six years ago, Jennie and her husband moved to Florida from Maine. When not helping our clients in her excellent manner, Jennie enjoys beekeeping, astrology, astronomy, and kayaking with her husband.

Teddi Bear turned eight, and Paddington (aka Paddi), who is four, continue to greet our clients. 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.

Hopefully, 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 all major credit cards. You can always view our website, www.helpwithestateplanning.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,

Kit Van Pelt

To Fund or Not to Fund .... Who Is Responsible?

In a recent case, Ellerson v. Brendon F. Moriarty and the Moriarty Law Firm, an appellate court determined that it was an error to dismiss a beneficiary's complaint against an attorney who drafted a trust amendment but did not fund the trust with an asset that would benefit the beneficiary.

Erica Ellerson's ("Ellerson") grandmother hired Brendon Moriarty ("Moriarty") as her attorney to draft an amendment to her trust. The amendment provided that a parcel of real estate in Palmetto Florida ("Real Estate") would be distributed to Ellerson upon her grandmother's death.

Ellerson's grandmother died in 2018. Unfortunately, the Real Estate was not titled in the name of her trust and thus, was not available to be transferred to Ellerson. It is unclear what happed with the pour-over will.

As can be expected, Ellerson sued Moriarty. Ellerson argued that, while Moriarty was not Ellerson's attorney, Ellerson was a third-party beneficiary. Ellerson also argued that Moriarty never transferred the Real Estate into the trust, and he never limited his duty to her grandmother to "exclude advice or services to fund the trust." Ellerson also stated that there were conversations about the funding of the trust between Moriarty and Ellerson's grandmother.

The lower court dismissed Ellerson's complaint stating that Moriarty's only obligation to Ellerson, the third-party beneficiary, was to draft a facially valid amendment, not fund the trust. Ellerson appealed.

The appellate court determined that Ellerson had standing and determined that "[i]ntended third-party beneficiaries of testamentary documents have standing to bring an action for legal malpractice 'if they are able to show "that the testator's intent as expressed in the will is frustrated by the negligence of the testator's attorney."'

Further, the appellate court determined that, while this case involved intent in a trust rather than a will, such difference did not preclude the application of the intended third-party beneficiary exception to the privity requirement.

The appellate court then discussed the extrinsic evidence (the outside discussion Ellerson's grandmother and Moriarty had on funding the trust) and determined that it was admissible. "Indeed, the use of extrinsic evidence might the be the only way to prove that an attorney specifically undertook the duty to fund a trust devise."

If the appellate court found that a third-party beneficiary could not state a cause of action where he or she relied on extrinsic evidence

to prove that the grantor's intent was frustrated due to an attorney's negligence… "we would, in effect, be granting immunity to every attorney who agrees to but fails to fund a trust and/or trust amendment which he or she drafted."

The court remanded the case and stated that there were "critical factual issues that could only be resolved upon the taking of evidence…" and such factual issues were crucial to determine Moriarty's duty to Ellerson.

Ellerson had standing to sue Moriarty and her complaint alleged sufficient ultimate facts that (1) Ellerson was a third-party beneficiary, (2) her grandmother intended for the Real Estate to pass to her, (3) Moriarty did not limit his scope of services to exclude the drafting and recording of the deed and (4) Morairty agreed in conversations that he would draft a deed to effectuate Ellerson's grandmother's intent.

ADVICE: *This case is a great reminder that the signing of the estate planning documents is only be the BEGINNING of the estate planning process. All attorneys should clearly define their scope of work and even include a checklist as to what the attorney and client agree as to whom is responsible for funding the trust. If Moriarty had a checklist that clearly indicated that grandmother was responsible for following up with the preparation of the deed, or a fee agreement that clearly limited the scope of his work, then this lawsuit may not have happened. Also, anytime a trust amendment is prepared, be sure that the related pour-over will is reviewed and if review is not possible, draft a new pour over will.*

When Does 75% Plus 25% Not Equal 100% ... When the Tax Court Rules!

In the recent case of Estate of Miriam Ward v. Commissioner, T.C. Memo. 2021-017 (Feb.18,2021), the Tax Court ruled that a charitable deduction to charities was valued at a discount even though 100% of the charitable amount was given to charities.

Thomas ("Tom") and Miriam Ward ("Miriam") created a Family Trust in the 1980s which ultimately became a holder of LLCs holding interests in real estate leases and holding companies. After Tom's death, Miriam was the trustee of the Family Trust and managing partner of the LLC. She gave some LLC interests to her children and grandchildren in 2012 but did not file gift tax returns. Miriam died in 2014.

After her death, the estate representative filed the gift tax returns and the estate tax return on which the estate took a 100% charitable deduction for assets distributed 75% to charity and 25% to a family foundation.

The Internal Revenue Service ("IRS") issued deficiency notices for the valuation of the gifts of the LLCs on the gift tax return and assessed penalties for the late gift tax returns. The IRS also decreased the charitable deduction for the gifts to charity on the estate tax return.

The Tax Court ultimately agreed with the Estate's valuation appraiser. However, even though 100% of an LLC interest was given to a charity and a family foundation, the Tax Court held the charitable deduction had to be valued with respect to what the charity and the family foundation received. Since the charity only received 75% of the LLC interest, the discount was 4% and since the family foundation only received 25% of the LLC interest, the discount was 27%. Thus, the charitable deduction was reduced.

ADVICE: *The IRS has used discounts to "whipsaw" a taxpayer before, usually with the marital deduction and taking a discount for a share of a closely held entity contributed to a marital trust (thus not allowing a full marital deduction). Consider those discounts when transferring such assets that may qualify for a deduction. Discounts can cut both ways.*

Which Controls? The Partnership Agreement or the Will?

In Finlaw v. Finlaw, the court determined that a provision for disposition of a partnership interest in a partnership agreement superceded the terms of a decedent's Last Will and Testament.

The decedent, Twila, together with her husband and the Palmers, entered into a partnership agreement (the "Agreement") for the Palmer-Finlaw Associates (the "Partnership").

The Agreement provided that "[e]ach partner, who shall ultimately become a surviving spouse…. agrees to have prepared… a last will and testament so as to vest his or her interest in this Partnership in his or her children (lineal descendants). Should any partner … fail to execute such last will and testament, so as to ultimately cause his or her partnership interest to pass to and vest in an individual, who is not a spouse or lineal descendant of these partners, then…. the Partnership shall be liquidated and dissolved…"

Twila executed her Last Will and Testament and named her grandson, Jeffrey ("Jeffrey"), as personal representative and devised all of her assets to him.

Twila's son, Roger ("Roger"), filed a claim against Twila's estate for the Partnership interest. The lower court determined that the plain language of the Agreement provided that the disposition had to be to the child, Roger, and "[t]o expand the plain language meaning of 'children' to include any other lineal descendants of the Decedent would unnecessarily expand the standard definition of 'child' or 'children' beyond its plain meaning". Thus, the court ordered Jeffrey to deliver the Partnership interest to Roger.

On appeal, Jeffrey argued that he should inherit but, even if he did not, then the Partnership should be dissolved. The appellate court determined that "[u]nder both Ohio and Florida law, where contracting parties expressly agree on the disposition of property upon death, that agreement generally controls over a testamentary disposition of the property".

Thus, under the Agreement, the Partnership would ONLY be dissolved if the interest passed to an individual who was NOT a spouse or lineal descendant. As Roger was a lineal descendant, no dissolution occurred.

ADVICE: *When planning for estate disposition be sure that you review the LLC, corporate and partnership agreements for which individuals are members, partners, or stockholders. If the agreements provide contrary to the client's intent, then it is important to revise such agreements prior to preparing the estate plan so that there is coordination between the agreements and the estate planning documents. The Real Property Probate and Trust Law Section of the Florida Bar ("RPPTL') is currently considering legislation to amend the Uniform Transfer-On-Death Security Registration Act (the "Act") to clarify the Act's application to transfers-on-death of ownership interests in LLCs, LPs, and other closely held business entities.*

BEWARE

Change Is Coming ... Beware and Plan For It!

On March 25, 2021, Senator Bernie Sanders and Whitehouse proposed a bill (the "Sanders Bill") which would drastically change the estate and gift tax. Of course, the Sanders Bill is only a proposal, but this Sanders Bill should be considered in your 2021 planning.

While not comprehensive, the highlights of the Sanders Bill are as follows:

1. Decrease of the estate tax exemption from $11.7 million to $3.5 million effective 1/1/2022.
2. Decrease of gift tax exemption from $11.7 million to $1 million, effective 1/1/2022.
3. Increase in tax rates from 40% to 45%-65% depending on the size of the estate.
4. Reducing the annual exclusion gifts from $15,000 per donee to $30,000 per DONOR for certain gifts to irrevocable trusts and certain family entities.
5. Eliminate grantor trust planning (grantor trusts would be includable in the estate of the grantor).
6. Minimum term of 10 years for GRATS.
7. Valuation discounts would be eliminated and includability in the estate would be based on the pro rata portion of assets in the entity.
8. Generation skipping transfer tax exemption or dynasty trusts would be limited to 50 years, and those trusts currently in existence would also be limited to 50 years after the passage of the Sanders Bill.

Proposals to eliminate the step-in basis of assets upon death were also proposed in another act, the STEP Act, with exceptions for small estates.

ADVICE: *While the Sanders Bill is currently not law, you can see the wind of change. While no one can predict what will actually pass, you can probably assume some change will happen in 2022. Best advice ... see your advisor sooner, rather than later.*

An Estate Tax Closing Letter? Soon It May Cost You ...

The Internal Revenue Service ("IRS") issued a Notice of Proposed Rulemaking ("Notice") which proposes a new user fee to receive IRS Letter 627 – the Estate Tax Closing Letter (the "Letter"). A Letter is necessary to not only clear title for real estate, to close a probate, to confirm no further estate taxes are owed, but also to determine proper distributions, etc.

Prior to June 2015, a Letter was routinely issued for every filed estate tax return. While not required under the Internal Revenue Code, the Notice states that "the practice is fundamentally a customer service convenience offered to authorized persons in view of the unique nature of estate tax return filings and the bearing of an estate's Federal estate tax obligations on the obligation to administer and close a probate estate…"

In 2015, filed estate tax returns increased substantially because of the requirement to file estate tax returns to elect portability. Because of the volume of estate tax return filings and additional budget and resource constraints, in June 2015, the IRS continued the practice of issuing Letters but only upon request of an authorized person.

In 2017, the IRS noted that, if an account transcript includes a code 421 on an account transcript and the explanation "[C]losed examination of tax return," then the IRS has closed its examination of the return, and this account transcript could serve as the functional equivalent of a Letter. During the COVID-19 Pandemic, the IRS is now issuing Letters to an authorized person only upon request via fax.

On September 27, 2021, the IRS issued the final regulation that effective October 28, 2021, a $67 user fee will apply to any estate requesting an estate tax closing letter. Requests must be made via pay.gov.

ADVICE: *Unfortunately, this user fee is the start of a slippery slope to higher fees in the future. As an example, the fee to request a Private Letter Ruling can cost a taxpayer as little as $275 and as much as $38,000. Such fee does not include the legal or accounting fees to prepare the request.*

Recent Nebraska State Supreme Court Case – Non-Judicial Modification Is Not a Slam Dunk ...

In a recent Nebraska Supreme Court ("Court") Case, the Court determined that a nonjudicial settlement agreement (the "Agreement") did NOT reflect the settlor's intent and voided the agreement.

In Re Trust Created By McGregor, the decedent, Clifford McGregor ("Decedent") died on October 15, 2009, survived by his spouse, Evelyn. Prior to his death, he created a revocable trust which became irrevocable at his death. Evelyn was the sole trustee. After expenses, debts and taxes were paid, the trust created a Family Trust. Evelyn received all the income from the real estate held in the Family Trust. Upon Evelyn's death, the Family Trust created trusts for their two children, Allen and Debra (the "Allen Trust" and the "Debra Trust").

The assets of the Allen Trust and the Debra Trust were held for them until their death, at which time they each had a limited power of appointment ("LPOA"). In default of the LPOA, the assets were distributed to their descendants, per stirpes. During Allen and Debra's lifetimes, they and their children were entitled to distributions for health, education, support, or maintenance.

The Family Trust stated that the assets "shall remain in trust," and that the Family Trust would be "irrevocable and not revoked or amended in whole or in part by the trustee, beneficiary or any other person." The Family Trust trust also stated that it was Decedent's intent that the Allen Trust and the Debra Trust be construed as "a non-support discretionary spendthrift trust that may not be reached by the beneficiaries[']creditors for any reason."

In May 2011, Evelyn, Allen, and Debra entered into the Agreement which provided for outright distributions of the trust assets directly to Allen and Debra free of trust. Other equalizing distributions were also provided.

On July 25, 2018, Allen filed an action seeking approval of the Agreement and an order requiring compliance with the terms of the Agreement. Evelyn (even though she had actually signed the Agreement) filed an answer requesting that the lower court find the Agreement to be ***nonbinding***. She alleged the Agreement violated a material purpose of the trust, did not include all potential beneficiaries, and lacked consideration.

The lower court found the Agreement non-binding as that certain real estate was to be transferred to Allen's Trust and equalizing distributions were to be made to Debra's trust. The equalizing distributions could not be determined until Evelyn's death because the liquidity of the Family Trust assets could not be determined until Evelyn's death.

The lower court then discussed whether interested persons received notice. Nebraska had no case law as to whom would be interested persons in a nonjudicial settlement agreement. Because the possible takers under the LPOA and the default beneficiaries had not consented, the lower court as determined that Allen had not established an enforceable Agreement.

The lower court also found that the Agreement violated a material purpose of the Family Trust because the Agreement sought to change specific terms of the Family Trust. First, Allen would receive an additional tract of land which he would not have otherwise received under the Family Trust. Second, Allen and Debra would receive the assets outright instead of in trust. Finally, Debra and Allen would be required to equalize their distributions, either through an allocation of debt or cash. The court determined that none of these issues could be resolved through the Agreement. The lower court found the changes were substantial and constituted a violation of a material purpose of the Family Trust. Allen filed an appeal to the Court and the Court affirmed.

Allen pointed out that in the Agreement, Evelyn stated that "[E]velyn asserts the provision for distribution of the trust estate in the Trust does not represent the intentions of Clifford". Allen argued that modifying the terms to require equalization of the distributions to the Allen and Debra Trust, rather than making the equalization dependent on the availability of liquid assets, better served Clifford's intent to treat his children equally.

The Court affirmed the lower court finding that a spendthrift provision in the trust terms is presumed to constitute a material purpose of the trust. Because the Court determined that the Agreement violated a material purpose of the Decedent's intent, the Court did not consider the issues of interested persons or consideration.

ADVICE: *This case illustrates that non-judicial settlement agreements are not always a "slam dunk". Carefully review the Florida statute which specifically states that the modification of a trust is NOT prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust. However, the statute requires unanimous agreement of the trustee and all qualified beneficiaries. Thus, while the Florida court could have approved the Agreement in spite of the spendthrift clause (assuming the statute was applicable to this particular trust), all qualified beneficiaries did not consent to the Agreement. This case reminds us to consider various factors in a non-judicial settlement agreement— material purpose, consent by qualified beneficiaries, applicability of the Florida statute, and the settlor's intent.*

Marital Settlement Agreement – Who Receives The Proceeds of the 401(k)?

In Lynn Martinez-Olson v Estate of Dan Olson, Lynn Martinez-Olson ("Lynn") divorced Dan ("Decedent") in 2017. As part of the marital settlement agreement (the "Agreement"), each party agreed that they would receive all benefits existing by reason of their employment included but not limited to "profit-sharing plan, retirement plan, Keogh plan,… 401 (k) plan, employee savings plan,… together with all increases thereof, the PROCEEDS therefrom and any other rights related thereto. The other party hereby waives and releases any and all claims of interest therein. (emphasis added)."

Decedent did not change his 401(k)beneficiary after the dissolution of marriage. Thus, at his death, Lynn remained the beneficiary. Lynn and Decedent's daughter, Chelsea, made competing claims to the 401(k) and the company ultimately distributed the 401(k) monies to Lynn in accordance with the beneficiary designation and in accordance with federal law.

While federal law compelled the distribution to Lynn, Chelsea argued that such distribution did not prevent Chelsea from bring a post-distribution action to enforce the contractual waiver in the Agreement and to recover the plan proceeds. Chelsea then brought an action to require Lynn to turn over the proceeds to Decedent's estate or to his four living adult children.

Lynn argued that, because the Agreement did not specifically refer to the "death benefits", she did not waive such interest in the death benefits. The general magistrate agreed with Lynn.

Chelsea, as personal representative of the Estate, disagreed and argued that Florida's revocation on divorce statute would provide the legal mechanism to automatically revoke Lynn's beneficiary designation.

The trial court determined that the language in the Agreement was clear in that Lynn was not entitled to the PROCEEDS therefrom and ordered Lynn to turn over all proceeds to the Estate. Lynn appealed.

The appellate court looked at the plain language of the Agreement, agreed with the trial court, and determined that the question is "whether the language in the settlement agreement is specific enough to override the predissolution beneficiary". "[T]he plain language of paragraph 9.1 under the Agreement is specific enough to override the beneficiary designation form." Although the Agreement did not use the term "death benefits," such omission did not mean the language in the Agreement was not specific. "'[M]agic words are not required' in a marital settlement agreement in order to specify who is to receive the proceeds or benefits of a policy, plan or account."

Because the language in the Agreement was specific, the court did not have to "delve into statutory interpretation or venture into the thicket of ERISA preemption" and did not express any view as to the validity of the application of the revocation-on-divorce Florida Statute.

The court also cited an Eleventh Circuit decision in finding that, while "a party who is not a named beneficiary of an ERISA plan may not sue the plan for any plan benefits," … that party may sue the plan beneficiary to recover those benefits "but only after the plan beneficiary has received the benefits." Thus, the estate could sue to recover the proceeds from Lynn after the proceeds were distributed to her by the ERISA plan administrator.

ADVICE: *Yet another reminder to those lawyers who draft prenuptial or postnuptial agreements. Be very specific as to the parties' decisions on retirement proceeds. Also, if you represent the parties after divorce, then remind them to change their beneficiary designations to reflect to whom they want the proceeds to be distributed.*

ALERT....New Legislation Proposed By House Ways and Means (9/13/21)

The House Ways and Means Committee released 881 pages of **proposed** legislation on September 13.
Key Items:

1. Reduction in estate tax exemption from 11.7 million to 6.030 million.
2. Disallow grantor trust treatment for trusts created on or after date of enactment.
3. Valuation discounts on non-business assets disallowed.
4. Significant tax increases for IRAs in excess of 10 million.

Settling a Probate Claim? Read the Documents Supporting the Claim!

The recent case of Millini v. Paulucci reminds us that simple mathematical calculations may not be correct if you do not read the document on which you are basing the calculations. Incorrect calculations can lead to the dreaded word for any attorney… malpractice.

Unfortunately, but not uncommon, Jeno ("Father") and his daughter, Gina ("Daughter"), were involved in many lawsuits against each other. They came to a mediated settlement in which Daughter agreed to sell her interest in Apopka, Florida real estate to Father for $12 million, 2 million due at closing and 10 million reflected in a promissory note at 6 percent interest, to be repaid in 3 annual payments of 1 million each, with a balloon payment due on Sept. 9, 2011.

As part of the settlement agreement, Daughter, in turn, agreed to pay Father 2.9 million for which a note was signed. Father had a right to offset this note against the amount he owed Daughter.

Thus, at the end of day, Father owed Daughter 10 million (after the 2 million paid at settlement) at an interest rate of 6 percent and Daughter owed Father 2.9 million (the annual interest rate was not stated in the case).

Daughter received the three 1-million-dollar payments, but Father could not come up with the funds for the balloon payment due to Daughter on Sept. 9, 2011. Daughter agreed to a 60-day moratorium on collection efforts.

On Nov. 24, 2011 Father passed away. Daughter filed a statement of claim against Father's estate for 7 million, plus interest, for the note due her.

On January 15, 2013, attorney for the personal representative of Father's estate sent a check to Daughter's counsel for $4,677,594.52 to fully satisfy the claim against the estate. Attorney calculated 7 million, plus interest, less the 2.9 million, owed by Daughter to Father (Daughter had only paid interest on this note to Father before he died).

Daughter, upon advice of her attorney, signed a satisfaction of claim and both notes were marked paid in full.

Later, when Daughter's CPA was preparing Daughter's income tax return, the CPA determined that the 1-million-dollar payments paid by Father to Daughter should have satisfied the ***interest*** on the 10-million-dollar note first and THEN the principal. If interest had been satisfied first, then the balance due on the note from Father to Daughter would have been $8,726,560 NOT $7.0 million, a difference of $1,726,560. What attorney wants to get that phone call?

Daughter's counsel filed a petition in the probate court to amend her claim. The lower court determined that Daughter's filing of an amended claim was permissible under Florida law, and the "unilateral mistake committed by Gina's attorneys in preparing the statement of claim 'was not the result of [an] inexcusable lack of due care.'" At this point, you can hear Daughter's attorneys' sighs of relief. But… not so fast.

On appeal, the court determined that Daughter's attorneys "admittedly did not review the terms of the mediated settlement agreement and the promissory notes executed by Jeno prior to preparing the statement of claim. Had they done so, it would have been readily apparent that each $1,000,000 annual payment received by Gina was applied first toward the accrued interest and then to reducing the principal balance."

The appellate court "respectfully" disagreed with the lower court in the finding that the action of Daughter's attorneys was not an inexcusable lack of due care. The court noted the terms of the note were not complicated. The court stated… "[T]here was no excuse for the attorneys not to review the terms of the documents before preparing the statement of claim for Gina's execution". As Daughter did not establish a legitimate basis to set aside the satisfaction and release of claim, the lower court's order was reversed.

ADVICE: *This case illustrates the importance, when monies are in dispute, of hiring a specialist that understands the calculations. Generally, attorneys are not experts in calculations, and this is the time to hire a CPA to confirm the calculations. Further, as this author's mentors always advised, READ the documents!*

Prenuptial Agreement Means What It States ....

In Baldwin v. Harris, a surviving spouse, was successful in the interpretation of language in a prenuptial agreement.

Prior to Letetia ("Wife") marrying Henry ("Husband"), they entered into a prenuptial agreement, which contained a provision stating that, if wife survived husband and was not married to Husband, then Husband would include a provision in his estate planning documents stating that she would receive a monthly payment equal to the monthly payment she was receiving as of Husband's death.

Husband died. They were not married. Husband provided in his trust that the trustee was to give Wife a monthly payment as provided in the prenuptial agreement. Unfortunately for Wife, Husband did not fund the trust with any assets.

Husband's personal representative and trustee ("PR") argued that the Husband complied with the plain language in the prenuptial agreement, and it did not matter that the trust was not funded. The lower court entered a summary judgement in favor of the PR.

On appeal, Wife argued that the plain language of the prenuptial agreement did not permit Husband to simply include empty words in his estate planning documents, but rather required that he provide for Wife "to actually receive a monthly payment, either via his estate planning documents or otherwise."

The PR argued the Husband complied in the "technical sense" as he did "provide for" the monthly payment in the document but he did not actually have an obligation to ensure that Wife received such amount.

The appellate court easily dismissed that argument in finding that "such an interpretation strains the contractual language well beyond the bounds of common understanding." The court noted that the payment

to Wife was not conditioned on the trust having monies.

The PR also argued that the prenuptial agreement also stated that Husband could retain independent control and management of his own assets. Thus, Husband could choose to not fund the trust.

The appellate court determined that Husband did have the right to manage and control his own assets, but that did not negate his obligation to provide for Wife. He was not at liberty to avoid that payment altogether.

ADVICE: *In this author's humble opinion, this was a very weak argument and maybe a "Hail Mary" to avoid the payment, although the argument did win at the lower court. Carefully review the prenuptial agreement BEFORE you sign the agreement to be sure that it provides what you want. ALWAYS consult with legal counsel on the drafting of such agreements.*

Last Minute Prenuptial ... Time Enough to Waive Spousal Rights?

In Williams-Paris v. April Nell Joseph, Arlene ("Wife") appealed several probate orders that she waived rights to her husband's ("Decedent") estate. A year before their marriage, Decedent and Wife discussed a prenuptial agreement but did nothing. On their wedding day at 7:00 am Decedent demanded wife to find a prenuptial agreement online and sign it.

The wedding was taking place in Martha's Vineyard, all the guests were there and "feeling pressured by the significant embarrassment of canceling the wedding, "Wife found a form. Decedent drove Wife to a notary, signed the prenuptial agreement (the "Agreement") and were married at 4:00 pm. No disclosure of assets was made.

Four years later Decedent died intestate. Wife filed an action to void the Agreement, made an elective share election and petitioned for her intestate share.

The children argued that Wife was not coerced into signing "as verified by the notary's affidavit." Startingly, the lower court granted summary judgement on the issues of duress and coercion. Wife appealed and the appellate court agreed with the lower court but remanded the case to determine Wife's interest in the homestead.

ADVICE: *Avoid online parties agreements. Give plenty of time to review the prenuptial.*

Recent Case Clarifies No TBE Protection For TBE Asset Transferred to a Joint Trust

In the recent bankruptcy case, In Re Gregory Todd Givans, the bankruptcy court confirmed that real estate held by a married couple as Tenants by the Entireties ("TBE") loses such protection as TBE when such real estate is transferred to a joint trust.

Generally, under Florida law an asset held as TBE is protected from a creditor of one spouse. To create TBE there are 6 requirements: (1) unity of possession (joint ownership and control) (2) unity of interest (each interest is identical), (3) unity of title (the interest must be created in the same instrument (4) unity of time (interest commenced simultaneously) (5) survivorship and (6) unity of marriage.

In Givans, Gregg (the debtor who owed money) and his wife, Marna, owned a piece of residential real estate (not homestead) ("Property"). The Property was originally transferred from Marna and her mother to Gregg and Marna as TBE and then by Gregg and Marna to Gregg and Marna, as Trustees of the Gregory T. Givans and Marna A. Givans Inter Vivos Revocable Trust. (the "Trust") . The actual deed into the Trust was not recorded.

Under the Trust terms, upon the death of either Gregg or Marna, the assets were held for the survivor as an income beneficiary, and, at both deaths, the assets were distributed to their 2 children.

Gregg filed a bankruptcy petition and claimed the Property as exempt from bankruptcy because it was owned as TBE. Further they argued that they did not "deliver" the deed to themselves as trustees because it was not recorded. Thus, they argued that, because the deed was not delivered to the trustees, the Property was still held as TBE.

The court found that, under Florida law, "the delivery of a deed by the grantor and its acceptance by the grantee consummates the deed and it is effective and operative from that date on". The recording of the deed is "not essential to its validity as between the parties…". The court looked at the plain language of the deed which states that the settlor (Gregg and Marna) "transfers and delivers to the Trustee the property…the receipt of which is hereby acknowledged by the Trustee". The Trust language refers to the Property attached as an exhibit to the Trust.

The court then determined that the Trust could not own Property as TBE.

ADVICE: *Be very careful if you are advised to move everything to a trust to "avoid probate". Such a transfer is NOT always the best solution. The term, "probate", has become a four-letter word for some individuals. Many do not realize the cost of administering a trust, the lack of oversight by a court and many times a trust may not accomplish the purpose you want. Consult with an attorney to determine whether such transfers are best for your situation.*

Arbitration .... Is Prohibitive Expense a Defense?

Often, an individual entering a nursing home signs a contract which compels arbitration in case of disputes. In Darcell Wick v. Orange Park Mgt, LLC, the court answered the question of whether the child of the nursing home resident was bound by such a clause.

Darcell Wick ("Darcell"), as personal representative of his mother's estate, sued a nursing home after his mother's death for negligence, wrongful death, and a violation of the nursing home's residents' bill of rights. Darcell's mother had signed a contract, which compelled arbitration. Darcell argued the arbitration clause did not apply because the cost of arbitration was so expensive that it rendered the arbitration clause invalid (the Prohibitive Expense Defense) and the clause was void as a matter of public policy. The nursing home argued that the Prohibitive Expense Defense was not a stand-alone defense to arbitration but had to be combined with the defense of unconscionability.

The lower court agreed with the nursing home and granted a motion to compel arbitration and the appellate court affirmed the lower court.

The appellate court determined that arbitration agreements are favored in Florida and the only way such a clause would not be enforceable is if there was fraud, duress, or unconscionability. As Darcell did not raise the issues of fraud and duress, the appellate court addressed Darcell's argument of unconscionability.

The appellate court agreed with the lower court that the Prohibitive Expense Defense was NOT a stand-alone defense but must be combined with procedural and substantial unconscionability.

Darcell argued that the Federal Arbitration Act ("FAA") established the Prohibitive Expense Defense as a stand-alone defense and thus, equally applied to an arbitration clause under Florida law. Darcell also argued that the arbitration clause was void as a matter of public policy.

The appellate court found that, after review of conflicting district court decisions, there was "no persuasive authority for extending the judicially crafted … prohibitive-cost defense to an agreement governed by FAC and presenting a claim arising under state law." The appellate court also determined that the arbitration agreement was not void as a matter of public policy.

ADVICE: *Be sure and read the contract before the admission to the facility. It is hard to negotiate that provision out of the contract if admission is necessary. While there are defenses to avoid arbitration, it appears to be an uphill battle in the Third District. As conflict exists between the District Courts, perhaps the Florida Supreme Court will ultimately resolve the issue.*

our travels

Linda's recent dive in Roatan, Honduras.

recipe

Coconut Macaroons

Yield: 20 to 22 cookies

INGREDIENTS:

14 ounces sweetened shredded coconut
14 ounces sweetened condensed milk
1 teaspoon pure vanilla extract
2 extra-large egg whites, at room temperature
1/4 teaspoon kosher salt

DIRECTIONS:

Preheat the oven to 325 degrees F. Combine the coconut, condensed milk, and vanilla in a large bowl. Whip the egg whites and salt on high speed in the bowl of an electric mixer fitted with the whisk attachment until they make medium-firm peaks. Carefully fold the egg whites into the coconut mixture. Drop the batter onto sheet pans lined with parchment paper using either a 1 3/4-inch diameter ice cream scoop, or 2 teaspoons. Bake for 25 to 30 minutes, until golden brown. Cool and serve.

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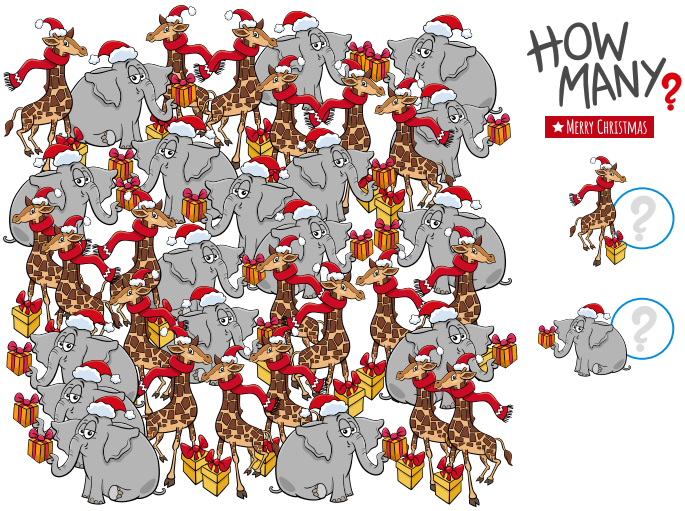
kid's corner



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Teddi & Paddi are ready for the day!

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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:
Closed from noon on Christmas Eve through January 2, 2022.

A Few Last Thoughts . . .

Assuming No New Legislation

Important Projected 2022 Numbers

Annual Gift Exclusion – $16,000

Estate & Gift Tax Applicable Exclusion – $12.060 million

GSTT Applicable Exclusion – $12.060 million

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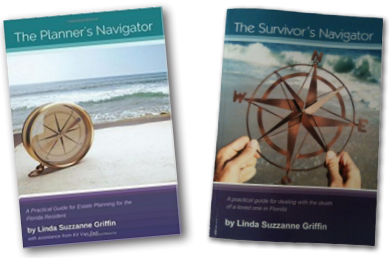

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