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University of Miami School of Law Center for Continuing Legal Education
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http://www.law.miami.edu/heckerling

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As we have done in January for the last twenty one years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 52nd Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 22-26, 2018 at the Orlando World Center Marriott Resort and Convention Center in Florida. A complete listing of the proceedings and the Institute's 2018 brochure are available at www.law.miami.edu/heckering. Introduction Part 1 issued on 1/11/18 covered the Institute Opening Reception, its Scope, the Faculty, the Advisory Committee, the Sponsors and the Vendors, plus general information at the end about the Institute. Introduction Part 2 issued on 1/12/18 contained a complete listing of all of the proceedings of this Institute. This Report continues our coverage of the proceedings.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Heckerling Reports Website, as we have since the 2000 Institute. The Reports from 2000 to 2017 can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling.htm. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Announcement: Relevant to Special Session II-C that is reported on in this Report, people ought to obtain a copy of "Using Technology Ethically: A Legal Ethics Guide to Data Security, Metadata, Cloud Computing and Other Tools of the Modern Trade," a myLawCLE coursebook that was delivered live by Federal Bar CLE on 1/26/18 and can be purchased as an on-demand video from myLawCLE. See https://www.mylawcle.com.

Summary: This Report #8 concludes our coverage of the Special Sessions that were held on Wednesday afternoon, the same being 2-C on technology and estate planning, 2-D on elder law, 2-E on post-death administrative nightmares, and 2-F on celebrity estates.

The next Report #9 will contain coverage of the Thursday morning General Sessions.

3:50-5:20 SPECIAL SESSIONS II (Cont.)

Session II-C
Technology and Estate Planning: The Rise of the Machines
Presenters: Bruce M. Stone + Eliam Medina + Suzanne Brown Walsh
First it was word processing and desktop calculators. Then document assembly systems, spreadsheets, and actuarial software. Mail delivery was replaced by faxing which was replaced by email which is being replaced by cloud storage and shared access. The internet provides access to vast troves of knowledge. Wills prepared online, executed with remote witnesses and existing only as electronic records are here. The only thing not yet replaced is the human brain of the estate planner. Will artificial intelligence replace us eventually? Do we have professional and ethical duties to embrace the fullest use of advances in technology? Read all about it in this Report.

The panel explored current developments in technology related to estate planning, with a focus on the development and proliferation of electronic will products and laws. The presentation began with Bruce Stone writing and executed a (limited) will on his tablet that was witnessed by Eliam Medina and Suzanne Walsh.

Part I – Electronic Wills

Stone began with a news story about a draft text message that was never sent, but included detailed information about assets and the disposition of the decedent’s body. An Australian court declared the draft text to be a valid will. The use of the words “my will” and the detailed information was enough for the Court to make the unsent text a will.

The materials included a story of a hypothetical couple that executes electronic estate planning documents one night after work. Using that example, Stone discussed the legal and practical issues arising from electronic wills or eWills. Ultimately, Stone opined that the wills would be valid in other states, but perhaps not in Florida.

By definition, an electronic will is a record created by electronic means that includes the same information that would normally be in an ordinary paper will. The panel looked to the Uniform Electronic Transactions Act of 1999 (UETA) for several key definitions and concepts—Stone noted that at present UETA does not under its terms apply to wills.

Stone then further broke down the definition of an eWill, beginning with the phrase “a record created by electronic means.” Under UETA, a “record” is information inscribed on a tangible medium or stored on electronic medium and is retrievable in perceivable form. An “electronic record” is a record created generated, communicated, received, or stored by electronic means. “Electronic” is defined to mean relating to technology having electrical digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

Stone pointed out that there is no “one” or “original” electronic will. There may be copies, but no single original. That aspect of eWills has positives and negatives. While it may be difficult to revoke an eWill via destruction (because there is no single original), it also is much more difficult to lose an eWill and far easier to identify whether a decedent has a will as all.

The main case on electronic wills is In Re: Estate of Castro, a 2013 probate court decision out of Lorain County, Ohio. That case involved a decedent who died without a paper will but who
executed an electronic will that was drafted by his brothers on an electronic tablet and executed in a hospital room. The will was drafted at the direction of the decedent prior to getting a blood transfusion. It was eventually signed by the decedent and his brothers as witnesses using a stylus. One month later, the decedent succumbed to his illness and died. A printed copy of the will was submitted for probate. The will made devises to persons other than the decedent’s heirs at law. Importantly, those heirs—the decedent’s parents—were represented by counsel and did not contest the will. Ohio law, which controlled, required that a will be in writing but did not specify a medium nor define what a “writing” is. Because the execution formalities had been met, the court found that the document was a valid last will and testament. Stone opined that it would have been inequitable under those circumstances to not admit the document as a will. The panel noted that the result might have been different had the electronic will been contested by the heirs.

Part II – Willing.com

Medina, a founder of the eWill website Willing.com, shared his personal experience with estate planning and shared his frustration with the complexities involved in even basic estate planning. Medina views Willing.com as “Turbotax” for wills. Since launching in 2015, Willing.com has raised $8 million, expanded to 50 states, and provided services to nearly 400,000 people. The panel then discussed next-step questions in the area including the application of artificial intelligence, blockchain technology, and identity authentication technology.

Part III – Electronic Wills Act

Walsh discussed the Uniform Law Commission Electronic Wills Act, which was approved as a project in 2017 and fast-tracked to be ready for states in Fall 2019. The first reading of the Act is scheduled to be in July 2018. Walsh is chair of the committee, Turney Berry is Vice Chair, and Susan Gary is the Reporter.

The committee has been tasked by the Uniform Law Commission with drafting a uniform act or model law “addressing the formation, validity, and recognition of electronic wills.” The Act will not cover trusts (except for testamentary trusts) because those are not subject to the same formality requirements as wills.

Walsh noted that the UETA has been enacted in all but 3 states and should smooth the transition to electronic wills because it puts in place the necessary legal framework. In fact, the UETA would permit eWills under its general terms, but the act currently contains a specific carve out for wills.

Turning towards the committee’s analysis, Walsh explored the current state of the law with respect to wills. Most state laws on wills, Walsh explained, are based on Wills Act of 1837 which lays out three distinct requirements:

1. The will must be in writing
2. The will must be signed by the testator, and
3. The will must be attested to by witnesses (typically two).

Some states allow oral or holographic wills.
The committee looked at what the relevance of those requirements are to wills, generally, in order to determine how the substantive goals of those requirements might be applied to eWills. Those functions are:

1. Evidentiary
2. Cautionary
3. Protective (protect against fraud and undue influence) and

Will formalities are strict, but in some instances may be relaxed. For example, the harmless error rule (UPC 2-503) permits courts to overlook minor errors in formalities under certain circumstances. Generally, proponents of a document that needs the harmless error rule to be admitted must prove by clear and convincing evidence that the decedent intended the document or writing to be a will or codicil.

Walsh pointed out that as the law has developed since the Wills Act of 1837, there are far more instances in which testamentary transfers are permitted to occur without any of these formalities. For example, a lady bird deed or a beneficiary designation on a brokerage account. Stone noted that those transfers can be done completely electronically and for many people would have a more significant financial effect.

In 2017, eWills Acts were introduced in five states and the District of Columbia, two of which were enacted. The states were Arizona, Indiana, New Hampshire, Virginia, and Florida. Walsh expects some of the states that did not enact those laws to revisit eWills statutes next year. Others may wait for the Electronic Wills Act, which is expected to be ready in Fall of 2019.

Finally, Walsh outlined some of the issues that the committee is grappling with, including

1. Recognition of “foreign” wills (comity, choice of law)
2. Revocation
3. Undue influence,
4. Electronic file integrity
5. Remote witnessing/notarization, and
6. Format of the ewill when it is submitted to probate.

**Part IV – Blockchain Technology**

Walsh closed with a discussion of the possible application of blockchain technology to eWills and other legal documents. The technology, Walsh explained, works through a network of decentralized computers known as “nodes,” which each record transactions across a distributed leger. Those transactions are time stamped, cryptographically “signed” with math, and validity by a “consensus” mechanism (which is meant to prevent tampering). Those qualities, noted Walsh, would each be useful for an eWill.

A blockchain can be “permissioned” which would keep certain data private while leaving other date public. For example, the terms of the will could be made private but the name of the decedent and the fact that the document is a will could be kept public. Walsh discussed the potential benefits of a system that increased the security of wills while also allowing for an easy
determination of whether someone ever had a will. Walsh analogized the technology to provenance of artwork.

Session II-D

Presenters: Bernard A. Krooks + Robert B. Fleming + Lawrence A. Frolik
Reporter: Bruce Tannahill

The bad news is that during later life individuals often encounter legal problems arising from health concerns, long-term care, and the need for appropriate housing. The good news is that elder law often provides answers by crafting solutions that permit clients to live as well as possible in the last decades of their lives. The panel discussed hypothetical, but realistic, problems often faced by older clients, and demonstrated how to “solve” or at least alleviate them, by applying the precepts and knowledge of elder law. This Special Session builds on the General Session presentation Mr. Krooks gave on Wednesday morning (Report #4). Here again the significant highlights are being reported.

Dealing with family situations and dynamics and how to pay for medical care and LTC is an important part of elder law. In this session, the speakers discussed several case studies presenting different issues that arise in elder law and how they would approach the situations.

Ethical issues

Elder law situations often present attorneys with the dilemma in determining who their client is and they may represent multiple people. Children or other relatives may bring the senior to the meeting. Mr. Fleming said it’s best to meet with the senior before hearing the story from the children.

Even if you tell the relatives that you do not represent them, they may reasonably think you are their attorney. Prof. Frolik said that when adult children disagree, you don’t want them as your clients.

The panel discussed Model Rule 1.14, which states that you should have as normal a relationship with clients who have diminished capacity. They agreed that it seems to be drafted to deal with an existing clients and Mr. Krooks is unsure how it applies to potential clients. The speakers recommended reviewing the ACTEC Commentaries on the Model Rules and the National Academy of Elder Law Attorneys’s Aspirational Standards for guidance on the ethical issues involved in elder law practice.

Financial Powers of Attorney and Health Care Directives
Clients should always have backup financial and health care agents. Keeping the documents up-to-date is important. Agents may die, become incompetent themselves, or the relationship between the principal and the agent may change so the agent is no longer an appropriate choice.

Having different people as health care durable agent and financial agent can cause problems. The financial agent may refuse to pay for expenses incurred by health care agent. It may be necessary to use a guardianship to resolve the problem.

Having a health care agent who does not live in the same area (or even same country) as the principal should not be a problem as long as the agent can stay in contact with the attending physician. The principal needs to give the agent specific information on the type of medical she does or doesn't want.

**Supporting Adult Children**

Clients often provide their adult children with financial support for numerous reasons, sometimes potentially reducing their ability to meet their own future expenses.

In some situations, you may need to explain to your client that she needs to take care of herself first. This may call for some tough love between you and your client followed by tough love between the client and the child. A panelist said that you’re about 50% social worker in dealing with these cases.

There are numerous ways for clients to help adult children without providing unlimited assistance, either while the client is alive or after the client’s death. Options include establishing a discretionary trust or a unitrust providing income for the child’s life and the child’s children as the remainder beneficiaries. A single premium immediate annuity or deferred income annuity may be a simple, efficient way to accomplish same result as a unitrust. The value to the client is the psychic value of taking care of the child.

**Medicaid Issues**

Medicaid planning for couples involves planning to maximize the assets and income available for the community spouse (the spouse not in or expected to enter a LTC facility) without affecting the institutionalized spouse’s Medicaid benefits. Mr. Fleming noted that not every state requires you to spend down. You want to keep as much as possible in joint property until one spouse is institutionalized. Assets above the limit can be spent to buy a larger residence or improve the current residence.

There is “terrific variability” between states on the treatment of gifts within the five-year period prior to applying for Medicaid, according to Mr. Fleming. Depending on the situation, you may be able to argue that the need for Medicaid only arose after an unexpected event, such as the disability or death of a caregiver. It might be possible to recharacterize a payment that appears to be a gift to be a loan or prepayment for care to be provided by the recipient.
Being Knowledgeable about Medicare

The panel agreed that clients assume you understand the basics of Medicare. They don’t generally look to their attorney for advice on the Medicare rules and are unlikely to pay for it. Choices a client makes can significantly impact the care they receive and the cost of that care. Failure to sign up for Medicare within specified enrollment periods may cause delays in coverage, permanent premium increases, or both.

Long-term Care Insurance

One case study involved a client who has long-term care (LTC) insurance, goes into nursing home, and payment is denied. The panel said that LTC insurance is consistently a nightmare to get claims paid. Problems include submitted forms being lost and claims being denied without providing a reason or citing incorrect information. This has led to a cottage industry of people who help clients collect for a percentage of the amount recovered. One panelist suggested that the best approach when faced with this problem is to involve an aggressive litigator. Prof. Frolik said that there are successful cases awarding punitive damages against insurance companies for failure to pay LTC claims.

One problem is that clients may fail to pay the LTC insurance premiums, causing the policy to lapse. To deal with this problem, a lot of states now require third-party lapse notification for LTC policies. If not required by the state, the client can specify someone to receive the notification.

Hybrid policies providing both life insurance or annuity benefits and LTC coverage may be the best approach. A potential problem is that these policies may not qualify under the Long Term Care Insurance Partnership Plan, which reduces the amount of assets that must be spent down to qualify for Medicaid.

Session II-E
Case Studies in Preventing Post-Death Administrative Nightmares [LIT][TRU]

Presenters: S. Andrew Pharies + David A. Baker + Jo Ann Engelhardt
Reporter: Michelle Mieras

This panel discussion examined real and hypothetical cases that resulted in post-death administrative nightmares and attempted to reverse engineer those cases to determine what, if any, preventative measures could have been taken at the estate planning stage. This Special Session builds on the General Session presentation Mr. Pharies gave on Tuesday (Report #2). This report covers the significant highlights from this session.

The panel presented nine scenarios and suggested proactive methods to prevent potential issues down the road.
Scenario 1 will be familiar to many practitioners: multiple children receiving unequal shares of an estate and one child being disinherited entirely. Assume the planning documents contain a standard in terrorem clause. The disinherited child will not be dissuaded from litigation, as that child has nothing to lose, and his case settles after prolonged litigation. Additional litigation is brought by another child receiving a smaller share, this time as an intentional tort claim. The court allows the tort case to proceed, and a significant settlement is reached. The panel suggested that the practitioner should have broadened the no contest clause to include the tort cause of action as a triggering event.

Additionally, the panel reminded the audience that in order for a no contest clause to dissuade litigation, the person must be given something that they’re not willing to forfeit. Ms. Engelhardt suggested that another way to make a beneficiary hesitate to litigate is to include a strong provision stating that any legal fees incurred will be assessed against their share. She also suggested encouraging clients to have these conversations during life rather than leaving potentially contentious estate plans as a surprise that comes to light at death. Mr. Baker added that the in terrorem clause could provide for third party defense fees to be allocated against the litigant’s share.

Scenario 2 addressed a wealthy family with children who think wealth is their birthright and a second marriage with a less wealthy spouse. Over the course of the marriage, through loans and joint investments, the less wealthy spouse accumulates significant wealth. Wealthy spouse dies with no marital agreement, and the kids sue for an accounting and to disgorge the wealth from the surviving spouse. Ms. Engelhardt recommended including specific provision into the planning documents, stating the history, that the wealthy spouse has made transfers freely to the other spouse, and directing fiduciaries not to pursue the surviving spouse. Mr. Baker noted that in most jurisdictions, the spouses could enter into a contract where the wealthier spouse releases the second spouse for any liability to pay back funds, thereby barring the fiduciary and other legatees from claiming the surviving spouse’s wealth.

Scenario 3 centered around an elderly, wealthy gentleman with a marital and charitable deduction-driven estate plan. Shortly before death, he is coaxed into making inter vivos leveraged transfers to his descendants. No changes are made to the testamentary documents. The IRS attacks the death bed transfers and asserts that significant gift taxes are due. Because the planning documents don’t contain clear direction on how payments will be made, the marital and charitable deductions are jeopardized. Ms. Engelhardt cautioned the audience that you need to run the numbers, and keep running the numbers with different scenarios to ensure that the client understands. Explain how the consequences may vary if the client dies now or dies later with changed tax laws and different values, and discuss abatement scenarios. Mr. Pharies suggested getting a contribution agreement between the donor and recipient.

Scenario 4 involved multiple children receiving unequal portions and one child being in charge of the estate/trust administration. The beneficiaries have years of public litigation, a result directly opposite of the private settlor’s wishes. Mr. Baker suggested including ADR provisions in the estate planning documents. He stated that 9 of 10 states that have passed on whether this can be binding on beneficiaries determined that it was binding. (The 10th state, California, is split on the type of issue that can be governed by the ADR provision.) He advised that the type of ADR (e.g., mediation or arbitration) and whether it will be binding or non-binding should be specified. Remember that binding arbitration would effectively waive appellate rights, but can offer certain benefits such as being able to include fee-shifting language (e.g., loser pays all fees).
After working through Scenario 5 (post death non-judicial settlements and Mr. Baker’s “Don’t Touch my Document Clause” covered in the Plenary Session), and Scenario 6 (dueling estate plans), the panel turned to Scenario 7, which involved residual gifts to charity. If this happens in a state with an active attorney general’s office, the AG will file an appearance and scrutinize every fee and expense paid, as this will reduce the residue/charitable share. Mr. Baker suggested instead leaving a fixed amount to charity to prevent these issues, and also to minimize the risk of losing the charitable deduction.

Scenario 8 involved naming someone who is generally business savvy but not knowledgeable in the realm of trusts and estates as fiduciary. To try to persuade them to act, exoneration and exculpation clauses are included in the documents. After death, the person declines to serve. Ms. Engelhardt stated that the fiduciary is being set up to fail. One way to incentivize a fiduciary’s service may be to include a contingent bequest to the named fiduciary to ensure that he is compensated appropriate for serving in cases where there will likely be litigation. Another option may be to waive potential conflicts of interest (to the extent permitted by law). Mr. Baker commented on the limited ability to waive conflicts, particularly if the named fiduciary is a business associate already involved in a business that will be part of the estate. He thinks that the best option is to expressly acknowledge potential conflicts of interest in the document and state how they should be handled. Mr. Pharies took a different view, stating that if someone is reluctant to serve as trustee, don’t try to incentivize them; pick someone else.

The panel concluded with Scenario 9, involving children battling over running the family business. Bad blood boils over into the “good” child’s service as fiduciary after the parent’s death. Because the child is distracted with the fights in the estate/trust, the business starts to falter, adding fuel to the fire. Mr. Pharies suggested structuring the gift to the “bad” child as a pecuniary gift, thereby limiting that child’s ability to complain about estate administration. Also consider exculpatory language, lowering the fiduciary duties, or subjecting the business/trust to more advantageous jurisdictions. Mr. Baker commented on whether the person running the business controlled by the trust is subject to the business judgment rule or if the more rigorous fiduciary duties are tacked on, and suggested that this is yet another reason to use a professional fiduciary. The panel was divided on the usefulness of getting the parent and children together before death to discuss how this would work and to enter into an agreement.

Session II-F
Dying for Fame in the Age of Celebrity: From Neverland Ranch to Paisley Park [LIT]
Presenters: Linda J. Wank + Edward H. Rosenthal + David Sleeman
Reporter: Herb Braverman

Using the Estates of Michael Jackson and Prince as case studies, this panel explored the unique, hot-button issues confronting fiduciaries and heirs of celebrity estates. This Report covers the highlights of this session.

This panel used a combination of fascinating slides to present information about some of our most well-known celebs, some of whom have estates making more money than the celebs made when living, hence, the term “Delebs”, which stands for dead celebs. Among those discussed in this fashion were Michael Jackson, Prince, Marilyn Monroe, Elvis, Steve McQueen, Robin
Williams, etc. The presentation was quite entertaining, but unfortunately I cannot reproduce the many images for you that were shown to us and made it so.

Mr. Rosenthal did discuss the importance of intellectual property law in this area, including the many trademarks, patents and copyrights, creative persons obtain and hold (often in their estates). He also discussed the “right of privacy”; that is, the right to be left alone in spite of ones celebrity. He made it clear that, other than the Constitutional right of privacy, there were no federal laws covering the subject and no uniformity among state laws dealing with the area. There appears to be more concern about the commercial aspects of this right which we all have it to some extent.

Ms. Wank and Mr. Sleeman discussed a number of related issues, such as valuation and appraisals, provenance, the effect of new technologies (for example, holograms of celebs doing what they did when they were alive and kicking). Without their slides, I can hardly convey the essence of their presentations here, except to say that Ms. Wank showed several lists of annual earnings by “delebs” and discussed why some of them are no longer on the lists and why others are excelling beyond their wildest living expectations!!

The Reporters:

Our on-site local Reporters who are present in Orlando in 2018 are Joanne Hindel Esq., a Vice President with Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq., an attorney with McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq., an attorney with the Dreyer Law Firm in Stuart, Florida; Herb Braverman Esq., an attorney with Braverman & Associates in Orange Village, Ohio; Kristin Dittus Esq., a solo attorney with offices in Denver, Colorado, Michael Sneeringer Esq., an attorney with Porter, Wright, Morris and Arthur, LLP in Naples, Florida, Michelle R. Mieras, a Fiduciary Risk Manager with Bank of the West in Denver, Colorado, Beth Anderson Esq., an attorney with Wyatt, Trrant & Combs, LLP in Louisville, Kentucky, Bruce A. Tannahill Esq., a Director of Estate and Business Planning in the Mass Mutual Financial Group in Phoenix, Arizona, and Patrick J. Duffey Esq., an attorney with Holland & Knight in Tampa, Florida.

The Report Editors in 2018 are Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is the Chief Moderator of the ABA-PTL discussion list. He is being ably assisted in those duties this year by Reporter Bruce A Tannahill Esq.