

Community Foundation of Broward
Professional Advisors Council

Heckerling 2015 Highlights

January 29, 2015

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The more things change . . .

- Dealing with digital assets
- Laws of Succession vs The New Biology
- Recent Developments in Florida Law

The more things change . . .

Digital Assets presented by Suzanne Brown Walsh:

- Electronic records accessed by computer, smartphone, tablet or computer;
- Includes online gaming pieces, photos, digital music, client lists, financial institution accounts, business records, frequent flyer and rewards programs, social media accounts and more;
- Currently 30 million Facebook accounts that belong to decedents.

The more things change . . .

Digital Assets (continued):

- Fiduciary duty to preserve assets of decedent;
- Fiduciary duty to prevent identity theft.
- Best practice is to ask estate planning clients to inventory accounts and passwords; and
- Draft estate planning documents that provide authorization for fiduciary to access and terminate those accounts.

The more things change . . .

Succession vs Biology presented by Joshua S. Rubenstein

- Control over disposition of remains;
- Control over disposition of body parts;
- Control over posthumous reproduction;
- Control over inheritance by posthumously reproduced individuals; and
- Control over posthumous paternity testing regarding alleged lifetime conceptions.

The more things change . . .

Succession (continued):

- Burial – controlled by decedent’s wishes, family members or state statute.
- Currently no right to control disposition of body parts while living, but organ donation governed by Uniform Anatomical Gift Act and state statute.
- Control over posthumous reproduction – Florida is first state with legislation – requires agreement between couple and physician;

The more things change . . .

Succession (continued):

- Control over inheritance by posthumously reproduced individuals – common law requires conception and proof of paternity prior to father’s death – no consensus among jurisdictions and lots of issues.
- Control over posthumous paternity testing regarding alleged lifetime conceptions – most cases involve exhumation and that is no longer necessary due to HLA blood typing and genetic marker testing, which can only rule out paternity but not confirm.

The more things change . . .

Recent Developments in Florida Law:

- Homestead Issues presented by Shane Kelley;
- Directed Trusts, Trust Protectors and Same Sex Marriage presented by Elaine M. Bucher; and
- Bequests to Attorneys and Lawyer-Fiduciary Privilege presented by William T. Hennessey.

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Recent Developments in Florida Law:

- Homestead Issues presented by Shane Kelley:
 - Three areas that need to be addressed:
 - Exemption from forced sale;
 - Inurement of the exemption upon the death of the owner; and
 - Restriction of the transfer of the property.
 - Fla. Statute § 732.401 governs descent of homestead at death. In 2012 Florida created an election for a surviving spouse to take an undivided one half interest in homestead property as a tenant in common instead of acquiring a life estate. Must file a notice within 6 months of date of death and record it in county where the property is located.
 - Fla. Statute § 732.702 – provides how the right to homestead and other various rights of a surviving spouse that may be waived before or after marriage.

The more things change . . .



Recent Developments in Florida Law:

- Directed Trusts, Trust Protectors and Same Sex Marriage presented by Elaine M. Bucher:
 - Florida Statute § 736.0808 regarding directed trusts in place since 2007.
 - Florida Statute § 736.0703 was recently amended to address corporate trustee concerns.
 - *Minassian v. Rachins* (4th DCA 2014) represents a major development in regard to powers of Trust Protectors.
 - Same sex marriage issue – On appeal to 11th Circuit Court of Appeals and may be taken on by the Supreme Court.

The more things change . . .

Recent Developments in Florida Law:

- Requests to Attorneys and Lawyer-Fiduciary Privilege presented by William T. Hennesey:
 - Florida Bar Rules make bequests to attorneys voidable;
 - Florida Statute § 732.806, effective after October 1, 2013, makes certain gifts void if the lawyer prepares the instrument making the gift or soliciting the gift unless the lawyer or recipient of the gift is related to the client;
 - Lawyer-fiduciary privilege – Jacob v. Barton case, where the court looks to real clients to see who benefited from the advice.

The more they stay the same

Recurring themes throughout the conference:

- Family businesses, family conflict, family rivalry;
- Section 2036 – “bona fide sale” still the most litigated tax issue;
- Valuations – important to use qualified appraiser;
- Portability - ability to get an adjustment at death of each spouse;
- Basis, basis, and more basis.

Everything old is new again

More recurring themes throughout the conference:

- Importance of income tax in estate planning;
- Only top .2% of individuals will need to be proactive due to estate tax concerns;
- The other 99.8% need help to pass assets as they want, not necessarily tax driven;
- TIP Act – reinstated the qualified charitable distribution for IRAs, but as Professor Donaldson noted, a carton of milk bought that day was good longer than the TIP Act.

Everything old is new again

The importance and difficulties of estate planning:

- Importance of trust drafting:
 - Define terms, such as “spouse”, “descendant”, “adoption”;
 - Consider use of a Trust Protector to be able to address unforeseen issues that might arise, such as tax law changes;
 - Provide ability for trustees to divide or bifurcate duties;
 - Specify terms and conditions as to who can serve as trustee;
 - Define “health”, “support” and “education”.
 - Provide direction to the trustee regarding discretionary distributions;

Everything old is new again

The importance and difficulties of estate planning (cont.):

- Importance of trust drafting (continued):
 - Provide the trustee with the power to treat distributions as advancements if necessary;
 - Specify whether to consider beneficiary's other income and resources;
 - Avoid letters of intent as they may conflict with trust terms;
 - Define “incapacity” and address such matter as absence, incarceration, minority, alcohol or substance abuse and health;

Everything old is new again

The importance and difficulties of estate planning (cont.):

- Importance of trust drafting (continued):
 - Consider use of powers of appointment;
 - Be specific in successor trustee language as to who has power to appoint, remove, etc.;
 - Specify when multiple trustees vote if it has to be unanimous or is a majority ok; and
 - Consider including a provision for multiple trustees allowing one to sign for all so long as they have all agreed.

Everything old is new again



Philanthropy is still relevant!

- It is important to know how to start that conversation with your clients.
- Suggestions include asking “if you could change one thing in the world, what would it be?” instead of “what charities do you support”?
- Two surveys were cited where clients and advisers were polled stated that clients want to know more about the non-tax aspects of their gifts, and the altruistic factors are more important to them than tax benefits, and yet their advisors still focused on the technical details before discussing the purpose and motivation for the gift.

Everything old is new again

Philanthropy is still relevant!

- Split interest gifts are regaining popularity:
 - CLATS
 - CRATS
- IRAs are still a good choice for gifting to charity at death because the charity pays no income tax.
- Roth IRAs are not a good choice since the tax has already been paid.
- While Qualified Charitable Distributions are still in a state of flux, if clients want to use current IRA dollars, have them distribute funds directly to the charity. If not re-enacted by the end of 2015, then worst case scenario is recognition of income and charitable deduction. Must be 70 ½ and in RMD. Limited to \$100,000 per year.

Everything old is new again



Philanthropy is still relevant!

- One challenge in charitable planning deals with restricted gifts:
 - Client wants to make an impact and wants funds to go specifically for that purpose.
 - Many things can go wrong without a proper gift agreement in place or without use of someone to follow through that intent is followed (like the Community Foundation).

Everything old is new again



Drafting Gift Agreements that stand the test of time:

- Agreements should state the charitable use as clearly as possible.
- Language should include plans in case of future changes in circumstances.
- Both the donor and the recipient of the gift should be parties to the agreement to ensure they agree on the purpose of the gift and that it is acceptable to the recipient.

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Drafting Gift Agreements (continued):

- Hypo #1: A married couple are successful real property developers and your clients of 20 years. They express an interest to support the local arts council, but the stability of the council is in question. They are concerned that the board won't be able to handle a large gift, and they would also like their children involved in the gift.

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Drafting Gift Agreements (continued):

- Hypo #1 Suggestions:
 - This is the perfect opportunity to use a local Community Foundation. The donors can set up a donor advised fund and include their children currently or in the future as decision makers. This also avoids having the charity control the money.
 - A private foundation would also be an acceptable alternative.

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Drafting Gift Agreements (continued):

- Hypo #2: A historic home receives a large bequest and the board of the non-profit declares this gift an endowment. Later, a hurricane does significant damage to the home's gardens. May the board use the endowment to repair the gardens?

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Drafting Gift Agreements (continued):

- Hypo #2 Suggestions:
 - Just because the Board designated the funds as an endowment does not mean it is an endowment, so the funds can be used for any purpose to benefit the historic home.
 - If more donors contribute to the fund that is being represented as an endowment (even if it didn't start of that way), it may turn into a donor restricted endowment.

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Drafting Gift Agreements (continued):

- Hypo #3: A wealthy cougar with charitable intent donates \$10 million to have a university theater named after her. Five years after the naming ceremony, she is convicted of statutory rape. Can the theater change their name?

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Drafting Gift Agreements (continued):

- Hypo #3 Suggestions:
 - Morality clause in gift agreement would be beneficial;
 - Absent policies or procedures that contemplate problems such as this, a court may have to determine if the name can be changed, and if so, whether the gift would need to be returned.
 - Agreements should include language as to time limits, future changes, what if building is destroyed, no longer used, and policy or agreement should be provided to every donor.

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Drafting Gift Agreements (continued):

- Hypo #4: Donors made gift to university for the purpose of performing a Shakespeare play each year. No one (other than the donors), likes Shakespeare plays and so the university changed the play schedule. Who, if anyone, has standing to force the university to put on the Shakespeare play?

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Drafting Gift Agreements (continued):

- Hypo #4 Suggestions:
 - Even if the donors are still alive, unless there is a gift agreement that governs, only the Attorney General has standing to enforce gifts.
 - Charity officials view this as protecting the public's interest more than enforcing donor intent.
 - If gift was structured through a Community Foundation, future payments could be withheld from the university.

Thank you for your time!