THE WALSHLAW REPORT

Experts in Estate Planning, Elder Law, Taxation, Business Law **Spring/Summer 2003**

Bad Facts Make for Good Law

So goes an old legal maxim, meaning that in some cases a legal victory by an unsympathetic party is important in protecting or establishing a sound legal principle. An example that springs to mind is a decision from 25 years ago allowing Klansmen to march through Skokie, Illinois - repugnant party, important legal principle.

Another example occurred here in Maryland recently in the case of *Duvall v. McGee*, in which the Court of Appeals of Maryland (the highest state court in Maryland - we do not have a state "Supreme Court") prohibited the estate of a murder victim from collecting against a trust on a judgment it had obtained against one of the murderers who was the primary beneficiary of the trust. Although we are sympathetic to the victims, we believe the court reached the right result.

Sally McGee died in 1993. In her will, she established a trust for the benefit of her son, James McGee (who apparently had a history of drug abuse), rather than leave his inheritance to him outright. Under the terms of the trust, the trustee (one Frank B. Walsh, Jr. - no relation) could pay out such amounts of the income or principal of the trust to James McGee, or to McGee's wife or to McGee's children or descendants, or to any charitable, medical, educational or religious institutions that the trustee chose. The trustee also had broad discretion to terminate the trust at any time, in which case the assets of the trust could be distributed to any one or more of those beneficiaries as determined by the trustee. Like most trusts, her trust was a "spendthrift trust", meaning that it had a clause in it that prohibited any beneficiary from assigning his or her interest in the trust, which in turn means that a beneficiary's creditors cannot attach the beneficiary's interest in the trust.

In 1996, McGee and Richard Willoughby were convicted of the 1995 murder of 74-year-old Katherine Ryon, a longtime friend of McGee's mother. McGee claimed that he and Willoughby had gone to Ryon seeking money for drugs, and that Willoughby strangled Ryon after she did not give them any money, while McGee looked on, afraid to do anything. Both McGee and Willoughby were sentenced to life without parole. Willoughby died in prison in 1997.

Robert Ryon Duvall, the personal representative (executor) of Ryon's estate, sued McGee. In 2001, McGee and Duvall entered into a settlement agreement in which a judgment of $600,000 was entered against McGee. At that time, the trust was valued at almost $900,000. Under the terms of the settlement agreement, Duvall agreed not to seize any part of regular distributions of about $3,000 per year that the trust made to McGee (which he reportedly uses for music, art supplies and magazines) or any payments by the trust for McGee's legal fees.

Duvall then sought to garnish the assets of the trust to satisfy the judgment against McGee. The trust contested that garnishment. There was no dispute as to the facts before the trial court, and both Duvall and the trust moved for summary judgment (a legal short cut that essentially means "No matter how your honor looks at the other

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side's case they can't possibly win, so let's quit wasting the court's time and enter an order in favor of our side right now").

The Circuit Court for Anne Arundel County granted summary judgment for the trust, holding that Maryland law was clear that Duvall could not garnish assets of the trust and that any change of the law would have to come from the legislature, or that the Court of Appeals would have to interpret the law further than it previously had.

Duvall appealed to the Court of Special Appeals (our intermediate level court). Before the case could be heard by the Court of Special Appeals, the Court of Appeals decided on its own to hear the case directly (itself an unusual step, meaning that the higher court already recognized that this was a very significant case deserving its attention).

Over the last 60 years, Maryland courts have allowed spendthrift trusts to be attached for a beneficiary's alimony, child support or (perhaps) taxes as "public policy" exceptions to the general rule. The Court of Appeals reviewed those exceptions, and distinguished them as being based on enforcement of a beneficiary's legal duties rather than debts. This might be only a semantic difference, but in law that's sometimes enough.

The Court of Appeals also considered, and rejected, Duvall's claim that the spendthrift provision should not be respected here because one of the reasons frequently cited for upholding them did not apply. When a lender voluntarily extends credit to a beneficiary, they can check the beneficiary's credit to determine if they have sufficient income, assets and character to repay the lender. Mrs. Ryon did not have the opportunity to review her assailants' creditworthiness. Although the Court of Appeals acknowledged that distinction, they did not find it persuasive enough to allow the trust assets to be garnished.

Now as you read through this article you might be thinking "How could the Court of Appeals let McGee keep all that money? How could they think the Court of Appeals reached the right result?" Fair questions; let's take a closer look.

Let's keep in mind that this case does not involve a situation where the murderer would actually profit from his crime, e.g., by inheriting from his victim or by writing a book about his actions. Maryland law already prohibits felons from profiting from their crimes in those situations.

The money does not, and never did, belong to James McGee in the first place; it previously belonged to his mother and now it belongs to the trust. Mrs. McGee obviously had good reason to place her son's inheritance in trust rather than giving it to him outright, although we doubt that she foresaw the degree of trouble that he would get himself into. She certainly did not intend for her son's creditors (even his judgment creditors) to be beneficiaries of her estate. Had Mrs. McGee thought her son's creditors could get any part of her estate, she might not have left him anything at all. Changing the rules after the fact would be unfair to the late Mrs. McGee.

Remember that the settlement agreement was negotiated between Duvall and McGee only. The trust was not a party to those negotiations. The trust spends about $3,000 per year for the incarcerated McGee. The settlement agreement specifically exempted those payments from attachment. McGee is in prison for the rest of his life. As long as there was enough money left in the trust to make those payments to him (and there would be), what does he care if Duvall gets

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the rest of the trust money? Once his payments were exempted, McGee had no real incentive to contest the entry of the judgment against him. Should we allow McGee to spend other people's money?

McGee apparently never married nor had any children. Who really loses if Duvall gets most of the trust money? Those charitable, medical, educational or religious institutions that would receive the trust funds when McGee dies. Is it really fair then to take money from those institutions while allowing the murderer to keep enough money to maintain or enhance his standard of living?

It is true that Mrs. Ryon did not have the opportunity to evaluate the creditworthiness of her assailants. But, would that have made a difference to her? Very few criminals have sufficient funds for their victims to recover damages. Should the result change just because *McGee's mother* (not McGee) had money? If Mrs. McGee were still alive, should Duvall have had the right to require her to leave her money to her son so that he could eventually get it for the Ryon estate?

It also endangers future, and deserving, trust beneficiaries to open the door "a little", at first just for intentional acts. Lawyers for anyone injured by a trust beneficiary would then routinely add an intentional act claim in an effort to shake-down a settlement from the trust. Later, trustees for beneficiaries with disabilities could find those trust funds are subject to attachment in the name of "public policy", and those trust funds, rather than enhancing the beneficiary's lifestyle as the beneficiary's parents or grand-parents intended, will be seized by the state and the beneficiary will be relegated to a subsistence level existence. Eventually, we could get into a system where parents have to leave their money in equal share to their children, no matter how deserving or undeserving, capable or incapable the child, because the child and his or her creditors "rightfully expected" that they would receive an inheritance.

On a strictly pragmatic level, many states (e.g., Alaska and Delaware) have been trying to attract additional trust business by strengthening their rules regarding the protection of trust assets from creditors. If Maryland starts to move in the other direction, those that can afford to do so will just move their trusts elsewhere.

Every law involves a balance between competing interests. We need to draw lines somewhere. We think the Court of Appeals drew the line properly.

"Guiding you through the maze of Legal issues as you age."

Elder Law Corner

Understanding the Needs of Elders

Where Does Estate Planning End and Elder Planning Begin?

We are often asked questions by clients, associated third parties, and others concerning the gray area between estate planning and elder care planning. The reasons for this are understandable and predictable: 1) we are all members of an aging population, 2) seniors, those persons over age 60, are increasing in significant numbers, 3) because of this on-going elder boom, government programs and families are under pressure regarding elder care, and 4) estate planning has traditionally not taken elder law issues into consideration. But is there a relationship between these two areas of the law?

The answer is a qualified Yes. Estate planning, planning for the orderly and appropriate distribution of property and its tax consequences, should be the first step in elder care planning. Conversely, elder care issues such as long-term care planning should be a part of estate planning. However, not all elder care issues should be or can be addressed as part of an estate plan.

The reasons for this are:

a) Every elder and family situation is different. There is no cookie-cutter method for crafting an appropriate care plan,

b) In elder law, there is generally more than one possible right answer. There may be as many as three or more different options in a given situation, each with its own advantages and disadvantages, and

c) Most importantly, many elders do not want to implement any elder care planning strategies prior to a crisis because pre-crisis elder care planning involves giving up the control of assets accumulated over their lifetime. These elders wish only to put into place necessary estate planning documents while maintaining independence and control.

The following examples illustrate this. An elderly client once visited our office accompanied by her children. The client already had all of her estate planning documents in place, in this case a revocable living trust, general durable power of attorney, and advance health care directive. As is often the case, the children were well intentioned and were concerned about their mother's assets being an available resource that could be lost to long term care costs and/or subject to Medicaid spend down. After interviewing and advising the family for approximately ninety minutes, the children excused themselves for a short break, leaving the elder and us alone for the first time. It is essential in our practice to be able to speak in complete privacy, without anyone else present. In the privacy of that moment, the elder confided to us that she had no desire to implement any of the options I had described to her regarding various pre-crisis elder care planning strategies. She also told us that she had only come to meet me for reasons of personal curiosity and courtesy to her children. We concluded that the client had made her feelings and intentions clear, and having already put into place all the essential estate planning documents, there was nothing further to discuss concerning

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elder care planning.

The client's goals concerning the disposition and management of her property were satisfied, and unless those were to change, or the status of the client's health to change, the client's plan was complete.

Conversely, a couple we will refer to by the fictitious names of Bob and Helen once sought estate planning and elder law advice without any urging from their children. Bob was 71years old, in good health, while Helen was 70, in apparently excellent health. The couple made it clear that they were committed to the idea of implementing certain pre-crisis elder planning techniques into their overall estate plan, so that in the end, the bulk of their estate would be protected from long term care losses.

However, they also revealed that i) their children were spendthrifts, ii) they planned to continue to be very active and travel extensively, and iii) they were going to continue to actively participate in the management of the family business. Due to the size of the estate, the client's good health, their lack of trust in their children's management of money, and their desire to remain completely independent, we suggested that the following actions were in order:

1) The implementation of appropriate estate planning documents,

2) The potential purchase of long term care insurance, and

3) Preparation for self-insurance against some portion of the potential costs of care.

Rather than the implementation of other more restrictive and unrealistic strategies, many elders require flexibility notwithstanding an overall desire for comprehensive planning. Despite a willingness on a client's part to implement certain pre-crisis strategies beyond the essential estate planning documents, many clients do not necessarily need to do so and should not do so.

Finally, there are those elders whose financial status and deteriorating health require that they consider all available planning techniques. These seniors may have previously been unwilling to consider such options, but are now forced to address issues such as asset depletion or qualifying for medical assistance. Fortunately for these elders, appropriate strategies and courses of action can still be discussed and implemented at that time.

Elder care planning is both situational and client driven. Notwithstanding the importance of financial status and its effect on the choices available to elders, it is essential that family members, trusted friends, and professionals also remain mindful of the goals, plans, lifestyles, and wishes of elders, even when those contradict what theoretically would seem "best" for them.

If you would like to schedule a two-hour elder law consultation, please call us during normal business hours.