



An Overview of *Battley v. Mortensen*: The End of Domestic Asset Protection Trusts?

By: Jennifer L. Moccia, J.D., LL.M.



In early 2011, a landmark federal bankruptcy case shed doubt on the asset protection powers of the previously lauded domestic asset protection trust (DAPT), alarming many attorneys and distressing certain of those trust-wielding clients. In a decision filed by the United States Bankruptcy Court for the District of Alaska on May 26, 2011, Judge MacDonald set aside Thomas Mortensen’s transfer of real property to an Alaska asset protection trust as a fraudulent conveyance. *Battley v. Mortensen*, Adv. D.Alaska, No. A09-90036-DMD (2011). This case deviated from previous DAPT holdings because, not only was Mortensen deemed solvent at the time of the transfer, but Alaska’s

four-year statute of limitations for reaching the assets transferred to the DAPT had already run. This controversial ruling has sparked heated debates among estate planners on whether its outcome could invalidate thousands of trusts formerly thought to provide exceedingly reliable asset protection.

Following his costly divorce in 1998, Thomas Mortensen personally drafted the “Mortensen Seldovia Trust (An Alaska Asset Preservation Trust)” in February of 2005. Mortensen had admittedly “not recovered from the financial carnage” of his divorce, and created the trust to hold and protect his recreational real property located in Seldovia, Alaska, worth approximately \$60,000 at the time of the transfer.

(Continued on p. 10, “Battley v. Mortensen”)

Transferring Literary Rights to the Next Generation: Draft Carefully

By: Doug Welty, J.D.



Funding an inter vivos trust with copyright interests could lead to unexpected problems generations later.

Copyright interests are different from other categories of intangible personal property (such as contract rights) because they are governed by a unique federal statutory system that allows an author’s heirs to “terminate” a copy-

right’s transfer under certain circumstances. (“Termination” being a term of art meaning, in the copyright context, rescission of the transfer by an heir of the transferor.)

Whoa, you say! How can this be? Isn’t an author free to sell or give the rights to his works to a third party (such as a Trustee), for consideration or for no consideration? And isn’t a deal a deal, once you shake on it, sign the documents, and pay the money (if any)?

(Continued on p. 11, “Transferring Literary Rights”)

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Statutory Right to Name a Guardian

By: Martha J. Hartney, Esq.



Every state provides a statutory right for parents to name a guardian. When parents don't name a guardian, and tragedy strikes, it becomes the judge's job to decide who will raise a child. If parents haven't named a successor, a court will appoint a guardian, without the knowledge parents have of their children and potential guardians. That someone may not be the person parents choose.

When working with international families, the need for good planning is amplified. What will you, as their adviser, suggest?

Rights of Non-Citizen Parents

A basic principle when serving families

is that *parents have a constitutional, fundamental right to the care, custody, and control of their child*. The decisions of a fit parent are not to be interfered with except to prevent harm to the child. *Troxel v. Granville*, 530 U.S. 57 (2000). The Supreme Court extended that right to non-citizen parents residing legally in the U.S. *Kaoru Yamataya v. Fisher*, 189 U.S. 86, (1903). Therefore, a non-citizen parent should be able to avail themselves of the statutes allowing them to name whomever they choose as a guardian, just as a citizen parent does.

It's not only a parent's right, it's also their *responsibility* to name a successor at death or incapacity. A court should not have to decide who will raise a child simply because the parent failed to do so. In Colorado, there are no restrictions on who may be named: a guardian may be a

citizen of another country. The Colorado Court of Appeals affirmed that proposition when it declined to overturn a trial court's decision to award custody to the mother in Switzerland. *In Re McGee*, 613 P.2d 348 (Colo. App. 1980).

Check your state's statutes and case law to determine if there are any qualifications of nominees—such as citizenship.

When a Child is a U.S. Citizen

Judges don't like to lose jurisdiction over children in their courtrooms because they want to ensure their safety and care: This creates a potential barrier for moving a child to another country. To counteract that reluctance, parents must make their wishes clear about who will raise their child *and where*.

If a parent wishes a child to return to their country of origin, a judge will find greater reason to expatriate if the child is a citizen of that country.

(Continued on p. 10, "Statutory Right")



The Marketing Assistant: What Do Great Marketers Know That You Don't?

By: Mark Powers & Shawn McNalis, Atticus, Inc.



As marketing advisors and coaches, one question we constantly grapple with is this: how can *good lawyers* become *great marketers*? Driven to distraction by constant interruptions, difficult staffing issues and demanding clients, most attorneys don't take the time -- to do what it takes.

Yet, many of our attorney clients are very good at marketing when placed in the right situations. It's getting them there that's the problem. Making phone calls with contacts often involves a lot of phone tag, calendaring client development events takes time, planning the basic logistics of marketing is distracting. As a rule, attorneys aren't very good at the *initiation* phase of marketing.

At Atticus, we believe this phase is essential – without someone to initiate and organize these steps, most marketing efforts will never get off the ground.

"If you aren't successful in setting up lunches, dinners and meetings with referral sources, your client development efforts aren't going to be very strategic," Shawn McNalis, one of our practice advisors, says. "If you're not meeting with the right people, then you're relying on nothing more than happenstance to promote your practice. Happenstance will take you only so far. We advise our clients to take a more proactive approach."

Large firms can rely upon marketing

directors to deal with client development. But what does the small firm practitioner do?

Enter the Marketing Assistant. When Atticus' client Mark Chinn, an attorney from Jackson, MS, had difficulty marketing himself, he sought change. That change came to him in the form of a young college student, studying marketing at a local junior college.

For a number of months Chinn had been listening to me promote the idea of leveraging himself by hiring a marketing assistant. Though his new assistant had little experience, Chinn immediately noticed the difference hiring a marketing assistant made to his practice. Every morning, armed with a list of contacts, she and Chinn would have a short meeting to strategize, set up lunches and plan client development events. They also focused on placing articles about his firm in both local and statewide newspapers.

(The rest of this article is available online at www.wealthcounsel.com/newsletter/january2012.html)



New Year, New Opportunities

By: Matt McClintock, J.D. and Jonathan A. Mintz, J.D.
Executive Team, The WealthCounsel Companies



Dear Members and Friends,

Welcome to 2012! We're anticipating another year of significant change in our industry, and we look forward to change within our family of companies in response. By year-end we may have a new President, we may have a new estate tax structure, and we may be well on our way to a new era of strong economic growth. Or not.

As we begin the New Year one thing we can count on is continued change – probably at an ever-accelerating rate. Tensions in Washington seem to be reaching a head with influential factions on polar ends of the ideology spectrum represented in Congress and in various media outlets. Whether this tension reaches a point of legislative stalemate, or whether one group gets enough momentum to effectuate significant change remains to be seen. The prospect of legislative change brings excitement for new planning opportunities, and continued inaction by policymakers will continue to make markets fluctuate, perpetuating an uncertain planning environment, and creeping us ever closer to the next estate tax repeal deadline.

As you consider your practice and the ways in which you can strengthen relationships with your clients and other professionals, your strongest point of leverage is the continued era of economic and legislative uncertainty. Clients look to you as one of their most informed and trusted advisors to help them and their families navigate life's uncertainty. That uncertainty is sometimes imposed by legislative action or inaction, and sometimes it's a natural byproduct of clients' dynamic lives. But either way, uncertainty breeds fear. Your mission is to guide families through that fear to peace of mind.

One of our major initiatives in 2012 is aimed at creating a groundswell of public interest in estate planning-related issues – most of which, we all know, have nothing to do with estate tax. We will be very intentional about connecting interested members of the public with members of WealthCounsel and The Advisors Forum to create client relationships and promote more planning opportunities.

We will also continue to evolve our software in ways that will create greater efficiency and usability, and provide new software suites intended to allow you to expand the scope of service you provide to clients.

As estate planning professionals we adhere to the notion that the really sticky issues in estate planning have nothing much to do with whether there is an estate tax. Families will continue to grow, children will continue to need inheritance protection, clients will continue to age, businesses will continue to be formed, managed, and transitioned, philanthropy will continue... These can't be solved by formulas or forms; they're solved by wise counsel.

It's a New Year, ripe with compelling opportunities. We are looking forward to another year together serving you as you serve clients.

Matt and Jonathan
Executive Team
The WealthCounsel Companies

About the executive team – Matt McClintock and Jonathan Mintz serve respectively as CEO and COO of The WealthCounsel Companies, comprised of WealthCounsel, LLC and The Advisors Forum, LLC. From September 2008 through December 2011 Matt and Jonathan served as Co-Executive Directors of The WealthCounsel Companies. In January 2012 they adjusted their roles to more accurately reflect the nature of the working relationship and emphasize their strengths more effectively.

Upcoming Events

Live Education

January 18-20 - Scottsdale, AZ

February 15-17 - Atlanta, GA

March 28-30 - Dallas, TX

“Practice Building Boot Camp: Comprehensive Revocable Living Trusts and Practice Development Solutions”

January 25-27 - Orlando, FL

“Medicaid Immersion & Practice-Building Camp”



January 26-27 - Bellevue, WA

February 20-21 - Scottsdale, AZ

April 11-12 - St. Louis, MO

“Planning for Gun Owners and the GunDocx™ Trust System”

January 27 - Okemos, MI

“How to Build a Recession-Proof Practice” (Co-Sponsored by the Michigan State Forum)

Web-Delivered

January 17, 1:00 - 2:00 p.m. ET

Webinar “Proactive Tax Planning for 2012”



January 31, 1:00 - 2:00 p.m. ET

Webinar “Paying for College”



February 28, 1:00 - 2:00 p.m. ET

Webinar “What is Estate Planning? Wills vs. Trusts”



March 6, 1:00 - 2:00 p.m. ET

Thought Leader Series Webcast: “How Good Estate Planners Become Great Marketers”

State Forum Meetings

January 13

Northwest Regional Forum
Illinois State Forum Meeting

February 3

Central Florida Forum
Southern California Forum

February 9

Northern California Forum

March 16

Wisconsin State Forum

Visit www.wealthcounsel.com
for complete calendar of events.

Consider Digital Estate Planning Services For Your Clients

By: Scott R. Zucker, J.D.



Digital estate planning is an area of law that is still in its infancy. However, it could be of great benefit for you to develop your

knowledge and practical wisdom about digital estate planning to help you prepare for the ever-increasing demand for services in this area.

This article will briefly identify some of the issues involving digital assets and several steps you and your clients can take to protect them. You may be surprised to find that the applicability of this topic is not limited to younger families and individuals.

What Are Digital Assets?

The two main classes of digital assets are 1) any online account that requires a username and password; or 2) any file stored in places including an individual's computer, mobile phone, server, local DVD or CD-ROM or at online storage sites.

Online Accounts

If the client is the only person who has access to her online accounts, then what happens when she dies? Much of the concern involves the rights of the online company, which were granted when the individual initially accepted the account's Terms of Service (TOS).

Several issues to consider for online accounts requiring a username and password include the following:

- The TOS Agreements of most popular online companies rarely, if ever, allow for the immediate or automatic transfer of the account to the personal representative.

(The rest of this article is available online at www.wealthcounsel.com/newsletter/january2012.html)



Succession Planning and the Family Farm

By: Todd N. Hallock, J.D. and Sara Nelson Hallock, J.D.



"Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue." - Thomas Jefferson

The farmer as virtuous is well-established in our national consciousness and reverence for the family farm sets planning for it apart from other types of family owned businesses. Even children who do not plan to actively participate in farming have a deep emotional attachment to the farm. According to the USDA, approximately 96 percent of the 2.2 million farms are classified as "family farms." The average age of a farm operator is 57 and the fastest growing segment is those over age 65. This aging trend suggests the increased need for planning as farmers reach an age when transition must occur because of death, disability or retirement.

Often when the time comes for transition the farm owner will have two choices: (1) maintain the operation while transitioning ownership to a son or daughter; or (2) shut down the farming operation and sell or lease the land. The preference is usually to transition ownership to a son or daughter, but this option poses many challenges both financial and emotional. These challenges can often lead the farm family to ignore the issue in hopes that it will cure itself. Of course, ignoring the need for a plan will not solve the problem anymore than turning up the car radio will fix that noise in the engine. Whether from retirement, disability or death, the time for transition will come.

The following steps can increase the odds of a successful transition of the family farm to the next generation:

Identify and Train Potential Successor(s). Identify potential successors early and determine what they will need to know and do to qualify as a successor. Do you want the successor to complete his/her education in a particular area? Do you want the successor to gain experience working outside of the family farm operation? The plan should consider what skills the successor will need to develop.

Plan for All Transition Scenarios. As stated above, transition usually results from one of three occurrences: death; disability; or retirement. A solid plan should account for each of these alternatives. Careful analysis must be given to the financial requirements of the current farm operator as well as the succeeding children in each scenario. Options might include a lifetime purchase, an inheritance, a purchase from the estate, or a long term lease.

Fund the Plan. The source of funding must be considered in advance. Will the plan require financing from a bank or will the parents carry the obligation? Disability and/or life insurance can be very important funding tools. Starting early is important to increase the likelihood of insurability and affordability.

Consider the Non-farming Children. Fair does not necessarily mean equal. Dividing ownership of the farm equally between all children, both farming and non-farming, is usually a recipe for disaster. If you desire to make a gift to a non-farming child, that gift should come from another area of the family's wealth. Life insurance can benefit your planning by providing a source of funds to provide an equitable inheritance to non-farming children.

(The rest of this article is available online at www.wealthcounsel.com/newsletter/january2012.html)



Misconceptions and Misunderstandings About the Estate Tax Exclusion

By: Randall H. Borkus, MS, J.D., LL.M./Tax

If you are married and have a net worth of \$10M+, or single and have a net worth of \$5M+, or you are a professional that supports individuals in either tier of net worth please, read on.

What if I told you it does not matter what Congress does about the estate tax exclusion? (Except in the case of complete elimination of the estate tax altogether.) We have watched as Congress debated everything from the complete elimination of the estate tax to minimizing the taxpayer's ability to avoid it by returning the applicable exclusion to \$1M. Personally, I see a government that is desperate for money and the estate transfer tax is low-hanging fruit and thereby an easy mark for the tax collector.

For years now wealthy individuals and their estate planning attorneys have been stymied by Congress' inability to resolve the estate and gift tax law. Moreover, the rumor is that the return to a \$1M applicable exclusion is being discussed by The Joint Select Committee on Deficit Reduction (the "Super Committee") as recently as November 2011. What continues to go on in Washington is embarrassing and not likely to change during our lifetimes.

Mark Twain once said "The political and commercial morals of the United States are not merely food for laughter, they are an entire banquet." Notwithstanding the banquet in Washington, I believe that no matter what Congress does with the estate tax, advanced estate planning and asset protection planning techniques are still worth the investment!

Having said that, if Congress completely eliminates the estate tax it would be the one improbable case where advanced estate planning would not retain its value; at least as to limiting one's estate tax exposure.

The reason the estate tax is an easy mark for Congress is that a large percentage of Americans do not take the time to put their estate planning in order. Furthermore, the Congress and the government know that most are guilty of fractured planning at best and count on it to raise funds. Excuses for not planning are numerous; "I forgot," "I'm too busy," "I'll get to it next year," but the very worst and inaccurate excuse is "I'll wait to see what Congress does with the estate tax law."

Therein lies a huge lost opportunity for wealthy individuals who believe that waiting is the answer. The truth is when an individual pursues comprehensive estate planning and asset protection planning, the investments and benefits created are effective no matter what Congress does with the estate tax exclusion.

In order to support this proposition, we ran simulations at Wealth Preservation Concepts, LLC looking at sample net worth clients of \$10M, \$20M, \$30M and \$50M and isolated the advantage created from advanced planning in each scenario. What we found when isolating the advantage from the advanced planning is that it is consistently valuable regardless of what Congress does with the estate tax exclusion.

In our research, we examined the advantage created from advanced planning using exclusion scenarios of \$1M, \$2M, \$3.5M or \$5M. We compared a sample advanced planning scenario to a "no planning scenario" under the same exclusion assumptions and projected the estate over a 20 year period using a 4% annual growth rate. See the \$20M example in Exhibit 1 (THE BENEFITS OF INVESTING IN ADVANCED PLANNING).

(The rest of this article is available online at www.wealthcounsel.com/newsletter/january2012.html)

Ins and Outs of Trusts

By: Gary B. Garland, J.D., CELA¹



Some of the public does not know what a trust is. Others think it is merely for the rich. Many others have come to me and said something like "I need a trust," as if it is aspirin or some panacea. What most of the public (and most non-estate planning attorneys) don't realize is that there are roughly 65 different types of trusts, some more broad than others, some quite specialized, and many share similar features. This brief overview should be a simple reminder for the seasoned practitioner, or a starting point for those new to the wonderful world of trusts.

First, let's start with the basics – the Trust has three "points" – a Grantor (Settlor, Trustmaker), a Trustee, and one or more beneficiaries. The Grantor creates the trust, the Trustee carries out the instructions of the Trust, and the beneficiary benefits from the trust. In some circumstances, the Grantor may wear all three hats.

Grantor or Non-Grantor? Included in the estate or excluded? Available to the beneficiary? Beneficiary's ability to control part or all of the trust? These probably rank highest in the architecture of the trust, so let's attack those first.

Grantor Trust versus Non-Grantor Trust

A Grantor Trust is a trust where the grantor has retained certain control over the trust. Any trust income is taxed on the Grantor's personal tax return (1040), at the Grantor's personal income tax rates. Conversely, a Non-Grantor trust's income is NOT taxed to the Grantor, and the trust is taxed at the compressed (usually higher) trust rates on a trust tax return (1041).

¹ Certified as an Elder Law Attorney by the American Bar Association as Accredited by the National Elder Law Foundation.

(The rest of this article is available online at www.wealthcounsel.com/newsletter/january2012.html)

Coming Soon: The WealthDocx® Winter 2012 Enhancement

The enhancement features a comprehensive style review of the RLT system and modifications to the LLC Operating Agreement

While the hallmark of the WealthDocx drafting system is the collaborative input of numerous users, contributions from various authors over the years have resulted in language inconsistencies. To address this, WealthCounsel is undertaking a comprehensive style review of the entire drafting system to provide clarity and consistency in each of the document assembly systems within WealthDocx.

The WealthDocx Winter 2012 Enhancement features a comprehensive style review of the Revocable Living Trust system which brings clarity and consistency to the RLT system. The result is an improved readability index that retains the documents' legal precision. Well-crafted, consistent language conveys a positive message about the attorney to

his/her clients, and enhances the chances for referrals from other professionals working with those same clients.

The enhancement also features revisions to the LLC Operating Agreement that will give members the ability to create LLCs with voting and non-voting interests without the need for customization. And while the WealthDocx LLC module already includes an option to issue preferred LLC distributions in

LLCs taxed as partnerships, it did not include a similar option for LLCs taxed as C Corporations. With the Winter Enhancement, members now have this expanded functionality for LLCs taxed as C Corporations.

Information about the availability of the Winter 2012 Enhancement will be posted on the Member's website and distributed via email in the Weekly newsletter.



“ Well-crafted, consistent language conveys a positive message about the attorney to his/her clients. ”

-Thomas Ray, J.D. CFP®
Executive Editor - WealthDocx®

Announcing the GunDocx™ Trust & Legacy Planning System

Not just a Gun Trust, but a comprehensive solution to build a successful niche practice

WealthCounsel is committed to ensuring that the WealthDocx drafting system meets the needs of all members, including attorneys with niche practices. To this end, we have identified a unique opportunity to extend the robust capabilities of WealthDocx to help attorneys whose clients include gun owners and firearms enthusiasts.

The *GunDocx™ Trust and Legacy Planning System* is the nation's only comprehensive firearms legacy planning system. This system includes: (a) a stand-alone module to the WealthDocx drafting system featuring a special purpose revocable living trust specific to firearms and accessories; (b) a two-day firearms legacy planning CLE course; and (c) a subscription-based social media marketing

system designed to help attorneys build a niche practice through online “communities of interest” serving gun enthusiasts. The three primary components of the system may be purchased separately or as a bundle.

By offering a comprehensive, organized approach that includes drafting software, education, and a marketing solution, we can increase the likelihood of success for an attorney to quickly build and execute a specialty practice in firearms legacy planning.

The demand for this solution originates from the fact that the transfer of certain firearms and accessories are restricted by federal, state and local laws. A properly drafted Gun Trust will help heirs avoid improper transfer of firearms that can

constitute a criminal offense. In addition to helping attorneys address the legal issues that gun owners face, the system is designed to help attorneys add a valuable new service to complement and/or enhance his or her core practice.

In conjunction with the release of the GunDocx Trust, WealthCounsel is offering a two-day educational course, the first of which will be held Jan. 26-27, 2012 in Bellevue, WA. The course will also be offered in Scottsdale, Feb. 15-16, 2012, and in St. Louis, April 11-12, 2012.

For more information about investing in the *GunDocx Trust & Legacy Planning System*, or to register for the educational course in a city nearest you, please check the Members' website for details.

Creating Legacies: What's Your Story?

As we leave the Holiday Season behind and enter another new year, we are mindful of the many families whose lives we've touched over the past year.

Estate planning truly is about "creating a legacy" for one's heirs, and each RLT or LLC we draft has a story behind it. These stories often involve the client's wish to protect beneficiaries' assets from creditors, or to ensure that a family-owned business is passed down properly to the client's heirs.

You have often heard that one of the most powerful tools that speakers use to deliver a message the audience will remember, is to begin the speech by "telling a story." WealthCounsel is offering members the opportunity to participate in a public relations initiative where they can share compelling stories on video about clients whose lives they have touched.

The *Creating Lasting Legacies* campaign was launched in October 2011 in conjunction with National Estate Planning Awareness Week. The initiative's main purpose is to showcase the meaningful work being done each day by WealthCounsel members, and to educate the public about the importance of having a proper estate plan.

Through May 2012, the campaign will showcase up to 24 members who will each share a compelling client case study in a YouTube video. In June 2012, an online public voting contest will be held to choose the top three stories and the winners will receive cash prizes. As of December 31, 2011, eight WealthCounsel members had shared their stories and their YouTube videos were published on the WealthCounsel website.

We encourage all members to visit the Legacies website page and view the



videos at www.wealthcounsel.com/Creating_Lasting_Legacies.aspx. And, if you use social media, we encourage you to "Like" or "Share" videos with your associates, clients, or friends. Members who are interested in sharing a client case study should view the participation guidelines found on the Legacies website page. For more information on how to participate, please feel free to email Lori Berry at lori.berry@wealthcounsel.com.

Participation in Annual Industry Trends Survey Increased by 30 Percent

The WealthCounsel Quarterly newsletter continues to rank among the top three most read publications

A report detailing the key findings from the *5th Annual Industry Trends Survey* will be available to members and to the public beginning January 9, 2012 on the WealthCounsel website.

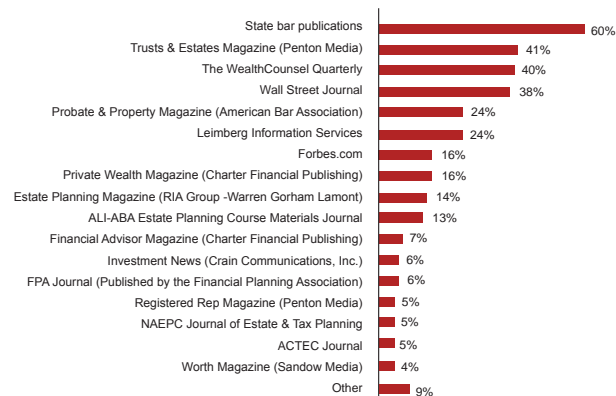


Between Sept. 7 and Oct. 21, 2011, a total of 1,085 respondents participated in the survey. This represents a 30 percent increase compared to 831 respondents who participated the previous year. A total of 419 WealthCounsel members participated in the survey, representing 38 percent of the response base.

When asked which publications they read regularly to stay abreast of issues relating to estate planning, 40 percent of respondents chose *The WealthCounsel Quarterly* newsletter. A segmented analysis of response data indicates that 79 percent of WealthCounsel members read *The WealthCounsel Quarterly* on a regular basis.

Figure 20:

Which of the following publications (either print or online) do you read regularly to stay abreast of issues relating to estate planning?



Dealing with Addiction: The Estate Planner's Role in Helping Families Heal

By: R. Scott Corey, J.D.



Over the past twenty years I have worked with a number of clients whose lives were impacted by alcoholism, chemical dependency, gambling and other self-destructive behaviors (collectively “addiction”). Statistically, 43 percent of Americans have been exposed to alcoholism in their families¹ and the outlook for the future is not improving. In a recent study, 1 in 8 Oregon children 12 and older reported using an illegal drug in the 30 days prior to the survey². How many will become addicts or alcoholics? Will they be your client’s children or grandchildren?

Parents are concerned about protecting and preserving their children’s financial legacy and the dark horse of addiction could impact their plan design in three ways: First, even if there are no signs of addictive behaviors among family members it may be an unlikely but possible future problem. Second, if the family’s genetic history indicates a propensity for addiction, it is a more likely potential problem. And finally, known addiction may be affecting one or more immediate family members (parents or children). The addiction may be active or the family member may be in “recovery” after undergoing successful treatment.

1. <http://www.drug-rehabs.org/alcohol-statistics.php>
2. Substance Abuse Mental Health Services Administration (SAMHSA) 2010 State level data report

(The rest of this article is available online at www.wealthcounsel.com/newsletter/january2012.html)

The Peter Principle – Alive and Well

By: Peggy Hoyt, J.D., M.B.A.



The concept behind the Peter Principle is that people get promoted until they reach a level of incompetency. This makes sense. As long as I’m doing well, learning, and performing, my efforts may be noticed and if there is an opportunity for advancement, I’ll get promoted. Ultimately, I’ll be promoted to a level where I’ve exceeded my capabilities to learn and grow - hence, the idea that I’ve reached the outer realm of my competency.

We’ve probably all seen the Peter Principle in action. These are people who are not competent to carry out the responsibilities they’ve been given or in some cases, responsibilities they’ve assumed on their own. As an entrepreneur I sometimes feel this way about myself. There are so many hats I have to wear - and wear well - that it’s no surprise there will be some tasks I’m just not good at.

Fortunately, as the business owner, I have the ability to delegate the tasks I’m not good at or to outsource these tasks entirely. The problem is recognizing the things we are not good at - that are not one of our unique abilities - and to assign this task to someone who has the requisite skills.

As solo or small firm practitioners we have a tendency to wait too long to realize we aren’t good at something. If we were capable of going to law school and passing the bar, then certainly we should have the ability to do the bookkeeping, the filing, the purchasing of office supplies, the hiring of team members - whatever it is that may need to be done. As such, we have blinders on to our real abilities - those things that will ultimately allow our businesses to grow and succeed.

The reality is we aren’t good at everything and it’s foolish to believe we are and to try to do it all. When we do try

to do it all, pretty soon Peter shows up. Then, we aren’t doing anything well because we are trying to do too much. We are also doing things that are taking our focus off the things that really are important to our success.

What are the things you do well? Sit down and really examine what your greatest contributions are to your practice and ultimately to your success. What are the things you don’t do well? What is just busy work that is eating up your productive time? How can you work smarter, not harder? What are you passionate about that gives you energy - the things you could do all day without getting bored or distracted? I ask myself these questions all the time. Sometimes the answers aren’t what we really want to hear or even, to know. You may have to ask a friend or trusted team member to help you identify your unique abilities and then hold you to task to only do those things that fall within that realm.

In our practice, I have three jobs that I do well: (1) Teach or write - in other words, educate people about what we do and how we do it; (2) meet with prospective clients; and (3) meet with people who can send me more clients. I’m famous for telling my team that if I’m doing anything else, then I’m probably doing their job. That can really get people scurrying! The reality is - the other aspects of our practice are not a good use of my time. That’s not to say there wasn’t a day when I tried to do everything. But, and fortunately for me and for the firm, I learned early how to delegate tasks to people who did a better job and had the skills and temperament for performing them well.

I spoke last weekend at an event for lawyers. I was asked to speak on two topics I’m really passionate about - social media and marketing. Interestingly, I’m getting asked to speak on these topics more often.

(The rest of this article is available online at www.wealthcounsel.com/newsletter/january2012.html)



Physicians Beware: The Buy-Sell Agreement and the Damages of its Absence in a Medical Practice

By: Patrick Phancao, J.D.

Truth be told, a buy-sell agreement is applicable to all sorts of businesses. However, because of the high income resulting from a physician's "sweat" equity, coupled with the fact that family heirs are not allowed to own a medical practice; this article is specifically dedicated to physicians. Let's jump right in...

Imagine the intense years you spent in Medical School, slaving away as an intern, the dreaded hours at the hospital; you finally get to open up a practice with a partner. Lo and behold, your reputation follows, your office starts to create a solid patient based clientele, and you finally generate a solid income stream for you and your family. Just as things are starting to settle down, you hurt yourself on a weekend activity. As a surgeon, imagine a hunting accident causing you to lose feelings on your operating hand. What about suffering a stroke, and thus preventing you from being fully functional, or a car accident taking your life away prematurely? Now I promise this is not the way I think. But unfortunately, these random accidents happen to physicians all the time. This is where a buy-sell agreement can make or break the family members and the partners left to deal with these issues.

Buy-Sell Agreement Definition:

First of all, a buy-sell agreement is nothing more than an executed contract where all the owners agree as to how the practice will be valued at the time of one of the partner's death or disability, and how the stock ownership will be purchased. Without such an agreement in place, the accidents mentioned above could bring a thriving business in the middle of a complicated legal proceeding.

Benefits:

Some physicians who see themselves as healthy and not susceptible to accidents also stand to benefit from such arrangements. Think of a younger and older doctor joining forces, the terms of how to purchase the other party's interest out in case of a mishap can be negotiated from the beginning in fairest terms for both sides.

Just as in any type of business, it is essential that "the show must go on." Any industry must have a continuous, orderly manner of conducting its practice. The medical one carries a burden that reaches beyond financial gains or losses. Therefore, a patient wants to have the comfort of knowing that his / her physician's office can easily and without hassle continue a treatment that needs to be followed closely.

As mentioned previously, unlike a business involving widgets, a physician's "asset" lies in his knowledge and experience. A doctor's set of skills is hardly something that can be passed on to heirs. Because the sweat equity will have generated some income stream, it is only fair that a financial pay-out be agreed upon for the family members that would be left behind.

In the event of an incapacity or premature death of one of the key physicians, his / her early exit can force a practice to associate itself with unwanted seed capital. Having seen this happen on more than one occasion, I can tell you this is not a position you want to find yourself in. Again, a buy-sell agreement would prevent finding yourself in such predicament.

The necessary components to a buy-sell agreement:

There are many workings within a successful implementation of a buy-sell agreement. The first one is to make sure to have it funded. This translates to having a reputable insurance policy in place. The premiums you end up paying to have this contract in place will well be worth its weight in gold.

Naturally, not all buy-sell agreements are created equal. Some key clauses you want to ensure your attorney includes in it are: The cost of buying out the partner's share in case of incapacity / death, a provision to buy out the ownership interest over time in the event of insufficient capital, the care of the family members left behind, and early buy-out options. These are just some of the issues you will want to address.

A buy-sell agreement can often be seen as the estate plan of the business. Not always the most appealing side of being a responsible person, but its benefits are priceless!

About the Author:

Patrick Phancao is an Estate Planning Attorney licensed in CA, FL, and the U.S. Patent & Trademark Office. He is the cofounder of Asset Protection & Elder Law Center in Irvine, CA, and is a member of WealthCounsel and NAELA. His entire focus is ensuring that his clients and their families are protected from unnecessary legal and tax issues regarding their assets. Mr. Phancao takes great pride in putting his client's "voice" in their estate plan, creating a lifetime legacy for future generations that reach far beyond mere wealth. Should you have any questions regarding this article, please visit www.apelcenter.com, and simply request the absolutely free report on your particular legal concern. Should your need be pressing, simply call 714-966-2646.

(Continued from p. 1, "Battley v. Mortensen")

His mother also gave him \$100,000 "to transfer the property to trust because she wanted to preserve it for her grandchildren." In April of 2009, Mortensen became ill, accrued massive credit card debt and filed for Chapter 7 bankruptcy in August of the same year. He disclosed \$26,421 in assets on the itemized personal property list provided to the Court, but did not include his interest in the DAPT (although he revealed the existence of the trust).

Despite Alaska's four-year statute of limitations for reaching assets transferred to a DAPT, the Court applied federal law, which includes a ten-year statute of limitations from the date a bankruptcy petition is filed for setting aside a fraudulent transfer if the transfer was made with "actual intent to hinder, delay, or defraud" a creditor. *See* Bankruptcy Code Section 548(e). Therefore, the remaining issue to be decided was whether Mortensen made the transfer to his trust with the actual intent required to set aside the transfer.

Since, by the terms of the DAPT, the purpose of its establishment was "to maximize the protection of the trust estate or estates from creditors' claims," the Court held that the transfer was made by Mortensen with the clear intent to hinder, delay or defraud his creditors. Although Alaska law also states that "a settlor's express intention to protect trust assets from a beneficiary's potential future creditors is not evidence of an intent to

defraud," the ten-year statute of limitations under federal law was enacted in order to close this self-settled trust loophole, and the Court followed this legislative intent. In determining Mortensen's actual intent, the Court not only looked to the purpose provision within the trust, but also considered his continual steady decrease in income, mounting credit card debt, statements of financial strife after his divorce and his lost stock market investment of the \$100,000 from his mother (rather than using the funds to pay off his substantial credit card debt). Thus, the transfer to the DAPT was set aside and the recreational property was sold to satisfy his creditors.

Is this ruling the beginning of the end of DAPT planning, or was this merely an advisory, fact-specific ruling that provides additional clarity to the current DAPT rules? Lawyers are split as they speculate whether this outcome was a fluke or the new reality. Although the Court did not uphold Alaska's four-year statute of limitations to prevent Mortensen's transfer from being set aside, the four-year rule is still effective and powerful against claims for assets held by a DAPT. However, when Mortensen erred by filing for bankruptcy without consulting an attorney, he unknowingly exposed himself to the Bankruptcy Code and its ten-year "clawback" rule. Had he not filed, Mortensen would have remained protected by Alaska's four-year rule. Despite the concern that this case signals the end of the utility of all DAPTs, many argue that Mortensen was simply a case of bad facts with an

unsurprising result, given that the debtor elected to file for bankruptcy prior to the expiration of the ten-year statute of limitations, and openly admitted that the trust was created to protect his assets from creditors – the very intent that is required by federal law to set aside the transfer!

Ultimately, Mortensen was not a proper candidate for a DAPT since he had waning anticipated income, almost no net worth beyond the Alaska recreational property and escalating debt. While some contend that the sky is falling and landmines are erupting in the realm of DAPTs, this case provides clarity and guidelines for properly establishing an asset protection trust. Rather than contributing to uncertainty, the Court ultimately validated those DAPTs that were not established to defraud creditors, as well as those trusts established more than ten years prior to filing for bankruptcy, regardless of their purpose. In light of this holding, DAPTs remain an effective asset protection strategy when properly marketed, drafted and implemented.

About the Author:

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(Continued from p. 2, "Statutory Right")

Even when a child is born on U.S. soil, parents should apply for dual-citizenship from their home country for their child. This has two effects: first, it indicates the parents' intent for their child to have connection to the home country; and second, it provides a basis from which guardians in the home country can request assistance from their own state department. Without dual citizenship, the home country's state department has little standing to assist with an expatriation.

If a parent wishes a child to remain in the U.S. but names a non-citizen guardian, it is unlikely that guardian will be permitted to remain in the U.S. by virtue of a guardianship alone. Parents must name a U.S. guardian or a person who would be entitled to emigrate for other reasons unrelated to a guardianship.

Best Interests and the Hague Convention

Despite a parent's right to nominate a guardian—and a word of caution—a

court can invoke both the "Best Interests" standard and the protections of the Hague Convention, (http://www.hcch.net/index_en.php, last visited 12/4/2011), to retain custody over a child who would be returned to a country where they would be endangered or persecuted. Most of us will work with families from countries where endangerment is not a risk, but you should be aware of and counsel every non-citizen client of this caveat.

(The rest of this article is available online at www.wealthcounsel.com/newsletter/january2012.html)

Well, no. Congress, in its seemingly infinite wisdom, has for more than a century enacted various schemes to protect authors from themselves - or, to be fair, to protect them from being taken advantage of early in their careers by predators who would pay them a pittance for their work. The 1909 Copyright Act provided an initial 28-year term of copyright protection, followed by a second 28-year "renewal" term whose rights vested either in the author, if still living, or if deceased, in statutorily-designated successors who recaptured any U.S. rights from any prior grantee of the author.

But this right was eroded over the years by various court decisions and industry practices. So, when enacting the 1976 Copyright Act, Congress created a new termination right that, unlike the 1909 renewal-term right, was inalienable by the author during his lifetime. (The 1976 Act termination right also applies to works that pre-existed its effective date.)

Under the 1976 Copyright Act, the following statutory successors, if they jump through the right deadline and filing hoops properly, and in the proper order, may be able to *terminate and reclaim* an author's lifetime grant of literary rights, *including an inter vivos grant to a Trustee*:

- The widow (or widower), who takes the entire termination interest unless there are children or grandchildren, in which case she takes half.
- The author's children and grandchildren, *per stirpes*, subject to the

widow's share just mentioned. The children of a dead child must act by majority decision.

- If there is no living widow, child, or grandchild, then the author's executor, administrator, or trustee will own the entire termination interest.

See 17 U.S.C. secs. 203(a)(2) and 304(c)(1). (There are other rules, such as the condition that a group of successors may exercise termination rights only if the group represents collectively more than half the rights that exist.)

To both complicate and simplify matters, though, some categories of copyright grants are immune from termination. Grants of copyrights in works made for hire are not terminable. Grants of non-U.S. copyright interests are not terminable under the Copyright Act (although they might be under applicable foreign statutes). And, most significantly for estate planners, *a copyright grant made in a Will is not terminable*, unlike an inter vivos grant to the Trustee of a revocable living trust. 17 U.S.C. secs. 203(a)(2), 304(c). See, e.g., *Larry Spier Inc. v. Bourne Co.*, 750 F. Supp. 648, 650, (S.D.N.Y. 1990), <http://is.gd/j60912>, *rev'd on other grounds* 953 F.2d 774 (2d Cir 1992).

As a practical matter, then, estate planners should keep this unique provision of law in mind when designing and funding living trusts for authors and artists. Funding a living trust with literary rights via inter vivos transfer can open up a door for termination litigation instituted after the author's death by unruly widows, or heirs who are omitted as beneficiaries or given only limited in-

terests in trust assets, or groups of heirs who band together to defeat spendthrift limitations. Or, in a worst-case scenario, creditors or divorcing spouses of heirs might discover termination rights of which the heirs themselves were not aware.

Attorneys who advise executors, trustees, and heirs (whether the heirs are disgruntled or happy), or act as executors or administrators themselves, also need to be aware of how termination rights work. They should be prepared to assert them, or defend against their unwarranted assertion, as may be appropriate.

The safest course of action for trust-based estate planners will usually be (i) to specifically exclude literary rights from general inter vivos assignments of personal property to Trustees, and (ii) to specifically include them in either a stand-alone or residuary clause of a pour-over Will. This will assure that they are transferred to the Trust under the provision of the Copyright Act referred to above that makes transfers by Will non-terminable.

For a more detailed discussion of the theory and practice of terminations of copyright transfers, with many useful citations, see Bill Gable, *Taking It Back*, LOS ANGELES LAWYER, June 2008 at 34, <http://is.gd/7uroMg>.

About the Author:
Doug Welty is the owner of C. Douglas Welty P.C. in Arlington, Virginia. He focuses his practice on estate and trust planning and wealth preservation. Doug received his J.D. from the University of Virginia in 1982, and is a member of the Virginia State Bar and the District of Columbia Bar. His website is at weltyblair.com.

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