EMERGING ISSUES IN ESTATE PLANNING

The days of standard estate planning are long past. Preparing an estate plan in the 21st century involves working with clients to address myriad issues that were only part of science fiction 50 years ago. And, with the development of new types of assets comes confusion and insecurity in how best to deal with them.

Most clients continue to want to "avoid probate." Most lawyers continue to approach estate planning from a will/trust/advance directive/POA perspective. But, what do we do with assets that are legal in a state but illegal under federal law? What about assets that have no physical properties? And, then there are assets that exist in a physical sense but are invisible to the naked eye.

A. DIGITAL ASSETS

It is only in recent years that issues involving digital assets have begun to surface and be addressed. Most people, when considering their digital assets, think of Facebook, Twitter, other forms of social media, documents stored in the cloud and similar things.

Expanding the scope of what constitutes a "digital asset" is required. These assets range from those listed to online contact lists, stored emails/text messages and crypto. People have crypto based financial accounts.

Knowledge of and accessing those accounts and digital assets remains a challenge for estate executors. The access issue is a concern when clients consider which heirs will receive those assets.

Clients need to provide:

- What kind of assets
- Key locations
- Access controls in place for security (e.g. PINs, passphrases, multisignature/timelock requirements

Pam Morgan, author of *Cryptoasset Inheritance Planning*, has a form clients can use, Template Letter for Crypto Estate Planning

Technical and legal planning is necessary to ensure proper transfer of these assets. A court order alone, without the key, cannot be implemented.

Owners of cryptocurrencies may use many different digital wallets for each different currency. As with anything involving technology--backing up the data on a regular basis is necessary.

Forty-two states have laws addressing digital assets and executor access. The exceptions are: Rhode Island, Louisiana, Maine, Kentucky, Oklahoma, Pennsylvania, New Hampshire, and Massachusetts. Delaware's digital asset law proceeds from a different framework. Most states use the uniform law drafted by the Uniform Law Commission.

From an executor's point of view, cryptocurrencies are very volatile and the value can change quickly. Selling those assets quickly is advisable. This may mean naming an executor solely responsible for the testator's digital assets. The one-size-fits-all executor may have become an anachronism.

1. Considerations for tracking/recording cryptocurrency:

- Access to digital assets requires private information. Without it, the assets are not accessible and can be lost forever. Maintaining a physical record for the private access information is essential. It can be shared with the executor or another trusted third party.

    1. **Private Key**: the investor alone knows this key; verifies ownership, allows access, should be recorded; create a physical copy & secure it in a bank safe deposit box can be safest way to protect it.
    2. **Passwords**: username, password, and security question information for the exchanges must be recorded to retrieve the assets from the exchange wallets.
    3. **Two-Factor Authentication (TFA)**: exchanges usually require TFA so investors can prove their identity; accomplished using a mobile application.

- Hardware Wallets: the exchange default digital wallet is susceptible to hacking so investors are advised to use a "hardware wallet." These are purchased online and usually are encrypted flash drives requiring a password and PIN code. Digital assets can be lost if the wallet is lost or damaged. Investors can purchase secondary wallets and make them exact replicas of the primary wallet; this provides a level of redundancy. Investors should record the 24-word recovery phrase, PIN code, password & other access information for the wallets plus provide for custody of the information and any wallets in their will.

- The Uniform Fiduciary Access to Digital Assets Act (UFADAA) has been enacted in 24 states. Fiduciaries are empowered to manage digital assets but it does not mean they have the key powers re the cryptocurrencies. Without the private key and other essential formation, the executor will not be able to access or manage the assets.

- Determine Tax Basis: digital assets are treated as property by the IRS for tax purposes. Capital gains and losses must be reported on digital asset transactions. Some exchanges provide Excel worksheets showing the investor's sales/purchases; investors need to track their own history for exchanges that do not provide this information.

Failure to plan ahead may result in these digital assets being lost. Gerald Cotton founded QuadrigaCX, Canada's largest cryptocurrency exchange. When he died in December 2018, in India, he took with him all the keys, passwords, PIN codes and access information. There is approximately $190 million dollars held by the exchange in cash and cryptocurrency. No one is able to access the accounts. $28 CDN million in assets has been frozen because the real identity of the owners cannot be ascertained. Cotton's widow has had experts trying to hack his laptop--without success. It is possible the funds are lost forever. The salt in the wound: the fund continued to accept funds after his death because no one wanted to let people know he died.

a. CRYPTOCURRENCY is a term describing digital currencies. They use cryptography to secure payment networks and transactions. Cryptography is not a new phenomenon - spies have used it for eons. Today, however, dissolving paper and invisible ink has been replaced with a digital process. Bitcoin, Ethereum, Litecoin, Dash, and Ripple are examples of cryptocurrencies. All cryptocurrencies are digital currency. PayPal and loyalty points on a particular platform are considered digital currency.

Cryptocurrencies are traded on online platforms known as "exchanges." If an investor does secure their assets in a "hardware wallet" have those assets stored in the exchange's default digital wallets.

b. Digital Currency is the umbrella term and cryptocurrency is a subcategory. The **Coin Market Cap** lists the different types of cryptocurrencies available on the market. Bitcoin is the most popular and the most well-known primarily because it was the pioneer.

c. BLOCKCHAIN is a network of computers working together to record, verify, and confirm transactions. It is a public ledger recording those encrypted transactions. Transactions form the block and each block is a segment of the chain. The process is designed to be private and secure.

B. MARIJUANA[1]

Marijuana remains a Schedule 1 drug at the federal level. There is no indication the federal government intends to change the status quo even as more states pass laws legalizing the use of marijuana.

There are several issues involving marijuana that attorneys need to consider from an estate planning perspective.

- Capacity
- Will and trust clauses that restrict inheritance or benefits in relation to the use or non-use of illegal drugs

[1] *Estate Planning for Mary Jane and Other Marijuana Users*, Gerry W. Beyer and Brooke Dacus, Probate & Property, March/April 2019, Vol. 33, No. 2, ABA Real Property, Trust and Estate Law Section

- Life insurance policies
- How to provide for passing along marijuana-based assets in a will or trust
- Limits on what lawyers can advise their clients with marijuana-based business interests

1. CAPACITY

Capacity issues may arise if the testator/settlor used marijuana (or other controlled substances) on a regular basis. There is no definitive research concerning the impact of regular marijuana use on a person's cognitive abilities. Recent research indicates that those who start using marijuana at an early age may experience problems with cognitive functions and the decline may accelerate with age.

The courts have not yet weighed in on the issue but there are cases involving a testator's competency where intoxicants or other mind-altering drugs were a factor. This would include pain medication given to people under palliative or hospice care protocols.

In re Estate of Byrd, 749 So.2d 1214 (Miss. Ct. App. 1999); *In re Estate of Coles*, 205 So.2d 554 (Fla. Dist. Ct. App. 1968); *McGrail v. Schmitt*, 357 S.W.2d 111 (Mo. 1962); *Naylor v. McRuer*, 154 S.W. 772 (1913)

Attorneys may want to ask clients about marijuana use and document the file reflecting the client's answers. Asking whether a client has consumed any type of drug in recent days/weeks/months before executing legal documents may also need to become a regular part of the practice. Clients need to understand their capacity may be challenged if a dissatisfied heir (or someone who thinks they should have been an heir) decides to raise the issue and challenge the underlying legal document.

A person's testamentary capacity is usually determined at the time of signing. However, for clients with a long-time practice of using marijuana or similar drugs, the impact on capacity may be significant. Recent use (24-48 hours before signing) of any intoxicant or mind-altering drug should preclude the client from signing any legal document. Scheduling the signing until a reasonable time has passed without any use (24-48 hours) may be advisable.

2. RESTRICTIONS ON INHERITANCE BASED ON DRUG USE

Clients may want to restrict inheritance to heirs who do not use illegal drugs. The conundrum facing lawyers is deciding:

1. what is an "illegal" drug.
2. What law controls? State or federal law?
3. Is it the law in effect when the will/trust is signed; when testator/settlor dies; when beneficiary first becomes entitled to a distribution of trust assets or current law.
4. Is there a difference between use for medicinal or recreational purposes?

5. Which law applies? Where the testator died? Where she lived when she signed the will/trust? Where the beneficiary/heir lives at testator's death? Where beneficiary/heir lived when the will/trust was signed?
6. How often did the heir/beneficiary use the drugs? Once at 19 or daily?
7. When did the heir/beneficiary last use? Does it matter?
8. Who is to decide?
9. Is it an ongoing prohibition? Can trust beneficiaries be subjected to regular drug testing? Who pays for it? Who monitors it?

Clients must address each issue and the language in the will/trust needs to be as specific as possible.

Need to consider whether a marijuana-based business can be sold by a fiduciary after the owner dies. Is it a cash-based business without bank accounts? To whom can it be sold? What if owner's heirs are minors? Or, can there be a business succession plan for these businesses?

3. LIFE INSURANCE: This is more difficult and revolves around how people answer the questions when applying for insurance. Lying on an application may render the policy invalid. Questions involving the use of "illegal drugs" may have been universal but state laws are changing. Whether the insurance company relies solely on federal definitions needs to be determined.

Determine if the insurance company will issue a policy.

4. MARIJUANA-BASED ASSETS

Under federal law, the cultivation, distribution or possession of marijuana is a criminal offense (21 U.S.C.A. 841(a), 844(a) (2010)). Does federal law preempt state laws that decriminalized marijuana?

Clients and their heirs/beneficiaries are likely to be affected by the competing interests and laws.

There are ethical questions that need to be considered. Specifically, can a lawyer assist a client in drafting a will or trust that includes illegal assets? None of the states have yet addressed this issue.

But, even if the states resolve the dilemma, could a lawyer be subject to federal prosecution for assisting a client?

Are lawyers limited to advising clients of the potential legal ramifications of their business or retention of marijuana based assets?

Clients also need to consider the potential criminal liability of their executors/trustees who have a fiduciary duty to manage the estate/trust assets. Executors/trustees may find themselves unable to manage assets because they do not qualify under the law to operate a marijuana-based business.

How does the Uniform Prudent Investor Act apply to the executor/trustee's fiduciary duties? There are also tax issues to consider. Specifically, the IRS will try to establish who owns the assets and their value for tax valuation. This issue arises from an estate, inheritance and income tax perspective--federal and state. Is it the "wholesale" or "street" value?

Would these assets be subject to attachment by creditors? Could a court order an executor to sell the asset to satisfy creditor claims?

The issues raised are not being fully addressed by the bar, the judiciary or the legislatures. Until the federal government resolves the Schedule 1 issue relating to marijuana's inclusion, these issues will continue to ruin everyone's buzz.

C. RESTRICTIVE CLAUSES IN ESTATE PLANNING DOCUMENTS

The restrictive clauses people want inserted in wills and trusts generally affect who will inherit or benefit from their assets.

How do lawyers work with clients whose values concerning family, gender identity, sexual orientation, marriage, race, religion, etc. are different from other family members?

Redefining the definitions included in wills and trusts continues to be a concern. What is the best way to define "children," "partners," "family."

Does an heir who transitions after a will/trust is drafted still qualify as an heir/beneficiary? Name and gender is different. Does it matter if the testator/settlor knew about the heir's transgender status? Do other heirs/beneficiaries have a cause of action to challenge the transgender person's inheritance/benefits? Can they argue "Jennifer no longer exists" because of the person's transition?

Religion

- *In re Feinberg*, 919 NE 2d 888 (2009), the Illinois Supreme Court upheld a will provision requiring the beneficiaries to be married to a person of the Jewish faith in order to be eligible to receive the designated bequest. Came to be known for the "Jewish clause."

- How to incorporate provisions in estate planning documents that conform to faith requirements. Often arises with observant Jews and Muslims. New book, *Estate Planning for Muslim Clients*, (ABA 2019).

- Are clauses that restrain marriage options for heirs/beneficiaries enforceable? Only if based on religious beliefs? Testator believes same-sex marriages are invalid and preclude an inheritance? Public policy issues? Restraint on marriage?

- Addressing issues when testator/settlor cites "strongly held religious/moral beliefs" to restrict inheritances; public policy considerations; who determines who is excluded? How is exclusion determined? Challenges? Fiduciary duty?

D. CONSIDERATIONS

1. Definitions

- Include a clause regarding **gender-neutral v. gender-specific terms**. Specifically defining gender terms: "wife" only refers to females; "husband" only refers to males; "spouse" refers to anyone to whom the beneficiary is legally married.

- Specify that a beneficiary occupies the relationship appropriate to his/her gender identity at birth. Public policy issues override testator's expressed intent?

- Changes in the meaning of "child," "issue," "descendant," and similar terms referencing the parent-child relationship

- Issues posed by increase in gender transition; impact on estate planning when transition occurs after the will/trust is signed

- Legal relationships of children born before and during a marriage; marital presumption

- Clarifying "genetic descendants" or "descendants by blood" in estate documents going forward; impact on children born via ART without genetic or biological connection to testator/settlor or the intended parents

- How to interpret for documents already in place? DNA testing required? What are executor's obligations if an heir/beneficiary rights are challenged?

- Trust agreement/will doesn't recognize adoption in determining descendants; can trustee/executor ignore the ban if it frustrates the testator/settlor intent?

- Defining and designating heirs/beneficiaries to include various family iterations

- Specifically addressing transgender family members (known/unknown)

2. Posthumously Conceived Children

- Specific written consent to become a parent after death; provide clear/convincing evidence of intent to be a parent post-mortem (UPC § 708)

- Recognition of posthumously born children as heirs (*Astrue v Caputo*, 566 U.S. 541 (2012)), or trust beneficiaries

- Differentiating between child conceived before and after the parent's death (application of Uniform Parentage Act, 2002, § 707

3. Multiple Parents/Unmarried Parents

- Addressing poly families and the children involved

- Parental rights

- Posthumous conception

- Provisions for guardianships/custody/visitation/support arrangements

- Defining relationships in relation to determination of a testator's "descendants"
- Provide for "equitable parentage" recognition in will/trust

- Need for formal shared custody agreements, adopted by a court or court sanctioned parentage actions to clearly establish parental rights of non-bio/genetic parent

- See *C.G. v. J.H.*, 193 A.3d 891 (Pa.2018), PA Supreme Court refused to consider possibility of "parentage by intent" where there is no formal contract in case of unmarried lesbian couple; one partner conceived & gave birth through ART; other partner did not participate in decision to bear a child and didn't consider child to be hers.

4. Gender Transition

- Does it matter if the settlor/testator knows about an heir/beneficiary being transgender?
- Issues presented if other heirs have strong objections to transgender family members and threaten legal actions; how to deal with/address such prospective threats

- What type of action/clauses can be used to prevent an heir/beneficiary who transitioned/is transitioning when testator/settlor dies from receiving an inheritance/benefit

5. Stored Genetic Materials

- Who owns these materials; included in decedent's estate as personal property

- Alabama state constitution recognizes legal rights of personhood to embryos; are embryos heirs/beneficiaries? Intestate rights? Requirement to include a disinheritance provision in the will/trust?

- Inheritance rights of embryos given/donated to others; need those embryos be explicitly disinherited or mentioned to prevent any future legal challenges?
- Recent development of extraction of genetic materials from minor children who are undergoing radiation/chemotherapy to preserve ability to have children in the future; can minors own their genetic material? Are the stored genetic materials the property of the minor's parents & included in the parent's estate? Which parent?

6. Firearms

- Need to understand federal and state law & regulations governing ownership and transfers of firearms

- What are administrator's duties regarding disposing of firearms that are not properly titled in decedent? Type of firearm/accessory (bump stock) that is illegal to be owned at time of death? Fiduciary duty to include value of those items in the estate/trust?

7. Assets on Ice

- How to preserve assets for clients who want to be **cryogenically frozen**

- What happens if revival is unsuccessful?

- Any concerns re Rule Against Perpetuities?

- Providing for changes in law while preserved? Who needs to be involved in planning?

a. Possible Methods

i. Trust: store assets/transfer ownership; ensure financial stability; settlor cannot be the beneficiary;

ii. Personal Revival Trust: preserves assets for client's revival; dynasty trust?

iii. Patient Care Trust: holds portion of/all assets; use generational trust to give assets to future groups;

iv. Cryonic Suspension Trust/Cryonic Suspension Wealth Trust

v. Will reflecting testator's intent concerning distribution of assets

vi. Life insurance

8. Pet Trusts

- Best practices for providing for long-living animals (birds, tortoises)

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