



Norfolk & Plymouth Estate and Business Planning Council

Presents...

When a Great Estate Plan Collides with Life

Thursday, September 17, 2015

8:15 am to 9:00 am: Registration, Breakfast, Networking

9:00 am to 11:00 am: Educational Program

Lantana, 43 Scanlon Drive, Randolph, MA

Most advisors don't know what to do when incapacity and addiction problems wreak havoc with a client's estate and financial plans. Do you simply wait for the "second shoe" to drop, or do you have strategies and resources ready to implement, so that you are truly a family's trusted advisor? Listen to a seasoned estate planner and probate litigator dissect the case study of Gwendolyn and Maurice. After a lifetime of hard work, this elderly couple now risks losing their family business and wealth due to their heir apparent's divorce, coupled by mental health and addiction problems.

By Attending, You Will Learn:

- Managing the Crisis & Triage Techniques for Protecting the Client's Health & Assets
- Utilizing Geriatric Care Managers & Addiction Experts as part of Your Team
- Appointing Successor Fiduciaries & Removing Fiduciaries: Powers of Attorney, Health Care Proxies, Guardianships & Conservatorship, Trustee Succession
- Impact of Divorce on a Family Business' Operation
- Highlights of recent Appeals Court case *Pfannenstiehl v. Pfannenstiehl*

Our panelists...

Lisa M. Cukier, Esq., Burns & Levinson, LLP, Boston

Daryl Cameron Every, Esq., Milton

Nicholas S. Gray, Esq., Rubin & Rudman, LLP, Boston

Norfolk & Plymouth Estate and Business Planning Council

www.NPEPC.org - 1-844-37-NPEPC

OUR PANELISTS

LISA M. CUKIER, ESQ. is a partner at Burns and Levinson, LLP in Boston. Lisa concentrates her practice in all aspects of estate and trust litigation, fiduciary litigation, probate law, divorce, guardianship and conservatorship, and elder exploitation. Ms. Cukier is a frequent speaker at Massachusetts Continuing Legal Education as well as Massachusetts Bar Association programs and other educational forums. Prior to joining Burns & Levinson in 2002, she served as Assistant General Counsel for the Department of Mental Health and the Department of Mental Retardation. Ms. Cukier is a graduate of Suffolk University Law School and Northeastern University.

DARYL CAMERON EVERY, ESQ. is a sole practitioner in Milton, where she concentrates in special needs and elder law, disability advocacy, public benefits, and estate planning. She advises families, guardians, trustees, and non-profit organizations, who are committed to maximizing public benefits with private resources for individuals with intellectual and/or physical disabilities. Ms. Every serves as the Dever Class Action Representative in the landmark *Ricci v. Okin* federal class action, and she is currently President of the Norfolk Plymouth Estate Planning Council. She also is a graduate of Northeastern University School of Law and the University of Massachusetts at Amherst.

NICHOLAS S. GRAY, ESQ. is a partner in the Trusts and Estates group at Rubin and Rudman, LLP in Boston. His practice centers on estate, income and gift tax planning for individuals and families, as well as serving as trustee. Mr. Gray advises on matters including trust administration, estates, guardianships and conservatorships. He has been in legal practice since 1999 following an extensive career in software development, programming, and systems analysis. Mr. Gray is a graduate of Suffolk University Law School and Westminster Choir College.

WHEN A GREAT ESTATE PLAN COLLIDES WITH LIFE

AGENDA

NORFOLK-PLYMOUTH ESTATE PLANNING COUNCIL

THE LANTANA

THURSDAY, SEPTEMBER 17, 2015

- | | |
|--------------------------------|---|
| 8:15 a.m. – 9:00 a.m. | Registration, Continental Breakfast & Reception |
| 9:00 a.m. – 9:15 a.m. | Welcome & Opening Remarks
<i>Daryl Cameron Every, Esq., Milton</i>
<i>President, Norfolk-Plymouth Estate Planning Council</i>

<i>Neil Blicher, MBA, CFP, Worcester</i>
<i>President, Society of Financial Service Professionals (FSP) –</i>
<i>Boston Chapter</i> |
| 9:15 a.m. – 10:00 a.m. | Assessment of Clients' Needs & Triage Strategies
<i>Nicholas S. Gray, Esq., Rubin & Rudman, Boston</i> |
| 10:00 a.m. – 10:45 a.m. | Stabilizing the Family Business & Dealing with Addiction
<i>Lisa M. Cukier, Esq., Burns & Levinson, Boston</i> |
| 10:45 a.m. – 11 a.m. | Questions and Answers |
| 11 a.m. | Adjourn |

WHEN A GREAT ESTATE PLAN COLLIDES WITH LIFE

FACT PATTERN

Ten years ago, Gwendolyn and Maurice were riding high. The electrical business that they had built together was doing well, they were in excellent health, and one of their children was going to run the business when they retired. The estate and financial plan seemed to have all the relevant aspects of their lives addressed.

Then, flash forward to 2015 – Maurice is stricken by Alzheimer’s disease and a stroke. Gwendolyn is exhausted from caring for Maurice and experiencing health problems herself. Health care costs are rapidly consuming the family’s resources. The once thriving business is rapidly losing revenues from a lack of stewardship. Moreover, the son who was considered so capable of operating the business has his own problems: bi-polar disease and alcoholism.

As the trusted advisor, you get the call.

- *Can Gwendolyn and Maurice be helped?*
- *Can you spot the issues and put together an effective rescue plan for stabilizing this couple’s lifetime of work and commitment?*
- *What do you advise?*

GWENDOLYN & MAURICE - ASSETS

CLIENTS: GWENDOLYN & MAURICE

- GWENDOLYN: 70 YEARS OLD
- MAURICE: 75 YEARS OLD

CLIENTS' ASSETS IN

	<u>2005</u>
- PRIMARY RESIDENCE, NEEDHAM	1,000,000.
- CAPE VACATION HOME, CHATHAM	600,000.
- BANK ACCOUNTS	
o MAURICE & GWENDOLYN	300,000.
- 401(K) ACCOUNTS	
o MAURICE	1,000,000.
o GWENDOLYN	200,000.
- LIFE INSURANCE	
o ON MAURICE –Whole Life Policy	500,000.
- TOTAL.....	3,600,000.

- BUSINESS: MAURICE'S ELECTRICAL, P.C. (description below)
- 2 ADULT CHILDREN: JACK & MICHELLE
 - o JACK: 36 y.o., co-owner in business. Maurice and Jack not always see "eye to eye" about how to operate business.
 - o MICHELLE: 33 y.o., special needs, not able engage in substantially gainful work, parents always hopeful Michelle would work in business with "support"

10 YEARS AGO, ESTATE PLAN WAS PREPARED

Husband has: Will – pour over to trust
Revocable Trust
POA – "Springing" Powers
HCP

Wife has: Will – pour over to trust
Revocable Trust
POA – "Springing" Powers
HCP

Revocable Trusts:

Trustees: Maurice & Gwendolyn

Successor Trustees: Son Jack

Initial Trustees may appoint additional Trustees, including Professional Trustee

Revocable Trusts Assets: Needham house, bank accounts. Cape house in Maurice's & Gwendolyn's name.

Springing Powers of Attorney:

Maurice - Agent #1 spouse; Agent #2 Son Jack

Gwendolyn – Agent #1 spouse; Agent #2 Son Jack

Health Care Proxy:

Maurice – Agent #1 spouse; Agent #2 Son Jack

Gwendolyn – Agent #1 spouse; Agent #2 Son Jack

TODAY

CLIENTS' ASSETS IN	<u>2005</u>	<u>2015</u>
- PRIMARY RESIDENCE, NEEDHAM	1,000,000.	1,700,000.
- CAPE VACATION HOME, CHATHAM	600,000.	300,000.
- BANK ACCOUNTS		
o MAURICE & GWENDOLYN	300,000.	500,000.
- 401(K) ACCOUNTS		
o MAURICE	1,000,000.	1,700,000.
o GWENDOLYN	200,000.	400,000.
- LIFE INSURANCE		
o ON MAURICE – Whole Life Policy	500,000.	500,000.
- TOTAL	3,600,000.	5,100,000.
- BUSINESS: MAURICE'S ELECTRICAL, P.C.		
Ownership: Maurice, Gwendolyn, Jack		
o 2005 EMPLOYEES: 10		
o 2015 EMPLOYEES: 5		
o PRESIDENT: MAURICE		
o VP: MICHAEL		
o TREASURER: GWENDOLYN		
o GROSS REVENUE YR:	3,000,000.	1,500,000.
o NET ASSETS (BUILDING, LAND, VEHICLES):	2,000,000.	2,000,000.

WHAT HAPPENED IN THE INTERIM?

FAMILY DYNAMICS CHANGED

- MAURICE: LOST CAPACITY. STROKE, DX ADVANCED DEMENTIA. SPENDING \$6200 WK FOR HOME CARE. (16 HRS/DA X \$55/HR X 7 DA/WK). CANNOT BE MAINTAINED IN HOME.
- GWENDOLYN: LOSING CAPACITY AT SLOW RATE. MILD DEMENTIA.
- NEITHER MAURICE OR GWENDOLYN IS RUNNING THE BUSINESS
- SON JACK IS POORLY RUNNING THE BUSINESS – NOT BRINGING IN BUSINESS, LAYING OFF EMPLOYEES, NOT PAYING BILLS. IN MIDDLE OF DIVORCE. BI-POLAR & SELF MEDICATING WITH ALCOHOL
- BUSINESS' BOOKKEEPER IS GETTING SOME BILLS PAID FOR BOTH THE BUSINESS & THE HOUSEHOLD
- DISABLED DAUGHTER MICHELLE LIVING AT HOME WITH PARENTS. INTELLECTUAL DISABILITY. NOT RECEIVING ANY SERVICES.
- DESIGNATED FIDUCIARIES IN EP NOT SUITABLE
- DISTRIBUTION PLAN OF REV TRUSTS: CARE FOR SPOUSES, LEAVE REMAINDER IN TRUST FOR 2 KIDS UNTIL EACH IS 35 YEARS OLD
- TAXABLE MASSACHUSETTS ESTATE

**LISA CUKIER, ESQ.
JORDAN BOWNE, ESQ.**

OUTLINE FOR TRUST COMPROMISES

I. Trust Compromises

- a. Between trustees and beneficiaries
- b. Compromise agreements may resolve the following:
 - i. Questions regarding construction or interpretation of trust instrument;
 - ii. Disputes between beneficiaries and/or a trustee;
 - iii. Powers and authority of a trustee;
 - iv. Approval of a trustee's accounts; and
 - v. Other issues.
- c. Two methods:
 - i. Trust Compromise *with* Court approval, G. L. c. 190B, § 3-1102(3)
 - 1. Court must find that "contest or controversy is in **good faith** and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is **just and reasonable**," and;
 - 2. If such finding is made: the Court "**shall** make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement."
 - ii. Trust Compromise *without* Court approval
 - 1. If valid, operates as a binding contract upon parties.

II. Change in statutory law

- a. Prior to enactment of MUPC and MUTC, trust compromises covered under G. L. c. 204, §§ 13, 14 (repealed);
- b. MUPC applies to pre-existing governing instruments, except for governing instruments which **became irrevocable prior to March 31, 2012** (effective date of Acts 2008, 521, § 9).

III. Procedure for Court Approval under MUPC, G. L. c. 190B, § 3-1102

- a. Terms of compromise must be:
 - i. In **writing**;
 - ii. **Executed** by **all** competent persons and parents or guardians acting for any minor child having beneficial interests or having claims which **will or may** be affected by the compromise;
 - 1. **Exception**: execution of terms of compromise not required by any person whose **identity** cannot be ascertained or whose **whereabouts** is unknown and cannot be reasonably ascertained.
- b. Who may submit to Court for approval of compromise agreement?
 - i. Petitioner may be **any interested person**, including a personal representative or a trustee;
 - ii. Submit agreement to Court for approval **and** for execution by the trustee and other fiduciaries and representatives.

- iii. Petitioner should utilize Probate and Family Court form MPC 250, “Petition for Approval of Compromise, G. L. c. 190B, §§ 3-1101, 3-1102”
- c. Notice requirements:
 - i. Prescribed by G. L. c. 190B, § 1-401;
 - 1. Court fixes return date and issues citation;
 - 2. Petitioner must cause notice of return day to all interested persons, including affected trustees of the trust(s);
 - a. By certified, registered, or ordinary first-class mail with a copy of citation at least 14 days before return date; or
 - b. By hand delivery with a copy of citation at least 14 days before return date; or
 - c. By publishing copy of citation once in a newspaper designated by Register of Probate at least 7 days before return date.
 - 3. Interested party may waive notice or assent to Petition
 - 4. Proof of notice to be filed with Court;
 - 5. Objections to Petition:
 - a. Any party may file an appearance before 10:00 a.m. of return date;
 - b. Written affidavit of objections with specific facts and grounds for objection due 30 days after return date;
 - c. Note: **unlikely** to have objections if seeking approval of compromise agreement in which all interested persons have executed written terms of compromise.
 - ii. Note: If charities or charitable interests are involved with the compromise agreement, the attorney general is a necessary party. G. L. c. 12, § 8G.
 - iii. Note: Parties to the compromise agreement should request that the Court appoint a GAL to represent the interests of any minors or future contingent interests who are not already represented by another party through virtual representation. See G. L. c. 190B, §§ 1-403, 1-404.
- d. Standard for Court, G. L. c. 190B, § 3-1102(3)
 - i. “The court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement.” G. L. c. 190B, § 3-1102(3)
 - 1. If contest or controversy is in **good faith**; and
 - 2. Effect of agreement upon interested persons is **just and reasonable**; then
 - 3. Court shall make a Decree and Order:
 - a. Approving the agreement; and
 - b. Directing all fiduciaries subject to its jurisdiction to execute the agreement and administer the trust in accordance with the agreement
 - c. Note: Probate and Family Court has a form for Decree and Order, MPC 775

IV. Effect of Approval of Trust Compromise Agreements, G. L. c. 190B, § 3-1101

a. Binding effect

i. If approved by Court after formal proceeding, then compromise agreement is binding on the following persons:

1. Trustee(s) and any other fiduciary; and
2. All competent interested parties; and
3. The guardian or conservator, if any, of all other interested persons to the compromise agreement; and
4. Unborn, unascertained and other persons who could not be located.
5. Note: Minor children represented only by their parents or guardians may be bound only if their parents or guardians join with other competent persons in execution of the compromise.

b. Specific performance for failure to act by trustee

i. If a trustee or other fiduciary fails to comply with the agreement, any interested party may bring an action for specific performance in the Probate and Family Court;

V. Effect of Valid Compromise Without Court Approval

a. Trust compromise with terms of compromise in writing and executed by trustee(s) and all interested parties is still **binding upon the parties as a contract**, and the parties are subject to the terms of the contract even without approval of the compromise agreement by the court. Renwick v. Macomber, 225 Mass. 380, 385 (1917).

i. Exception: A fiduciary may raise the possibility that the compromise agreement is illegal or contrary to public policy. Richmond v. Wohlberg, 385 Mass. 290, 295-296 (1982).

VI. Example of Trust Compromise Agreements when Beneficiary has Unexpected Incapacity

a. See Gwendolyn and Maurice fact pattern

**LISA CUKIER, ESQ.
JORDAN BOWNE, ESQ.**

**OUTLINE ON DIVISIBILITY OF TRUST INTERESTS AS ASSETS IN DIVORCE:
THROUGH THE LENS OF THE PFANNENSTIEHL DECISION**

- I. General issues to consider:
 - a. To what extent can a party's interest in a trust be includable in the marital estate, for purposes of division, under G. L. c. 208, § 34?
 - b. What criteria goes into the Court's determination to include interests in a trust as a divisible asset?
 - c. How is a party's interest in trust valued for purposes of division?
 - d. Did the Appeals Court majority in Pfannenstiehl get it right?

- II. Pfannenstiehl v. Pfannenstiehl, 88 Mass. App. Ct. 121 (2015)
 - a. Background on Trust in Pfannenstiehl:
 - i. Family Trust in Pfannenstiehl is an **irrevocable spendthrift trust** established by Husband's father. Trust holds shares of stock in Husband's family-controlled private corporations. Two trustees, including Husband's twin brother and an outside trustee who was "inextricably interconnected with, and aligned with, the husband's family". Husband's brother and father serve as officers and directors of the corporations.
 - ii. Husband, as beneficiary of Trust, received one large payment of \$300,000, then consistent near-monthly distributions of several thousand dollars until one month prior to the commencement of divorce proceedings when distribution was stopped for the Husband. Husband's two other siblings continued to receive distributions during his divorce proceedings.
 - iii. There were eleven (11) beneficiaries of Trust at time of divorce.
 - iv. **Spendthrift provision in Trust**: "Neither the principal nor income of any trust created hereunder shall be subject to alienation, pledge, assignment or other anticipation by the person for whom the same is intended, nor to attachment, execution, garnishment or other seizure under any legal, equitable or other process."
 - b. General analysis of interests in trust as divisible assets under G. L. c. 208, § 34:
 - i. "General Laws c. 208, § 34, defines the scope of a trial judge's discretion to assign interests in the marital estate to the wife or husband, based on a number of specified factors . . . Separate from the division of assets within the estate is the question whether certain assets properly are considered a part of the estate. In making the determination of what to include in the estate, the judge is not bound by traditional concepts of title or property." S.L. v. R.L., 55 Mass. App. Ct. 880, 882-883 (2002).
 - ii. Massachusetts courts "have held a number of intangible interests (even those not within the complete possession or control of their holders) to be part of a spouse's estate for purposes of § 34." Baccanti v. Morton, 434 Mass. 787, 794 (2001), *quoting from* Lauricella v. Lauricella, 409 Mass. 211, 214 (1991).

- iii. “When the future acquisition of assets is fairly certain, and current valuation possible, the assets may be considered for assignment under § 34.” Williams v. Massa, 431 Mass. 619, 628 (2000).
 - iv. “Whether a party’s interest in trust property is part of the marital estate for purposes of § 34 has been said to present a question of law.” See Lauricella v. Lauricella, 409 Mass. 211, 213 & n. 2 (2001); D.L. v. G.L., 61 Mass. App. Ct. 488, 493-494 (2004).
- c. Does a spendthrift provision in a trust necessarily prevent the trust from being included as a divisible marital asset?
- i. Spendthrift provision definition: provision in a trust intended to prevent creditors from attaching a beneficiary’s interest in the trust before the interest is actually distributed to beneficiary.
 - ii. Settled trust law holds that the mere statement of a spendthrift provision in a trust does not render distributions from a trust, immune to inclusion in the marital estate for G. L. c. 208, § 34, calculations.
 - iii. “It is well established by law that a trust, **even one with a spendthrift provision**, may be included in a marital estate for purposes of division under § 34.” See Krokyn v. Krokyn, 378 Mass. 206, 213-214 (1979); Lauricella v. Lauricella, 409 Mass. 211, 216 (2001); Davidson v. Davidson, 19 Mass. App. Ct. 364, 371 (1985) (remainder interest subject to valid spendthrift clause included in estate for property division under § 34).
 - iv. Appeals Court majority on the Pfannenstiehl spendthrift provision:
 - 1. The spendthrift provision was being used to mask the husband’s income stream and thwart the division of the marital estate in the divorce.
- d. Criteria used to by majority in Pfannenstiehl decision to determine Husband’s interest in Trust was divisible asset:
- i. **Family lifestyle was interconnected to the trust distributions;**
 - 1. Trust distributions integral to the family unit and family depended on it for their routine expenses and to maintain their standard of living. The family lifestyle and expenses . . . could not have been met on the husband’s after-tax net income without the 2004 trust income stream as woven into the marriage fabric;
 - ii. Judge found that the substantial monthly income distribution was **deliberately and abruptly shut off for the husband alone** as the divorce proceedings were in the immediate offering;
 - iii. Judge found that the **income stream** from trust was **not too remote or speculative, nor purely discretionary**.
 - 1. **Compare with D.L. v. G.L.**, 61 Mass. App. Ct. 488 (2004), the trust at issue involved payments that were wholly discretionary, and, consequently, the trust was not includable in the marital estate. Further, neither income nor principal had ever been distributed from the subject trust to the husband, a marked contrast to Pfannenstiehl where there were serial monthly distributions to the husband.

- iv. **Ascertainable standard** which governs the Trust distributions, **was tied to such life matters as support, welfare and maintenance:**
 - 1. Trust language in Pfennenstiehl: "...to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class . . ."
 - 2. **Held:** Husband's interest in the Trust is vested in possession, with a presently enforceable right to the trust distributions to support his lifestyle during his lifetime including for maintenance, welfare, and education.
 - 3. Marsman v. Nasca, 30 Mass. App. Ct. 789, 795 (1991), *quoting from Woodbury v. Bunker*, 359 Mass. 239, 243 (1971) (language directing trustees to pay beneficiary such amounts as they "shall deem advisable for his comfortable support and maintenance" has been interpreted to set an ascertainable standard, namely to maintain life beneficiary "in accordance with the standard of living which was normal for him before he became a beneficiary of the trust").
 - 4. *See also Dana v. Gring*, 374 Mass. 109, 117 (1977); Dwight v. Dwight, 52 Mass. App. Ct. 739, 744 n. 5 (2001) ("the trustee would be under a duty to provide income from the trust to the husband should the trustee determine, upon inquiry, that the husband needed it").
- e. Valuation and Division of Trust
 - i. Valuation: Judge found total value of Pfennenstiehl Trust was approximately \$25 million, and Husband's 1/11th interest at \$2.265 million. Wife was allocated approximately 50% of Husband's interest in Trust. Husband required to make 24 monthly payments.
 - ii. "Once the judge included these assets as part of the marital estate, [he] had broad discretion how to divide the entire estate equitably . . ." Williams v. Massa, 431 Mass. 619, 625-626 (2000).
 - iii. The value of a vested, but not yet distributed, interest may not be susceptible of precise calculation "does not alter its character as a divisible asset." Lauricella v. Lauricella, 409 Mass. 211, 217 (2001).
 - iv. Divorce law takes an **expansive view** of what may comprise the marital estate of a party, including a beneficial interest in a trust. In Pfennenstiehl, the distributions to the husband from the trust from 2008 to 2010, support including the trust in the estate of the husband under G. L. c. 208, § 34.
 - 1. *See Earle v. Earle*, 13 Mass. App. Ct. 1062, 1063 (1982); Davidson v. Davidson, 19 Mass. App. Ct. 364, 374 n. 13 (1985); Comins v. Comins, 33 Mass. App. Ct. 28, 30 (1992).
- f. **Dissent in Pfennenstiehl:**
 - i. **Interpreting the trust instrument as a whole**, including but not specifically limited to the spendthrift clause, the uncertain value of the interest, and the discretionary nature of the instrument, **renders the husband's interest in the trust too speculative and remote for inclusion in the divisible estate.**

- ii. "Ascertainable standard" cannot be read in isolation; but rather must be considered in the context of the terms of discretion in which it is found and of the entire trust instrument.
- iii. Cases where interest in trust are fixed and certain:
 - 1. Lauricella v. Lauricella, 409 Mass. at 216-217 (husband's interest in trust rightfully included in marital estate where husband was one of two beneficiaries, and trust was completely funded by sole asset, which was house in which husband had regularly resided previously and from sale of which husband could profit);
 - 2. Comins v. Comins, 33 Mass. App. Ct. at 30-31 (wife's interest in trust properly included in marital estate where wife was sole beneficiary of separate trust which had fixed fair market value).
- iv. Dissent's problems with majority's decision:
 - 1. Trust instrument makes clear the class of beneficiaries is open (and number of beneficiaries may well increase), but the Trust also allows for distributions to be made in equal or unequal shares, and upon consideration, in the trustees' discretion, of funds available from other sources for the needs of each beneficiary.
 - 2. Fractional share methodology employed by the judge produced an arbitrary result. Focus of the inquiry should be on the **terms of the trust instrument itself**, not how those terms may be or have been manipulated.
- g. Lessons from Pfennenstiehl:
 - i. Agree with majority or dissent? Three-to-two decision; Further appellate review?
 - 1. Arbitrary result?