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EDITOR'S MESSAGE

Readers are of course quite aware of enactment in December of the Tax Cut and Jobs Act. Its principal features for estate, gift and GST tax planning include the following:

1. Doubling the exemptions to $11.2 million per taxpayer ($22.4 million for a couple), which further reduces the already minor number of taxpayers in the system.

2. Returning the exemptions to 2017 levels eight years later in 2026 unless the Congress legislates further, which provides the usual uncertainty to the system.

3. Resisting repeal of step-up of basis on death—for now.

PLJO invites reader reaction to the Act and its estate planning implications for their clients. Please send responses to the Editor by email, rbrucken@bakerlaw.com.

RESEARCH WITH PROBATE LAW JOURNAL

By Robert M. Brucken, Esq.

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Editor-in-Chief, Probate Law Journal of Ohio

Most back issues of Probate Law Journal of Ohio (PLJO) are now on the OSBA website and accessible by EPTPL Section members. Suggesting how to use them in your research may now be in order. The website contains issues commencing Sept/Oct 1999 through all but the most current two years (through Nov/Dec 2015). As Editor of PLJO, I have discovered several tricks that facilitate use of PLJO for legal research. This is to share some of those tricks with our readers.

OHIO LEGISLATION

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PLJO is often the only source for informal legislative history of Ohio trust and estate legislation. Legislation prepared by EPTPL Section committees and sponsored by OSBA is usually preceded and followed by up to three PLJO articles, often authored in the "first person" by the chair of the sourcing Section committee or other author of the proposal himself. These articles will identify the problem to be solved, later propose the legislative solution and finally explain the resultant law. Articles are also generally published on non-OSBA sourced trust and estate legislation, particularly if it is enacted with OSBA support.

To access this material, all you need to know is the year of the legislation of interest to you. You can get the year from the annotated statutes, Casemaker, etc. Open any PLJO issue of that year to its Legislative Scorecard. It will list the legislation under Pending or Enacted Legislation, whether or not the legislation is OSBA sourced or supported, and will cite all pertinent PLJO articles on it to the date of the issue. Be sure also to check a later issue after enactment for a final article explaining the final enacted version of the law.

You may also find under Pending Legislation in the Legislative Scorecard references to bills (by subject and bill number) introduced but not enacted. Such bills die at the end of the legislative biennium, though they may be reintroduced later. You also find them by year.

PLJO SUBJECT INDEX

A long-time glaring omission of PLJO was a comprehensive subject index. However, PLJO now contains a relatively simple rolling one year subject index, commencing with the issue of Jan/Feb 2015. Thus, both all articles and all case summaries commencing with the issue of Jan/Feb 2014 (one year earlier than the publication of the first index) are now accessible through this index. To find complete coverage of a subject, by article or case, from 2014 forward start with the index in the Jan/Feb 2015 issue and then go to the index in the Jan/Feb issue of each subsequent year.

EARLIER SUBJECT INDICES

There are several earlier fragmentary subject indices. Perhaps the most helpful is the single cumulative index of articles and cases in annual volumes 16, 17 and 18 (Sept/Oct 2005 through July/Aug 2008), found in the Nov/Dec 2008 issue. Two more limited indices of articles and cases are of the first four issues of volume 15 (Sept/Oct 2004 through March/April 2005) in the July/Aug 2005 issue, and of the first four issues of volume 16 (Sept/Oct 2005 through March/April 2006) in the July/Aug 2006 issue, but note that the latter partially duplicates the larger three volume index.

The first eight annual volumes of PLJO each contain a one-year cumulative subject index to the articles and cases in the volume. These are found in the July/Aug issues of years 1991 through 1998. These indices were discontinued after West Group

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acquired Banks-Baldwin Law Publishing Co., the founding publisher. PLJO issues from Sept/Oct 1990 (the initial issue) through July/Aug 1999 have not been posted on the OSBA website, but under the West license to OSBA they may be so posted in the future if there is demand for them. If you have access to these issues, their annual indices will be useful in researching them.

SPECIAL TOPICAL INDICES

PLJO has already done further research for you on two topics. First, there are special indices of articles on the Ohio Trust Code in the following issues: May/June 2007, Nov/Dec 2008, Jan/Feb 2010, May/June 2014 and Nov/Dec 2016. There is also an index of articles on assertion of claims at death against nonprobate assets in the Nov/Dec 2010 issue.

FREQUENTLY SEARCHED ISSUES

There are issues of PLJO that may be subjects of more frequent search. You may want to earmark issues that you access from time to time. Examples are issues containing material on enacted omnibus bills, including the following:

> Sept/Oct 1996, containing an article on all nine items in 1996 HB 391
>
> Jan/Feb 2012, containing articles on all nine items in 2011 SB 117 and 2011 SB 124
>
> Jan/Feb 2013, containing articles on the Legacy Trust Act and three other items in 2012 HB 479
>
> Jan/Feb 2017, containing articles on all eleven items in 2016 HB 432 and 2016 SB 232

ONLINE SEARCH

PLJO has for years been online in Westlaw. There it offers word search capability. The EPTPL website postings are not currently so searchable, but perhaps they will become so in the future.

Best wishes with your research with PLJO!

DO-IT-YOURSELF ASSET PROTECTION BACKFIRES IN RECENT OHIO DIVORCE CASE OF *SOLEY V. SOLEY*

By Edwin P. Morrow III, Esq.
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In *Soley v. Soley,*[1] a Husband's asset protection scheme to thwart his creditors by placing title to property in his wife's name backfired when they later filed for divorce - and it might have been even worse.

The initial facts are simple: husband, fearing creditors, deeded separate property (real estate later sold for $170,000) to his wife, allegedly "with the specific understanding by both parties that the sole purpose of the transfer was to avoid creditors." They later divorce while living abroad in Budapest, Hungary (the court there understandably punting on the issue of dividing U.S. based property). She sells the property before the local Ohio divorce court partitions the U.S. assets. He fights the sale.

The main question for the courts—how is the property treated? Should it be his separate property, her separate property, or marital property? While the initial deed transfer was incredibly simple on its face, the procedural history and law surrounding the ultimate effect of it was not—it includes jurisdictional issues, Ohio's archaic dower law, constructive trusts and the law of gifts and marital property law (surprisingly, there was no discussion of the "clean hands" doctrine).

Not only did this simple gifting strategy ultimately cost the husband half of what was previously his separate property, but there has been over seven years of litigation because of it, including two appellate decisions. The litigation initially included the third party outside buyers of the property as well. Conservatively, the parties probably spent tens of thousands of dollars in attorney fees, not to mention the stress and hassle of taking more than seven years to settle a divorce.

In 2016, 490,365 people filed Chapter 7 bankruptcy. The number of annual divorces is much, much higher (CDC statistics omit data from some major states, but a reasonable estimate of annual divorces would be well over a million, see https://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm). So, the odds would tell you that any strategy involving gifting outright to a spouse, even if it legitimately thwarts a future creditor, is still a bad bet to make. Those of you with physician clients—take note!

Let's walk through the gist of the arguments: Husband's first claim was that the wife held the property as trustee for him under a constructive trust. This argument failed at the trial court level and later at the appellate court level, and for good reason. A constructive trust is an equitable remedy against someone who wrongfully acquires legal title. The trial court rejected this argument due to the statute of frauds (a weak argument that makes no sense to me), but ultimately the appellate court (1st decision) got that right and rejected the husband's argument on this point. The wife did nothing wrong, there was no mistake of the husband's clear intent to transfer title and therefore no constructive trust.

But the first appellate decision understandably remanded to the trial court for determination of whether the property was separate or marital property. After all, that's a completely different issue. The trial court then determined that since it was the husband's property before marriage, and there was no gift because there was no donative intent, it was his separate property—i.e., the change in title meant absolutely nothing at all for divorce purposes.

The appellate court ultimately rejected this conclusion, however, and found that there was indeed a gift—there was intent, delivery and acceptance. However, once the court found that the transfer was indeed a gift, it jumped to the conclusion that the property should be considered marital property, citing several similar Ohio appellate decisions. Ohio law requires looking to the totality of the circumstances for such a determination, rather than bare legal title.

While the ultimate decision was probably a fair result, the appellate court did not examine or discuss why it would not be the *wife's* separate property. Under most state laws, gifts or bequests are a donee's *separate* property—it usually doesn't matter whether the donor is a parent, another benevolent person or even a spouse. Indeed, Ohio statute clearly provides that separate property includes "(vii) Any gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse."[2] There is nothing in Ohio's statute that provides an exception for gifts from spouses (although we could make an argument that there should be). Since the court determined the manifest weight of evidence (enough to overrule the trial court) was that the husband made a gift of the entire property during the marriage, it should have at least examined whether it should therefore have been the donee-spouse's *separate* property. Arguably there was clear and convincing evidence that the intended gift was to her alone, otherwise he would have kept his name on the title as joint tenant.

However, after more than seven years of litigation, I suspect the wife was happy to receive half and be done with it. There was no appeal filed to the Ohio Supreme Court.

Takeaways: The husband's do-it-yourself asset protection plan was ill-considered and ultimately cost him half the property and considerable attorney fees to boot, and it could have cost him the entire property under a plausible reading of the statute. Using a trust would have been a much better solution (at least as to future creditors—any transfer would have been voidable if he became insolvent as to his creditors under fraudulent transfer law). He could have used a spousal lifetime access trust with a "floating spouse" provision that removed the spouse as a beneficiary upon divorce. Third party-created irrevocable trust assets are not property subject to division in a divorce.[3]

Alternatively, he could have even used a self-settled asset protection trust under the Ohio Legacy Trust Act and remained a beneficiary. Most readers are familiar with the Ohio Legacy Trust Act's exception that permits someone who is a spouse of the settlor at the time of funding to reach such a trust.[4] However, had husband used such a trust, at least it would have been clear that his separate property was not intended to be converted via outright gift to her as her separate property or marital property.

ENDNOTES:

[1]*Soley v. Soley* , 2017-Ohio-2817

[2]Ohio R.C. § 3105.171

[3]E.g., see *Guagenti v. Guagenti*, 2017-Ohio-2706

[4]Ohio R.C. § 5816.03(C)

AN OHIO CONFLICTS OF INTEREST "NUTSHELL"

By Deborah A. Coleman, Esq.

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Based on presentation by the author at the Cleveland Estate Planning Institute in October 2017.

Conflicts of interest can be more difficult to spot and more challenging to resolve in trusts and estates work than in any other area of law. There are many reasons for this. A trusts and estates lawyer usually works outside the adversary system, often with multiple members of a single family. Emotions can run strong; understanding of the technical aspects of the law, the lawyer's role and work product can be limited. Intermediaries are common: is not unusual for one person to approach a trusts and estates lawyer to prepare documents for someone else to sign. And one person may have multiple roles, each of which presents slight or significantly different interests or duties.

Here is a "Conflicts Nutshell" to help you think about where the potential for a conflict of interest resides, with particular focus on the important first step of identifying your client. Once you identify your client or clients, you know to whom you owe duties of confidentiality, loyalty, and competent, diligent representation. You can evaluate whether there is a risk that your ability to serve that client could be significantly limited by your other duties or interests, and you can prepare to seek and document your client's informed consent to a limited representation, if appropriate and feasible. For potential conflict situations that arise regularly in your practice—for example, doing estate planning for a husband and wife—you can develop forms of engagement letters and conflict waivers that address typical issues.

For a more comprehensive review of the ethical issues that may arise in trusts and estates practice, I recommend the *Commentaries on the Model Rules of Professional Conduct* published by The American College of Trust and Estate Counsel ("ACTEC"). ACTEC also publishes *ACTEC Engagement Letters: a Guide for Practitioners,* which contains a wealth of forms and checklists. Both are available at www.actec.org. The few marked differences between the ABA Model Rules of Professional Conduct and the Ohio Rules of Professional Conduct do not affect the value of these ACTEC publications to Ohio lawyers.[1]

14 PRINCIPLES OF CONFLICT ANALYSIS

There is potential for a lawyer to have a conflict of interest that requires evaluation and potentially client consent whenever the representation of one client will be directly adverse to another client or there is a substantial risk that the lawyer's ability to consider, recommend or carry out an appropriate course of action for a client may be limited by a lawyer's personal interest, the interest of a current or former client, or that of some other person. Ohio Rules of Professional Conduct ("ORPC") Rule 1.7.

Some potential conflicts can be waived by clients with informed consent. ORPC 1.7(b). *See infra* at para. 7, 11. Other conflicts, such as representing clients who are directly adverse in the same proceeding, are unwaivable. ORPC Rule 1.7(c); *See Dayton Bar Ass'n v. Parisi,* 131 Ohio St.3d 345, 956 N.E. 2d 268 (2012) (lawyer's conflict in representing both guardian and ward in guardianship proceeding could not be waived).

Identifying the client or clients is the first step in any conflict analysis. The best practice is to identify the client or clients at the outset, and confirm their roles with them.

Generally, the ethics rules do not determine whether there is a lawyer-client relationship, and with whom. "Principles of substantive law external to the Rules determine whether a client-lawyer relationship exists." ORPC Scope [17]. Furthermore, "Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." *Id*.

Useful principles in identifying your client:

In our system, lawyers do not represent families or situations, they represent one or more clients. *See* ORPC Preamble [2], [3].

Each client has the right to make his own decisions in matters of substance, and is entitled to expect that the lawyer who represents him will advise and represent him loyally, without being limited by personal interests or responsibilities that are not disclosed and to which consent has not been given. ORPC Preamble [2]-[4], Rules 1.2(a), 1.7; *e.g. Hatfield v. Seville Centrifugal Bronze,* 106 Ohio Misc. 2d 10, 732 N.E.2d 1077 (C.P. Medina 2000).

One who confides to a lawyer when seeking legal services is entitled to assume that her confidences will be protected, even if she does not hire the lawyer, unless she has knowingly and expressly waived that protection. ORPC Rule 1.18; *Taylor v. Sheldon,* 172 Ohio St. 118, 173 N.E.2d 892 (1961).

A lawyer has ethical duties of loyalty and confidentiality to any person who reasonably believes that the lawyer represents her. *Stuffleben v. Cowden,* 2003-OH-6337 (8th Dist.), *see Attorney Grievance Commission of Maryland v. Coppola,* 419 Md. 370, 19 A.3d 431 (2011)(lawyer deemed to represent his clients' children whom he advised at her bedside.)

A person for whom a lawyer drafts an instrument may reasonably regard the lawyer as his representative. *E.g. Columbus v. Grell,* 14 Ohio St. 2d 208, 237 N.E. 2d 298 (1968)(wife reasonably believed that lawyer would protect her interests when he prepared separation agreement according to terms to which she and her husband, whom lawyer had previously represented in personal injury case, agreed.) Some authorities have held that the person who signs an instrument prepared by a lawyer is a client of the lawyer. *E.g. San Diego Bar Opinion 1990-3.*

A person may be a lawyer's client whether or not she is charged for the lawyer's services, or is the person who receives or pays the lawyer's his bills. *E.g. Sarbey v. National City Bank, Akron,* 66 Ohio App. 3d 18, 583 N.E.2d 392 (9th Dist. 1990).

Absent an express agreement to the contrary, a lawyer who performs legal services for a trustee under an express trust or an executor or administrator of a decedent's estate does not incur a duty or obligation in contract, tort, or otherwise to any person to whom the fiduciary owes fiduciary obligations merely by reason of having done that work. R.C. § 5815.16.[2]

A lawyer represents a fiduciary in her representative capacity when engaged to advise the fiduciary regarding matters affecting the trust or estate. A lawyer represents a fiduciary in her individual capacity when retained to advance the interests of the fiduciary. ACTEC Commentaries on the Model Rules of Professional Conduct (5th Edition 2016), Commentary on MR 1.2 at p.39.

R.C. § 5815.16 does not address the question of whether a lawyer for another type of fiduciary, such as a guardian or attorney-in-fact, has fiduciary duties to the person for whose benefit the fiduciary serves. In regard to such relationships, *Arpadi v. First MSP Corp.,* 68 Ohio St. 3d 453, 628 N.E.2d 1335 (1994)[3] may still control. The Supreme Court held in *Arpadi,* in the context of a dispute arising from a limited partnership, that those persons to whom a fiduciary duty is owed are in privity with the lawyer for their fiduciary for the purpose of a malpractice claim arising from matters to which the fiduciary duty relates.

When a client has impaired capacity, the lawyer is obligated to maintain a normal client-lawyer relationship with the client as far as reasonably possible. *See* ORPC 1.14. However, the impairment may prevent the client from effectively waiving a conflict. *E.g. Cuyahoga Cty. Bar Assn. v. Newman,* 2004-Ohio-2068.

Where a single individual wears "two hats"—e.g. as fiduciary and beneficiary - and asks a lawyer to represent her in both capacities, the lawyer should evaluate this situation as if the lawyer is asked to represent two different clients. *See In re Estate of*

Peka, 2008 WL 467425 (Minn. Ct. App. Feb. 12, 2008) (lawyer disqualified from representing litigant both individually and as conservator (guardian) where the litigant's personal interests conflicted with her fiduciary duties); *Cf. Allison v. Allison,* 15 Ohio St. 2d 44, 238 N.E. 2d 768 (1968)(requiring executors to choose between continuing their fiduciary service or their will contest; implying that clients' conflict was imputed to their attorneys).

Before accepting the representation of any one client, a lawyer must evaluate whether the representation would be directly adverse to another client, and whether there is a substantial risk that his own interests, or those of some other person, including a former client, will materially limit the lawyer's ability to consider, recommend or carry out an appropriate course of action for the client. If either is true, the lawyer must assess whether he can nonetheless represent the client competently and diligently, and if so, proceed only after full disclosure to and with the consent of the affected clients. ORPC 1.7.

Some personal conflicts with clients, such as business transactions or drafting an instrument that gives the lawyer a gift, are subject to specific rules in addition to the general conflict of interest rules. *See* ORPC 1.8.

When a lawyer's work for a client is arranged by, facilitated by or paid for by an intermediary, the lawyer's evaluation of potential conflicts in accepting or continuing her work for the client must take into account her relationship with, and the role of the intermediary. Complicating factors include:

If the other person is also a client, the analysis in para. 7, and both clients' informed consent are required before the lawyer accepts the representation;

A lawyer who drafts for one person at another's behest must beware of undue influence, especially if the latter is also a client or is paying the bill;

A lawyer may not accept payment from a non-client without assurance that the third-party's involvement will not affect the lawyer's independent judgment or result in disclosure of confidential information, and the client's informed consent. ORPC Rule 1.8 (f);

Discussing the client's affairs with or in the presence of a non-client defeats the attorney-client privilege and violates the lawyer's duty of confidentiality, unless the non-client's participation is necessary for effective communication between lawyer and client or the consultation is necessary in order for the lawyer to provide legal assistance to the client. e*.g. In re Busse's Estate,* 332 Ill. App. 258, 75 N.E.2d 36 (1947)(sustaining privilege for communications in presence of client's friend, upon whom client relied for "everything" including assistance in business affairs).

There is a potential conflict of interest whenever a lawyer is asked to represent multiple clients with related interests, whether the assignments for each client are similar (*e.g.* providing estate planning to husband and wife) or different (*e.g.* serving as corporate counsel while providing estate planning to the company's owner). In any situation involving multiple clients with related interests, the lawyer must consider whether, and under what conditions, the lawyer can competently and diligently represent both clients. ORPC 1.7.

In considering whether to seek waivers of a potential conflict so that the lawyer can accept or continue a representation, the lawyer must consider whether he can give each client enough information about the potential conflict for the client effectively to consent, and whether each person from whom a waiver is sought is able intelligently to receive relevant disclosures and provide informed consent.[4]

In theory, the representation of two persons in the same or related matters may be joint or separate. If the representation is joint, the clients share an attorney-client privilege with the lawyer but cannot claim privilege against each other. *Squire Sanders & Dempsey, LLP v. Givaudan Flavors Corp.,* 127 Ohio St. 3d 161, 937 N.E. 2d 533, ¶ 32 (2010); *Netzley v. Nationwide Mut. Ins. Co.,* 34 Ohio App. 2d 65, 78, 296 N.E.2d 550 (2d Dist. 1971). Joint clients should be informed that information from either client may be required to be shared with the other if the lawyer considers such sharing of information necessary or beneficiary to the representation. Separate representation of multiple clients in related matters may be permissible if the lawyer reasonably concludes that she can competently and diligently represent each of them, but separate representation strains the lawyer's duties and impartiality. ACTEC Commentaries on MR 1. 6 at p.84.

Conflict waivers must be confirmed in writing. ORPC 1.7(b)(2). Engagement letters are strongly encouraged to define the scope of the representation, and to address other issues related to the representation. ORPC 1.5(b).

Changing circumstances can require a lawyer to re-evaluate whether the lawyer can continue to represent multiple clients, or must withdraw from representing one or more of them.

In addition to foregoing principles, there are practical and legal considerations that you may have to take into account in a given situation. For example, there may be a question of whether a person to whom your new client is connected by family or organizational ties is a current client or a former client. This distinction makes a difference in terms of continuing obligations that may limit your ability to represent the new client.[5] Whatever the circumstances that make it difficult for you to determine whether you have a conflict and how to deal with it, ask for guidance if you are not sure how to proceed.

ENDNOTES:

[1]The ABA Model Rules and the Ohio Rules differ materially with respect to three extraordinary situations: the circumstances in which a lawyer may or must reveal confidential information without client consent (compare Model Rule 1.6(b)(2) and (3) and 4.1(b) to Ohio Rule 1.6(b)(2) and (3) and 4.1(b); when screening can be used to prevent the disqualification of an entire firm when a lawyer from another firm "switches sides" (compare Model Rule 1.10 (a)(2) to Ohio Rule 1.10 (b)-(d)), and the scope of the duty to report professional misconduct (compare Model Rule 8.3 to Ohio Rule 8.3).

[2]The Supreme Court has not ruled on the effect of this statute on the holding in *Elam v. Hyatt Legal Services*, 44 Ohio St. 3d 175, 541 N.E. 2d 616 (1989) that a vested beneficiary of a trust has standing to sue a lawyer for the fiduciary in malpractice.

[3]As to limited liability companies and limited partnerships, the Arpadi rule was also abrogated by statute. *Fornshell v. Roetzel & Andress, LPA*, 2009-Ohio-2728 (8th Dist.), *citing* R.C. §§ 1782.01(C), 1705.61 and 1782.08.

[4]Note that when an organization is required to waive a conflict of interest presented by the lawyer's representation of an owner, officer or other constituent of the organization, the consent must be given by someone other than the person to be represented, or by the shareholders. ORPC 1.13(e).

[5]When a lawyer retains a client's signed original documents, sends periodic "client advisories," and has not sent a termination letter, it may be unclear whether the person for whom the documents were prepared remains a current client. A lawyer has duties of loyalty and confidentiality to a current client, but only a duty of confidentiality to a former client.

PLANNING FOR VACATION HOMES AND REAL ESTATE

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Based on presentation by the author at the 2017 Cleveland Estate Planning Institute.

With summer a distant memory, most vacation property owners have closed up their cottages and vacation homes for the season. While the physical maintenance of such properties is likely done until spring time, now is a perfect time for planners to engage their clients in fiscal planning related to such properties.

Given the significant sentimental and financial value associated with such properties, failure to properly plan for the transition of vacation homes to family members can lead to unwanted federal estate taxes and significant disappointment when dysfunctionality and poor management among donee family members cause the property to be sold off to third parties. Proper estate planning can help reduce the federal estate tax exposure related to such properties and provide a proper management plan to be incorporated by the family so as to permit the properties to carry on for multiple generations.

Why Worry About Vacation Properties

According to the U.S. Census Bureau, the number of vacation homes in the United States grew by 27.7% from 2000 to 2010. [1] More importantly, "heirloom homes" account for 5 to 10% of the entire U.S. housing stock. [2] Such homes typically carry with them deep emotional ties and, along with their insignificant value, create potentially significant estate tax exposure and planning problems. Vacation property owners must address issues of estate tax, gift tax, capital gains tax, carry over basis concerns, asset protection and, most importantly, control in order to effectively transfer such properties to the next generation.

This article will explore a few of the planning options for vacation properties and the pros and cons associated with each. Further, this article will also identify core terms and provisions to be addressed in trust instruments, tenancy in common agreements and management agreements as part of one's estate planning for vacation properties.

TRANSFER OPTIONS

1. OUTRIGHT TRANSFERS

The outright transfer of real estate is the most commonly used approach taken by clients and planners when transferring property from one generation to the next. Simply transferring the property by deed or Certificate of Transfer is a concept familiar to most individuals and certainly is the least expensive of all the planning approaches.

In situations where there are multiple donees, individuals often choose the outright transfer option so as to avail themselves of fractional interest discounts when less than an entire interest is being transferred at a given time.[3] Given the significant value of these heirloom properties, discounting can help leverage one's estate and gift tax exemption.

That being said, the draw backs associated with an outright transfer are greater than those associated with the other transfer options discussed later in this article. The biggest concern arises when the property is being conveyed to multiple individuals. Such conveyance creates a co-tenancy and raises the threat of a partition action to divide the property. With co-tenancy, there is no automatic mechanism to enforce non-payment of a co-owner's share of expenses, taxes, insurance premiums, etc. More so, disgruntled or cash strapped co-tenants may choose to sell their interests to a developer or other third party who, in turn, may file a partition action and force a sale of the property, thereby frustrating the donor's goal to keep the property within the family.[4]

In addition to the threat of a partition action, cotenancy or fractional ownership in the property may expose such property to claims of a donee's creditors or expose the property to claims by a spouse in a divorce action. Even in jurisdictions where domestic relations courts will treat inherited property as "separate property," if an owner's marital property is used to help maintain the vacation property (e.g., paying taxes, insurance), co-mingling may convert the family property to marital property and then ensnare the property in nasty litigation.

Planners also need to focus on income tax concerns related to the vacation properties. With the current increased estate tax exemption, transfers of such properties outright during life will cause the property to lose a potentially significant step-up in basis at death under Internal Revenue Code § 1014. One must be careful to weigh the income tax concerns against the estate tax concerns before any outright intervivos transfer is completed.

2. TRANSFERS IN TRUST

An alternative to the outright transfer would be a transfer via a revocable or irrevocable trust. Such transfers are relatively easy to document and help maintain the desired privacy clients often look for. The benefits of both revocable and irrevocable trusts are numerous and do not warrant listing in this article. That being said, perhaps the most important consideration is to carefully spell out the terms of management of the property and other related details within the trust instrument. Studies have shown that junior family members are more willing to accept such restrictions and abide by them when they have been spelled out in a trust instrument, as opposed to simply being "dictated" to them.

With that said, transfers into trusts are not without potential problems. Revocable trusts generally do nothing to reduce one's estate tax exposure relative to the property itself. Similarly, irrevocable trust provisions are clearly difficult to amend and the grantor needs to be confident in the long lasting effect of the trust restrictions they are implementing. Additionally, a disgruntled beneficiary may utilize the provisions set forth under § 5804 of the Ohio Revised Code governing modification of irrevocable trusts to frustrate the settlor's intentions.

For example, a non-charitable irrevocable trust may be terminated upon consent of all beneficiaries if the court concludes that continuance is not necessary to achieve any material purpose under O.R.C. § 5804.11(B) or that the modification is not inconsistent with the material purpose of the trust. A court may even modify administrative or dispositive provisions of an irrevocable trust or terminate an irrevocable trust if because of circumstances not anticipated by the settlor, modification or termination will further the purpose of the trust under O.R.C. § 5804.12.

Thus, while a transfer into an irrevocable trust would appear to "lock-up" the property, a beneficiary could attempt to thwart the donor's planning by forcing a sale of the property or a premature termination of the trust so as to avoid the trust restrictions contained therein. Consequently, it is incumbent upon a planner to specify in the trust instrument that the vacation property is to be held in trust and that doing so is a material reason for the existence and implementation of the trust. Care must be taken to explain the settlor's goals with respect to the property (e.g., preservation for more remote generations, avoid development, etc.) and how he or she desires for the property to be held and administered into the future.

Yet another concern with transferring vacation properties into a trust involves finding ways to maintain the property after the settlor has passed. Many practitioners simply convey property in trust and forget that there will be significant costs needed to pay for insurance, taxes, capital improvements, etc. A careful plan will incorporate some form of funding (life insurance or otherwise) into the mix to insure that liquidity exists within the trust for payment of such costs. Attention should be given to how the property will be maintained to avoid situations where the beneficiaries are forced to contribute themselves to the trust, potentially creating adverse income and estate tax ramifications.

3. TRANSFERS INTO A BUSINESS ENTITY

A better option for heirloom properties is to utilize a business entity to own the property. Whether it is a limited liability company or limited partnership, a business entity can provide the proper degree of control necessary to carry out the donor's wishes with respect to the property.

Using a business as the vehicle to own the vacation home permits the donor to retain certain managerial control, utilize fractional interest discounts for gifting, and implement protections against those concerns which would otherwise arise with cotenancy ownership. A properly drafted operating agreement or partnership agreement may contain rights of first refusal and restrictions on transferability which will prevent interests in the property from passing outright to a spouse (or soon to be exspouse) and creditors. Because the donee members of the business entity do not own the property outright, the threat of a partition land sale is nullified. Likewise, creditor protection is available when using limited liability companies as creditors usually may only obtain a charging order against a member's interests. The creditor generally may not satisfy his or her claim against the entity's underlying assets and therefore protects the property itself from unwanted claims.

However, the use of a business entity to own a vacation property does carry with it significantly more costs associated with forming the entity, drafting the operating and partnership agreements, and filing income tax returns on an annual basis. Similarly, if care is not taken in drafting the governing agreements, Internal Revenue Code § 2036(a) or § 2038 may cause the property to be includable in the donor's estate. Likewise, similar to transferring property through trusts, care must be taken to make sure that funds (such as life insurance proceeds) are contributed to the business entity to provide adequate funding for capital requirements in the future.

MANAGEMENT CONCERNS

While clearly there are many vehicles available to transfer vacation homes to family members, each carries with it its own significant positives and negatives. Care must be taken to ensure that an appropriate vehicle is chosen which matches each family's unique needs. All too often, estate planners fail to account for non-tax considerations when dealing with vacation properties.[5] Planners typically fail to discuss with the senior generation whether the family really does want the property. Location, maintenance costs, and time are all factors which may lead the junior generation to pass on the use of the property. Despite a parent's best wishes, children living in all areas of the United States may not find it desirable to travel to a remote location to use a vacation property, or alternately, foot the bill to maintain the property throughout the year.

Likewise, sibling rivalries, difficult spouses, and general ambivalence by family members may cause one or more junior family members to not want to receive the property as part of their share of the estate. A senior generation member should consider the financial resources of the next generation and whether they really will allow the donee to own and enjoy the property free from economic hardship. Ownership can present serious financial burdens for family members and a lack of liquidity to fund the maintenance of the property may turn what should be viewed as a positive into a significant financial burden for the donees.

In drafting a trust provision or operating agreement for the management of vacation properties, it is important for the family to address certain issues. Typically such issues, are broken down between "use" and "maintenance and financial."

Use issues typically involve whether individuals other than family members will be entitled to utilize the property. Must an owner be present while the property is being used? Can ex-spouses own an interest or even utilize the property? Will the property be available for rent to outside parties? Will the primary use of the property be rental or personal? The family also will need to take care to determine how use will be allocated during desirable times (holidays, spring and summer vacations). These are but a few of the key issues which need to be explored before a plan is implemented.

Conversely, from a maintenance perspective, thought must be given as to whether a group of individuals will manage the property or whether one individual alone will be selected as a manager. In larger families, it is often beneficial to have each family line appoint a designated representative to serve on a "property management committee." These individuals will then represent their respective family line in determining how the property will be managed and maintained. Having such representation can help avoid one child or family line from monopolizing the use of the property.

Care should also be taken in selecting how much money will be held in reserve for maintenance of the property, whether annual or periodic reports are to be created, and how will costs be allocated among the family. How will taxes, insurance, capital improvements be handled? If a family member no longer desires to participate in the ownership, how will the buyout of such family member occur? Buyout prices typically are set at substantially less than if the property would be sold to third parties and payment terms typically should be extended over many years to facilitate the buyout. More so, care must be taken to determine an appropriate valuation mechanism for such transfers.

Often it becomes necessary to allocate costs partly on the basis of actual use and partly on the basis of ownership or beneficial interests. It is generally not fair to allocate costs entirely on the basis of ownership or beneficial interest because some owners will make more frequent use of the property than others. Conversely, allocating costs entirely on the basis of use may not be feasible, as the economics of family property ownership often dictate that if the user charge gets too high, family members will decide not to use the property as frequently. This creates a vicious circle where usage of the property goes down and user charges go up.[6] Charging users a different amount for each of the various seasons may result in increased occupancy and reduce overall charges.

As you can see, there are a number of significant issues that go into planning for a vacation home. Simply deeding the property to the next generation is not typically the best solution. A carefully drafted trust or operating/partnership agreement needs to be well thought out and should be discussed with the entire family and not just the senior generation. Obtaining support from the family is key to the future success and preservation of the vacation home for multiple generations.

The author directs your attention to his outline "Planning for Vacation Homes and Real Estate - Making Sure Your Piece of Heaven Doesn't Become a Living Hell for Your Family" contained in the 2017 CMBA Planning Institute material on October 27, 2017 for a more detailed summary of the tax and management issues associated with maintaining and preserving vacation properties for the next generation.

The material appearing in this article is meant to provide general information only and not as a substitute for legal advice. Readers should seek the advice of their attorney or contact David Woodburn at dwoodburn@bdblaw.com or 800.686.2825.

ENDNOTES:

[1]Vickie Elmer, "How To Pass Down a Vacation Home," Kiplinger's Retirement Report, December 2014.

[2]Timothy D. Borchers, "The Vacation Home - Will it Be A Blessing or A Curse For the Next Generation?," Massachusetts Lawyers Weekly, August, 2010

[3]See *Estate of Baird v. Commissioner,* T.C. Memo 2001-258, which allowed fractional interest discount of 60% after considering appraisals.

[4]Benjamin Lavin and Raymond C. Odom, "Transferring the Family Vacation Home To Family," NorthernTrust.com - Insights on Wealth Planning (June 2016).

[5]Cameron R. Seybolt and Michael P. Sampson, "Estate Planning Alternatives For Family Vacation Property - Keeping The Cabin In the Family," Real Estate Institute - November 4-5, 2011. and Fiduciary Trust, "Estate Planning With A Vacation Home," https:\\www.fiduciary-trust.com\insights\estate-planning-with-a-vacation-home.

[6]David J. Backer and Richard A. Spencer, "Multi-Generational Ownership And Planning for Family Owned Properties" (2012).

WHAT DO YOU DO WHEN YOU FIND AN M-16 IN YOUR CLIENT'S BASEMENT?*

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Adapted from the author's presentation at the 12th Annual Greater Cleveland Council-Boy Scouts of America Estate Planning Conference, September 19, 2017.

"A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." U.S. Constitution, 2nd amendment

"The people have the right to bear arms for their defense and security."

Ohio Constitution, Art. I, Sec. 4

It can be safely said that knowledge of firearms law was not part of the customary training of estate planning, trust and probate attorneys. Closely held businesses, financial derivatives, real estate interests and many other kinds of real and personal property have been the subject of articles and lectures on transfer and taxation for decades. Firearms in estates is a more recent topic in legal literature. However, the reason probate attorneys need to understand the laws and regulations surrounding the ownership and transfer of firearms is the same as for any other species of property: your client expects you to know.

The legal consequences of improper transfers or dispositions of firearms are substantial. Both federal and state law make the illegal transfer of a firearm a crime.[1] The penalties are severe. Additionally, the improper transfer of a firearm is likely a breach of fiduciary duty.[2] Lawyers must learn about the statutes and regulations that govern firearms and firearms transfers in order to properly counsel clients. The two primary sources of federal firearm regulation are: The Gun Control Act of 1968[3] (GCA) and the National Firearms Act of 1934 (NFA).[4] In addition, Ohio (as the other forty-nine states) has its own firearm statutes and regulations, found principally in the Ohio Weapons

Control Act.[5] This article will discuss practical issues related to the administration of firearms in an estate.

The debate surrounding the merits of gun control or the constitutional rights of citizens under the Second Amendment, are irrelevant to this discussion. As a practicing probate attorney, it is critical for you to understand how a client's firearm ownership may affect the way you advise your clients when preparing wills and trusts as well as handling the administration of those firearms upon death.

FIREARM OWNERSHIP IN THE UNITED STATES

The second amendment to the United States Constitution and Article I, Section 4 of the Ohio Constitution guarantee the right of individuals to keep and bear arms.[6] In 2003, the Ohio Supreme Court held the right to bear arms to be a fundamental right in the state of Ohio.[7] Recent statistics published by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) reveal that in 2005, there were 8.9 million instant background checks performed through the National Instant Criminal Background Check System (NICS).[8] By 2015, that number increased to 23 million. In 2005, there were 127,000 transfers of registered firearms under the NFA. In 2014, the number of registered transfers increased to 1.3 million. It is estimated that in the Midwest alone, thirty-five percent of all households acknowledge to owning firearms.

These statistics illustrate that if you do any estate planning, even an occasional simple Will, you will likely encounter firearm owners in your practice.

WHY IS THIS IMPORTANT?

Those unfamiliar with firearms generally may be surprised to know that these assets can range in value from scrap to tens of thousands of dollars per firearm. Some firearms have museum quality value while others may have training and education value. Certainly, some firearms are historical in nature, while others have sentimental or utilitarian value. Under all circumstances, a legally possessed firearm will have some monetary value.

Firearms are highly regulated and may expose an executor or heir to significant criminal penalties and civil liabilities if firearms are not properly handled, stored and transferred. In addition, your client will expect you to address her firearm ownership during her lifetime and upon her death. Since firearm ownership is not governed by certificates of title and not subject to transfer on death - type designations, the disposition of firearm assets upon a client's death requires proper estate planning and administration.

WHAT TYPE OF FIREARMS DOES YOUR CLIENT OWN?

At the outset, whether you are advising a client in the preparation of a Will or you are assisting family members in the disposition of your client's assets following death, it is essential that you know exactly what type of firearm the client possesses. In general terms, there are two types of firearms. Table 1 provides a general description of these types of firearms.

The GCA defines "firearm" as any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive. While the famous Daisy Red Ryder BB gun that Ralphie Parker received for Christmas in *A Christmas Story* looks like a lever action rifle, that gun is not a firearm under the GCA since it uses compressed air and not an explosive to expel a projectile.

The NFA uses the same general definition of a firearm found in the GCA and then further defines "firearm" to include:

- A shotgun having a barrel or barrels less than 18 inches in length;
- A weapon made from a shotgun if such weapon has an overall length less than 26 inches;
- A rifle having a barrel less than 16 inches in length;
- A weapon made from rifle having an overall length less than 26 inches;
- A machine gun;
- A silencer; or

- A destructive device.

If you do not know they type of firearm your client possesses, it is essential that you find out.

EXECUTORS AND PERSONAL REPRESENTATIVES

Normally, when an estate is opened, the probate court appoints an executor to take possession of the decedent's assets and to distribute those assets (or the proceeds from the sale of those assets) to the decedent's creditors and ultimately her beneficiaries. Once appointed, the executor enjoys the right to possess the decedent's assets and to transfer those assets in accordance with the decedent's will, the statute of decent and distribution or the orders of the probate court. When it comes to firearms, it is not so simple.

Firearms may only be possessed by persons who are not disqualified by federal and state law. The appointment of an individual nominated in a will as an executor does not supplant a state or federal disqualification.

After you conclude the executor is lawfully able to possess the decedent's firearms, you must next determine whether the recipient is lawfully able to possess them as well. In addition to the federal disabilities set forth in section 923 of the GCA, state law may further restrict the possession of firearms or ammunition. For example, under the GCA, a dealer in firearms is prohibited from delivering a handgun or handgun ammunition to a person under twenty-one years of age; or long guns or shot guns to a person under eighteen years of age.[9]

TRANSFER OF TITLE VS. TRANSFER OF POSSESSION

In most probate administrations, the transfer of title and the delivery of possession go hand-in-hand. Title to the decedent's financial assets, real estate and personal property are transferred upon death based upon a will, contract or as a matter of law in the case of intestacy. However, when it comes to firearms, both federal and state law require that the delivery of possession occur only if the transferee is permitted to possess the firearms lawfully. Even though title to the firearm has unquestionably passed to a beneficiary, if that same beneficiary is a convicted felon, unregistered alien or has some other firearm disability, *possession* of that firearm may not be delivered unless that disability is removed.

For probate attorneys, it is essential to keep in mind the distinction between title and possession. The consequences of a fiduciary transferring a firearm to a beneficiary disqualified from possessing that firearm can be substantial for both the beneficiary and the fiduciary.

INTERSTATE TRANSFER OF FIREARMS

Generally speaking, the GCA prohibits the interstate transfer of firearms. If a firearm is owned by a resident of Ohio and it is to be transferred to a resident of New York, the GCA requires that the transfer go through a licensed dealer.[10] A firearms dealer is known as a Federal Firearms Licensee, (FFL). An FFL is a person who devotes time, attention and labor to dealing in firearms as a regular course of business with the principal objective of livelihood and profit.[11] The ATF is responsible for issuing firearms dealer licenses in the United States.

Under the GCA, there is an exception when the interstate transfer is to an out-of-state beneficiary. Thus, an executor does not need to become a dealer in order to administer firearms in an estate. The GCA provides: "[the restriction on interstate transfer or transportation] shall not preclude any person who lawfully acquires a firearms by bequest or intestate succession in a state other than his state of residence from transporting the firearm into or receiving it in that state, if it lawful for such person to purchase or possess such firearm in that state." In other words, it is lawful for the executor to deliver a firearm to a Missouri beneficiary who receives the firearm in Ohio and transports the firearm back to her home state of Missouri. It is also lawful for an executor to transport or ship that firearm from Ohio to the Missouri beneficiary. While the GCA exception allows for an interstate transfer without using an FFL, the executor remains responsible for making certain that any such transfer is lawful nonetheless.

From a practical standpoint, as an attorney representing a fiduciary, the better practice is to recommend using an FFL to facilitate both interstate and intrastate transfers of firearms.

WHY USE AN FFL?

In 1993, as part of the Brady Handgun Violence Protection Act, Congress mandated the creation of the National Instant Criminal Background Check System (NICS) in order to determine if prospective firearm purchaser was eligible to purchase a firearm. FFL's are required to conduct an NICS background check to verify the transferee's eligibility prior transferring a firearm. This background check provides an assurance to the fiduciary that the transferee (whether in kind or in the case of a sale) is not disqualified to possess the firearm.

TRANSFER TO BENEFICIARIES

In order for an executor to transfer a firearm to a beneficiary, the beneficiary must have rights to the firearm by bequest or intestacy; and the firearm must be lawful for that person to possess in her state of residence. An executor may transfer a firearm interstate to a beneficiary by one of three methods: (1) physically handing over the firearm to the beneficiary; (2) shipping the firearm to an FFL in the beneficiary's state where the beneficiary picks up the firearm from the local FFL; or (3) shipping the firearm directly to the beneficiary.

PHYSICAL TRANSFER OF FIREARMS

Using this method, the executor has no guarantee the beneficiary is authorized to possess the firearm. Further, it may require the beneficiary to transport the firearm through other states with varying laws and regulations regarding the transportation and possession of firearms.

SHIPPING TO AN FFL

This method of delivery is much simpler for the beneficiary but can be more cumbersome and costly for the executor. Typically, the executor must ship the firearm by common carrier to the out-of-state FFL. This method of transfer can be facilitated greatly if the executor uses an FFL in Ohio to transfer the firearm to a corresponding FFL in another state.

SHIP DIRECTLY TO THE BENEFICIARY

While the GCA permits the shipment of a firearm by an executor to a beneficiary, neither UPS nor Fed Ex, for example, will deliver a firearm to a nonlicensed individual. While lawful, it is not a practical method of transfer.

The most efficient and effective method of transferring a firearm to a beneficiary in an interstate or intrastate transaction is to use an FFL. The executor and the transferee are protected from an unlawful transfer through the NICS background check. In virtually every case, the additional cost of using an FFL is money well spent.

In situations where one or more of the decedent's firearms must be sold, the sale of a firearm to an individual outside of Ohio will necessarily require the delivery of the firearm to an FFL in the purchaser's state of residence. The better practice is to use an FFL even in situations where the sale of the decedent's firearms is to an Ohio resident.

NFA TRANSFERS

The NFA was passed in 1934 to address violence during the prohibition era. The NFA is a tax statute and part of the Internal Revenue Code (IRC). It was passed as an excise tax to address both interstate commerce and second amendment concerns. The excise tax applicable to the transfer of a NFA type firearm is $200.00.[12]

Unlike GCA firearms, which are not registered under federal law (or under Ohio law), NFA firearms must be registered in the National Firearms Registration and Transfer Record (NFRTR).[13] In order to lawfully transfer an NFA firearm, the firearm must already be registered and the transfer must be approved by ATF *prior to delivery to the transferee*.[14]

The penalties for non-compliance with the NFA are substantial. Section 5871 of the IRC provides: "Any person who violates or fails to comply with any provisions of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both."[15] In addition, Title 18 of the federal criminal code provides an additional fine of not more than $250,000.00 for an individual or $500,000.00 for a corporation that violates the provisions of the NFA.[16] The NFA and the NFRTR are administered by the National Firearms Act Division of ATF in Martinsburg, West Virginia. The NFA Division is helpful when it comes to assisting attorneys and executors in the process for transferring NFA firearms. However, since the NFA is a tax statute, the forms and applications for registration and transfer are tax documents that are subject to the same restrictions and limitations covering an individual's income tax returns.

POSSESION OF NFA FIREARMS

An executor must be able to possess NFA firearms lawfully. The unlawful possession of a NFA firearm is a serious violation of the NFA.[17] Once again, it is imperative that counsel know whether the executor is subject to any federal or state disqualification. In the event the executor is disqualified from possession, another person must be appointed by the probate court to take possession of the firearm during the administration. This becomes critically important in the case of NFA firearms because only the registered owner is lawfully permitted to possess an NFA firearm.

On July 13, 2016, the Department of Justice issued regulation 479.90a, expressly providing that an executor, administrator, personal representative or other person authorized under state law to dispose of property in an estate may possess an NFA firearm during the course of an estate administration without first seeking a formal transfer from ATF.[18] However, an executor's authority to possess the decedent's NFA firearm is limited solely to possession and does not include the use or other disposition. Further, the executor must make diligent effort to transfer the firearm to the lawful beneficiary or to a third party prior to the closing of the estate. Any transfer must fully comply with the registration process under the NFA.

TRANSFER OF NFA FIREARMS TO A BENEFICIARY

If an NFA firearm is transferred in-kind to a beneficiary, the transfer is exempt from the $200 excise tax. However, the transfer is not exempt from the application and registration process. To complete the transfer, the executor will submit ATF Form 5 to the NFA Division, identifying the specific firearm being transferred and the identity of the transferee. In addition, the transferee will be required to submit fingerprints and other supporting information so a criminal background check can be conducted. Unlike the transfer of a GCA firearm, no instant background check is necessary for an NFA transfer since the NFA Division conducts a separate background check.

Once the ATF approves the transfer, the completed Form 5 together with the ATF approval is returned to the executor. At that time, the executor delivers the NFA firearm and the approved registration to the beneficiary.

TRANSFER OF NFA FIREARM TO THIRD PARTY

In the event the executor determines that an NFA firearm must be sold, the transfer is subject to the $200 excise tax. The process for transferring the NFA firearm is virtually identical except that ATF Form 4 is used and the estate must tender the $200 excise tax at the time the application is submitted for approval. Once the transfer is approved, ATF will return to the executor the ATF Form 4 with the $200 excise tax stamp affixed to the approved application. At that point, the NFA firearm may be delivered to the transferee along with the registration document.

NFA PAPERWORK

Whether the transfer is to a beneficiary or a third party, it is the responsibility of the transferee to keep evidence of the firearm's registration available at all times. Further, when you encounter an NFA firearm, either through a client or when engaged to represent an executor or other fiduciary, it is imperative that you obtain the registration documentation in order to verify the firearm's lawful registration. An unregistered NFA firearm is contraband and may not be registered thereafter. Under no circumstances should counsel take possession of an unregistered NFA firearm. Instead, if no proof of registration can be obtained from the client or the decedent's records, and ATF is unable to provide evidence of registration, the firearm must be disposed of properly. In these circumstances, the unregistered NFA firearm can be delivered to an appropriate federal, state or local law enforcement agency. In some instances, a firearms museum may be interested in taking possession of the NFA firearm.

WHAT SORT OF PROBLEMS MAY ARISE?

Consider this example: the executor nominated in your client's will is an Ohio resident who, twenty years ago, was convicted of criminal battery in Colorado. At the time of conviction, criminal battery was punishable by up to eighteen months in prison. The executor was given probation and no further sentence.

The GCA provides "it shall be unlawful for any person . . . *who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate commerce, or possess in or effecting commerce, any firearm. . ..*[19] (Emphasis added.) The Ohio Weapons Control Act provides simply: "unless relived from disability under operation of law or legal process, *no person shall knowingly acquire, have, carry or use any firearm . . . if the person . . . has been convicted of any felony offense of violence.*"[20] (Emphasis added.)

In this example, the twenty year old conviction for criminal battery in Colorado is a disability under federal and Ohio law, thereby prohibiting the executor from possessing the decedent's firearms. Counsel's failure to assess the executor's ability to lawfully possess firearms could place the fiduciary in serious jeopardy.[21] It may be necessary to remove the executor or seek the appointment of a different executor at the outset in order to lawfully transfer the decedent's firearms.

Instead of serving as the executor, what if the Ohio resident with the Colorado felony conviction is the sole beneficiary of the firearms held in the decedent's estate? The executor is responsible for transferring firearms only to those who are legally qualified to possess them. If the executor decides to deliver the firearms directly to the beneficiary without using an FFL to complete a NICS check, she may be unaware of the twenty-year old disqualifying felony conviction. A NICS check conducted by an FFL will likely identify a firearms disability and prevent an unlawful transfer from occurring.[22] Your client's lack of awareness of a disqualifying felony conviction is not sufficient to meet her burden under the GCA, placing both the executor and the beneficiary in jeopardy.

Conflicts between state and federal law create equally vexing issues. Recently, states such as Colorado have decriminalized the medical or recreational use of marijuana. However, the use of marijuana remains a federal offense.[23] One of the statutory disabilities under the GCA is the unlawful use of certain drugs or narcotics, including marijuana. A recreational user of marijuana in Colorado is disqualified under federal law from possessing a firearm. ATF Form 4473 is used by FFL's to record the transfer of a firearm. As part of the NICS background check, a proposed transferee is required to answer under oath questions relating to firearm disabilities. Question 11(e) on Form 4473 states:

> Are you an unlawful user of . . . marijuana . . . regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside?[24]

If the executor transfers a firearm to a Colorado resident beneficiary that uses marijuana lawfully under state law, the executor runs the risk of criminal prosecution if she knew or should have known that the transferee/beneficiary was a user of marijuana in Colorado. If an FFL in Colorado is used to facilitate the transfer of the firearm to the Colorado beneficiary, the beneficiary is required to answer Question 11(e) truthfully and under penalty of perjury. If the transferee chooses to answer Question 11(e) falsely, the prosecution will be limited to the transferee and not to the executor.[25]

CONCLUSION

Assisting your clients in the transfer of firearms as part of their estate plan is important as firearm ownership is increasing drastically in the United States. Probate attorneys must be prepared to understand the myriad of statutes and regulations governing firearms ownership, just like counsel must understand the statutes and regulations governing real estate and other property.

The knowledge required should not be dismissed or ignored because of personal beliefs regarding firearms and firearms ownership. Whatever an attorney's moral or political views on the subject may be, the substantial consequences for failing to comply with the laws governing firearms requires counsel to become knowledgeable regarding these rules and regulations.

ENDNOTES:

[1]26 U.S.C.A. §§ 5812(a), 5861

[2]Unif. Trust Code §§ 802, 809, 1001 (amended 2010), 7C U.L.A. 588 (2006)

[3]18 U.S.C.A. § 921 *et seq.*

[4]*See, fn. 2, supra.*

[5]R.C. 2923.11 to 2923.24

[6]*McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); *See also, Kline v. Leis, infra., at n. 8.*

[7]*Kline v. Leis*, 2002 - Ohio - 1634. *See also, Arnold v. Cleveland*, 67 Ohio St. 3d 35, 38, 616 N.E.2d 163 (1993). The *Kline* decision upheld the right of Ohio citizens to openly carry firearms while also holding that Ohio recognizes no constitutional right to carry concealed firearms.

[8]*Firearms in Commerce*, U.S. Dept. Justice, BATFE (2011).

[9]However, a non-dealer (such as an executor) may not transfer a handgun or handgun ammunition to a person under eighteen years of age. For non-dealers, there is no age restriction for long guns or shotguns.

[10]That person is a Federal Firearms Licensee (FFL). 18 U.S.C.A. § 921.

[11]An executor (or Trustee) is not required to become a dealer to administer the firearms held in an estate or trust.

[12]The $200.00 excise tax has not increased since 1934. In equivalent dollars today, the NFA excise tax would be equal to $3,658.00.

[13]26 U.S.C.A. § 5841(a)

[14]The transferor of the firearm is responsible for the payment of the excise tax; and may not transfer possession. *See 26 U.S.C.A.* ?5811(b).

[15]26 U.S.C.A. § 5871

[16]18 U.S.C.A. § 3571(b) and (c)

[17]Only the registered owner of an NFA firearm may use and possess the firearm. Consequently, when administering an estate with NFA firearms, the executor must take steps to secure the firearms so that *no one* but the executor has access to possession.

[18]27 CFR § 479.09a

[19]18 U.S.C.A. § 921(a)(3)

[20]R.C. 2923.13

[21]The consequences for possessing or transferring firearms in violation of the GCA can be imprisonment to twenty-five years and fines. The point is that the consequences are criminal in nature.

[22]However, any database is only as good as the data inputs. Following a shooting outside a church in Sutherland Springs, Texas in November 2017, it was discovered that the Air Force failed to notify the FBI of a disqualifying criminal conviction that may have prevented the transfer of one or more firearms used by the perpetrator. https://www.foxnews.com botched-air-force-handling-texas-shooters-criminal-history-may-be-systemic-issue.

[23]Controlled Substances Act, 21 U.S.C.A. § 811.

[24]ATF Form 4473, Question 11(e)

[25]Of course, this presumes the executor does not have actual knowledge of the transferee's use of marijuana or any other illegal drugs. Such knowledge, even when using a dealer, may not exempt the executor from criminal prosecution.

ORGAN, EYE AND TISSUE DONATION: CREATING A PLAN TO SAVE LIVES

By Kent Holloway

Lifeline of Ohio
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and

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The community need for organ, eye and tissue donations is immense. An estimated 22 Americans die each day because the organ they need to survive is not available. In the state of Ohio alone, there are nearly 3,000 people currently waiting for organs at one of the eight transplant centers across the state. It is a public health crisis that could be largely solved by one thing: ensuring more people are educated about donation and register as organ, eye and tissue donors. Around 60-percent of state identification (ID) holders are currently registered as organ, eye and tissue donors. While that ranks ahead of the national average of 50-percent, many people face extremely long waits for an organ needed to survive. Organ donation is a rare opportunity. Only 1-percent of people die in a manner suitable for organ donation.

There are several pieces of legislation in the state of Ohio that affect organ, eye and tissue donation. The Uniform Anatomical Gift Act (Ohio Revised Code 2108) established the legal guidelines for organ and other anatomical donations in 1968. In 1997 the Second Trust Fund was established and allowed $1 donations through the Bureau of Motor Vehicles to help fund donation education and outreach.

Most importantly, the state established first-person authorized donation via the Ohio Donor Registry in 2000. This act ensured that the donor registration decisions of individuals over the age of 18 could not be overridden. People who register as an organ, eye and tissue donor are acknowledging they wish to save and heal lives through organ, eye and tissue donation at the time of their death.

Other legislative acts mandated donation education in driver's education programs (2004) and for all students in the state of Ohio (2017), established a living donor state tax credit (2007), and created Donate Life Ohio license plates (2007).

Organ Procurement Organizations (OPOs) are designated by the Centers for Medicare and Medicaid Services (CMS). Additionally, OPOs are registered with and regulated by the Food and Drug Administration (FDA).

It is easy to register as an organ, eye and tissue donor in Ohio. The easiest way to register as an organ, eye and tissue donor is to log on to the state BMV website. The process takes mere minutes. Along with registering donation wishes, it is also important that everyone discuss their wishes to be a donor with their family. Having these discussions can ease at least one burden and remove a decision for a person's loved ones during a tragic time.

Anatomical gifts are also included in the standard Ohio living will. While this is an important opportunity for a person to establish their wishes for donation, it is imperative that those wishes also be established on the Ohio Donor Registry. Registering as an organ, eye and tissue donor in this manner will ensure that any possible life-saving donations are given in the event a person's living will is unavailable or unclear. By simply logging on to the state of Ohio BMV website, a person's donation wishes can easily and quickly be established.

CASE SUMMARIES

In re Estate of John C.

Headnote: Wrongful death action

Citation: 2017-Ohio-8648 (10th Dist.)

Decedent sexually assaulted his younger sister, and his ex-wife insisted that he have no further relationship with his daughter who was then age seven or eight. Later he was killed in a truck accident and the issue was distribution of the wrongful death settlement proceeds. The trial court awarded the largest share of the proceeds to the now-adult daughter under RC 2125.03, although there had been no contact between decedent and his daughter since the assault, finding that nevertheless she had sustained compensable loss and noting that the lack of contact was not attributable to her. This equitable distribution was affirmed on appeal.

In re Estate of Shoemaker

Headnote: Will contests

Citation: 2017-Ohio-8699 (4th Dist.)

Will contest settlement was agreed to by two of the beneficiaries. Three other beneficiaries had not agreed to the settlement, but it was claimed that their interests were not affected by it. The trial court denied approval of the settlement, and one settling party appealed (the other apparently changed his mind and now wanted out). The appellate court affirmed the denial, because the three beneficiaries had not been heard on the settlement and had not agreed to it.

If the settlement really did not affect the other three beneficiaries, why did it matter that they were not on it, or why did they not join in it to facilitate it? The facts in the opinion seem to indicate (to the author) that it affected their interests.

Jacob v. Jacob

Headnote: Trust administration and termination

Citation: 2017-Ohio-8725 (9th Dist.)

Son was trustee of mother's trust. Daughter sued for an accounting, but the court on summary judgment held son had complied with the reporting requirements of RC 5808.13. Son had not furnished a formal accounting or annual report, but had provided various letters to daughter and other trust beneficiaries that the court held satisfied the statute, citing the NCCUSL Comment to the statute that it does not require formal accounting.

Trust had been amended by mother to reduce daughter's share by $216,928. Daughter had received $550,000 from mother in connection with her divorce, and had given some of it back. Daughter's accounting suit included contest of the trust, and she wanted to dispute the amount remaining and whether it was intended as a gift. However, the court noted that the issue before it was not the status or calculation of this amount, but whether mother lacked capacity to so amend the trust, and that daughter provided no evidence to contest the trust.

Brown v. Brown

Headnote: Trust administration and distribution

Citation: 2017-Ohio-8938 (3d Dist.)

Husband and wife created a revocable trust and conveyed real estate to it. The deed was recorded, and an unrecorded "abstract of trust agreement" indicated the trust was for the benefit of the settlors during their lives, with A/B trusts created for the survivor. After the deaths of both settlors, no trust instrument could be found, the abstract was totally silent on distribution after both deaths and literally no evidence was found identifying further beneficiaries.

Husband and wife had each been previously married. Husband left three children by his first marriage, and wife left three children by her first marriage. The issue was whether the trust real estate passed to only husband's three children or also to wife's three children. Both husband and wife made wills in 1995 leaving everything to the survivor and on death of the survivor to all six children. The trust was created in 2000. Wife died in 2013, and several months after her death husband made a new will benefitting only his own three children. On these facts, the court held that the trust now failed for lack of identifiable beneficiaries, citing RC 5804.09(C) and 5804.10, that the trust's purposes could no longer be achieved because it was now impossible to ascertain its beneficiaries. The real estate thus reverted to the estates of the settlors. However, the interest of the wife passed on her death to husband as her sole beneficiary, and the entire interest now passed to the beneficiaries under the husband's will, who were only his three children. Distribution to the three children direct was ordered without reopening the estates per RC 5808.17(D). Affirmed on appeal.

In re Estate of Robison

Headnote: Estate administration

Citation: 2017-Ohio-8980 (10th Dist.)

Decedent's widow filed exceptions to the estate inventory filed by decedent's son as executor. The probate court heard the exceptions, sustained some, overruled others and ordered filing of an amended inventory. The widow appealed that order with respect to the overruled exceptions. The appeal was dismissed for lack of a final order; the appealable final order would be the future order approving the amended inventory after it is filed.

Young v. Kaufman

Headnote: Wills and contests

Citation: 2017-Ohio-9015 (8th Dist.)

Decedent's will benefitted three of her five children, and the two disinherited filed a will contest. The contest was dismissed on summary judgment for lack of evidence of incapacity or undue influence; indeed, decedent was at the time an active manager of family businesses. On appeal, it was reversed and remanded. Although there was ample evidence of competency, the fact that one benefitted son worked with decedent in the family businesses and handled some of her estate planning contacts for her evidenced not only the opportunity for undue influence but perhaps even its assertion, to the extent that summary judgment on the claim of undue influence was not appropriate. The case presents an interesting issue of whether a fully capable testatrix might yet be subject to undue influence.

In re Parrett v. Wright

Headnote: Prenuptial agreements

Citation: 2017-Ohio-9057 (2d Dist.)

Surviving husband challenged prenuptial agreement. The agreement was prepared by wife's son, and the opinion states that neither party was represented by counsel so we assume the son was not a lawyer either. Not only was the agreement sparse, but it contained identification of only some of the assets of the parties and no information on their values. The trial court set it aside, affirmed on appeal. The opinion notes that agreements have been upheld when they only identify the assets, or only give their total values, but not where both are missing.

Disciplinary Counsel v. Furtado

Headnote: Disciplinary action

Citation: 2017-Ohio-9109 (S. Ct.)

Ms. Furtado was admitted to the Ohio bar in 1986. She was suspended for a federal conviction of embezzlement in 1994, reinstated in 1997 and permanently resigned with disciplinary proceedings pending in 2000. In 2012 she prepared the usual packet of estate planning documents for a "client" for $8,670, that she has yet to refund. The court enjoined her from performing legal services in Ohio and levied a civil penalty of $10,000.

Kaufman v. Young

Headnote: Settlement agreement

Citation: 2017-Ohio-9179 (8th Dist.)

Decedent had lent $3,890,000 to plaintiff, and after death the debt was owned by decedent's trust. There was litigation over it that was settled for $3,250,000 with a formal settlement agreement. The trustee of decedent's trust then issued Form 1099-C to plaintiff for debt forgiveness of the $640,000 difference, inviting the IRS to assert tax on it as income. Plaintiff sued the trustee, claiming that under the settlement agreement there was no debt forgiveness and that filing of the form was contrary to the settlement agreement and intended to harass plaintiff. The trial court dismissed the action, but the appellate court reinstated it. There appeared to be an arguable issue of whether any of the debt was forgiven so any tax might be due, but of course the IRS was not a party to this litigation.

Jackson v. PNC Bank, N.A.

Headnote: Trust contest

Citation: 2017-Ohio-9180 (8th Dist.)

Plaintiff was housekeeper for decedent, who had provided her with a copy of a page of his trust instrument showing a bequest to her of $150,000. After his death, it appeared that decedent during life had amended the trust terms and deleted the bequest. Her suit for the bequest was dismissed as filed beyond the two year limit for trust contests of RC 5806.04. She appealed, arguing that she was claiming fraud so a longer statute applied, but the dismissal was affirmed. She could not by arguing fraud convert the action from a trust contest to something else.

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LEGISLATIVE SCORECARD

Keep this Scorecard as a supplement to your 2016 Ohio Probate Code (complete to May 20, 2016) for up-to-date information on probate and trust legislation.

Recently enacted		
Adopt Ohio Family Trust Company Act	HB 229	Eff. 9-14-16
See Galloway, *Ohio Family Trust Company Act*, 27 No. 1 Ohio Prob. L.J (Sept/Oct 2016)		
Omnibus probate and trust act	HB 432	Eff. 4-6-17
Contains the following subjects: Estate tax apportionment act amendments Deposit of wills with court Real estate sales by guardians Uniform Simultaneous Death Act amendments Ohio Trust Code amendments Uniform Principal and Income Act amendments Uniform Transfers to Minors Act amendments Revised Uniform Fiduciary Access to Digital Assets Act Uniform Power of Attorney Act amendments See PLJO of Jan/Feb 2017 for material on each item.		
Second probate and trust act	SB 232	Eff. 3-14-17
Contains the following subjects: Divorce and TOD real estate Inheritance through artificial reproduction technology See PLJO of Jan/Feb 2017 for material on each item		
Conform Ohio tax law to federal tax law	HB 11	Eff. 3-30-17
Pending legislation		
Authorize benefit corporations	SB 205	Intro. 9-28-17
See Vannatta, *Ohio Benefit Corporations: Beneficial or Not?*, 27 No. 5 Ohio Prob. L.J. NL 2 (May/June 2017)		
Permit TOD for joint cars and boats	HB 297	Reported by House committee 12-7-17

Abolish dower	HB 407	Reported by House committee 1-25-18
Correct income tax bright line domicile rule See Robertson, *Proposed Legislation to Clarify "Bright Line" Residency Test for Ohio Income Tax Purposes*, 28 No. 1 Ohio Prob. L.J. NL 2 (Sept/Oct 2017)	HB 292	Passed House 11-1-17
Adopt MOLST (medical order life sustaining treatment) forms See Maag, *The Development of POLST to Honor Medical Treatment Goals at End-of-Life*, 23 No. 1 Ohio Prob. L.J. NL 3 (Sept/Oct 2016)	SB 178	Intro 8-10-17
Acceptance of powers of attorney	HB 446	Intro. 12-12-17
Proposed legislation sponsored by the Ohio State Bar Ass'n, Estate Planning, Trust and Probate Law Section		
Permit waivers of inventories and accounts See An Allegory, 19 Ohio Prob. L.J. 164 (March/April 2009); Schweller, *Waiver of Inventories and Accounts*, 23 No. 2 Ohio Prob. L.J. NL 14 (Nov/Dec 2012); Brucken, *Private Administration of Estates Now Available in Almost All States*, 24 No. 1 Ohio Prob. L.J. NL 12 (Sept/Oct 2013); EPTPL Section Report, *Waiver of Filing of Inventory and Accounts OSBA Probate Reform Proposal*, 28 No. 2 Ohio Prob. L.J. NL 1 (Nov/Dec 2017).		Ohio BAR of 10-17-94
Authorize arbitration of trust disputes See Clark, *Required Arbitration of Trust Disputes: Enforcing Settlor's Intent*, 24 No. 6 Ohio Prob. L.J. NL 2 (Jul/Aug 2014).		Spring 2014*
Clarify anti-lapse statute application to class gifts See Layman, *Ohio's Anti-Lapse Statute and the Proposed Statutory Response to Castillo v. Ott*, 26 No. 5 Ohio Prob. L.J. NL 6 (May/June 2016)		Spring 2016*

Predeath probate of will and trust See Lehman, *Wills and Trusts: Updating Ohio's Pre-Mortem Validation Law*, 26 No. 5 Ohio Prob. L.J. NL 5 (May/June 2016)	Spring 2016*
Disposition of body by Coroner See Millonig, *Coroner's Release of Body*, 27 No. 6 Ohio Prob. L.J. NL 2 (Jul/Aug 2017)	Spring 2017
Incorporation of trust instrument in will See Lehman, *Proposed Legislation Requires Testator's Intent to Incorporate a Document into the Will*, 27 No. 6 Ohio Prob. L.J. NL 1 (Jul/Aug 2017)	Spring 2017

* Full text and explanation given in EPTPL Section Report to OSBA Council of Delegates, posted on OSBA website under "Publications/Special Reports/Council of Delegates."

For the full text of pending bills and enacted laws, and for bill analyses and fiscal notes of the Legislative Service Commission, see the Web site of the General Assembly: http://www.legislature.state.oh.us/search.cfm. Information may also be obtained from the West Ohio Legislative Service, and from our Customer Service Department at 800-362-4500. Copies of legislation prior to publication in OLS are available from Customer Service at nominal cost.