Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2894

Date: **15-Jul-21**

From: **Steve Leimberg's Estate Planning Newsletter**

Subject: **Sharon L. Klein on Ellis v. Hurley: Massive Fortune, Bitter Court Battles Surround Definition of Grandchild**

"Disinheritance around a massive fortune, bitter court battles, out-of-wedlock children, iconic models, suicide…a soap opera plot? Hardly. The issue? Well, that is the issue: Are the settlor's out of wedlock grandchildren beneficiaries of a trust created decades earlier? In reversing the trial court decision, a California Court of Appeal in Ellis v Hurley confirms that the out of wedlock grandchildren are not considered trust beneficiaries."

We close the week with commentary by **Sharon Klein** on *Ellis v. Hurley*.

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Forbes features Sharon as a top Advisor in 2021 in two separate categories: One of the Top 100 Women Wealth Advisors in America, and a Best-In-State Wealth Advisor. *Crain's* named Sharon to its 2020 inaugural list of the Most Notable Women in Financial Advice. In 2018, she was honored by the UJA-Federation of New York Lawyers Division for her contributions to the Trusts & Estates community and the community at large. Sharon is a Fellow of the American College of Trust and Estate Counsel and has received the Accredited Estate Planner Designation from the National Association of Estate Planners & Councils. Sharon will be inducted into the Estate Planning Hall of Fame in 2021.

Here is her commentary:

EXECUTIVE SUMMARY:

Disinheritance around a massive fortune, bitter court battles, out-of-wedlock children, iconic models, suicide…a soap opera plot? Hardly. The issue? Well, that is the issue: Are the settlor's out of wedlock grandchildren beneficiaries of a trust created decades earlier? In reversing the trial court decision,[2] a California Court of Appeal in *Ellis v Hurley*[3] confirms that the out of wedlock grandchildren are not considered trust beneficiaries.

FACTS:

The Cast: Stephen Bing – The Father

American businessman, film producer and philanthropist who at 18 is widely reported to have inherited at least $600 million outright from the real estate empire built by his grandfather. Known for dating supermodels and movie stars, including Farrah Fawcett, Sharon Stone and Elizabeth Hurley, Stephen apparently led a decadent lifestyle, extravagantly generous with his friends, lavishly backing an array of failed movies, and donating millions to various charitable and political causes. Stephen jumped to his death from his luxurious Santa Monica apartment at age 55, reportedly basically broke, having about $300,000 in his name.

Peter Bing – The Settlor

Peter created trusts in 1980 for the benefit of his future grandchildren. Each trust terminated on October 31, 2020, at which time the entire principal and all undistributed income became distributable to the beneficiaries.

The trust agreements provided:

> The words 'child,' 'children,' and 'issue' whenever used herein shall include legally adopted persons, whether adopted by Grantor or by Grantor's natural or adopted children." The word "grandchildren" was not defined. Section III, entitled, "Powers of the Trustee" stated in pertinent part: "The Trustee shall have the power to construe this Declaration of Trust, and any reasonable construction adopted after obtaining the advice of responsible legal counsel shall be binding on all persons claiming an interest in the trust estate as beneficiaries or otherwise.

Damian and Kira - The Grandchildren

Stephen had two out of wedlock children, Damian Hurley, with Elizabeth Hurley, and Kira Kerkorian with tennis pro Lisa Bonder. Stephen initially denied paternity for both children. With respect to Damian, the public outcry over his behavior earned him the nickname “Bing Laden.” A court ordered DNA test confirmed that Stephen was indeed Damian’s father. Lisa Bonder reportedly hired a private detective, who retrieved Stephen’s dental floss from the garbage to prove with that DNA evidence that Stephen was Kira’s father.

The Issue

Peter had two children and four grandchildren: The two children of his daughter Mary were indisputably grandchildren entitled to inherit. The rights of Damian and Kira were in dispute. If they were excluded as beneficiaries, Mary’s children would inherit everything. Peter, Mary, Mary’s children, and the Trustee, in arguing that Damian and Kira were not “grandchildren” were pitted against Damian, Kira and Stephen in arguing that Damian and Kira did fall within the meaning of that word. So, the central question was: How should the word “grandchild” in Peter’s Trusts be interpreted?

Hello, Can You Hear the Settlor?

The settlor was around to tell the court what his intent was, and indeed he signed a Declaration stating that he wanted specifically to exclude grandchildren like Damian and Kira from the Trusts. The probate court, however, found Peter’s Declaration irrelevant, declining to accept his after-the-fact attempt to “define a term that, on its own, expresses no doubt as to its meaning.” The issue as framed by the Superior Court of California, County of Los Angeles Probate Division was whether the court should consider extrinsic evidence to interpret the Trusts, which turned upon whether an ambiguity existed in the Trusts as to the designation of "grandchild." The Probate Division held that it was guided by long-held principles of testamentary interpretation expressed by the courts of California "[I]f the court can ascertain the testator's intent from the words actually used in the instrument, the inquiry ends[4]…Where the terms of [the instrument] are free from ambiguity, the language used must be interpreted according to its ordinary meaning and legal import and the intention of the testator ascertained thereby.[5] According to the Probate Division, the term

"grandchild" in the Trusts was clear, unambiguous and not reasonably susceptible to another meaning when each of the Trusts is read as a whole. Thus, no extrinsic evidence was required to interpret the Trusts' use of the term "grandchild." The Trustee's interpretation that "grandchild" meant grandchild, but to the exclusion of non-marital grandchildren and adult adoptees, was held to be unreasonable and not entitled to deference. That decision was reversed on appeal.

Shame on You – Don't Be So Quick to Judge!

While Peter's vehement insistence about excluding his out of wedlock grandchildren might initially seem offensive and while Mary came under fire for plotting with her father to orchestrate what Stephen described as a "massive money grab" to cheat Stephen's children out of their inheritance, the circumstances were unusual. Apparently, Stephen had *never met* Damian, and he only met Kira after she became an adult. Certainly, Peter said in his Declaration that he had never met either child and did not consider them his grandchildren. Peter specifically stated in his Declaration that excluding Damian and Kira as beneficiaries was consistent with his intention at the time he executed the Trusts.

Armed with this Declaration, the Trustee obtained the advice of legal counsel who, having reviewed the language of the Trusts and Peter's affidavit, concluded that "under California law, it is reasonable to construe 'grandchild,' as the term is used in the Grandchildren's Trusts, to exclude a person born out of wedlock to a child of Peter who never resided while a minor as a regular member of that child's household." Specifically, counsel relied on California Probate Code Section 21115, subdivision (b), a statutory rule of construction for terms of class gifts and relationships which provides that, although persons born out of wedlock are considered children for the purposes of intestacy, "[i]n construing a transfer by a transferor who is not the natural parent [e.g., grandparent], a person born to the natural parent shall not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse."

It All Came Down to the Trustee

On appeal, the Court of Appeal, Second District, noted that the terms of the Trusts granted the Trustee the power to construe the Trusts, but an

interpretation would only be binding if it was adopted after obtaining the advice of counsel and if the construction was "reasonable." Because the Trustee interpreted the Trusts, the court held that it was unnecessary at the outset for it to do so. The court's task was to determine only whether the Trustee's interpretation was reasonable:

> *Our analysis begins and ends with whether the use of the term "grandchild" in the trust is reasonably susceptible to the interpretation of the trustee—that is, that it applies to grandchildren born out of wedlock only if they lived a substantial time, while minors, in the home of Peter's child. As long as "grandchild" can be reasonably construed as the trustee construed it, we must reverse.*

In determining whether the language was reasonably susceptible to the Trustee's interpretation, the court first considered the language of the Trusts itself, then turned to the extrinsic evidence relied on by the Trustee. Noting that the Trusts failed to define grandchild and failed to address out of wedlock children, the court turned to the two pieces of extrinsic evidence relied upon by the Trustee: Peter's Declaration and relevant legal authority.

The court noted that a decades-later declaration as to the testator's prior intent may well constitute evidence of the testator's intent, but also may be an attempt at "revisionist history." To the extent, however, it could be perceived as a statement of Peter's unspoken intent regarding a circumstance he had not expressly considered because he never imagined it could be otherwise, the court held that it may be relevant and may provide a reasonable basis for the Trustee's interpretation. The court was also convinced that Peter's Declaration was worthy of consideration in determining the reasonableness of the Trustee's interpretation since the law at the time of the Trusts' creation suggested that Peter's declared view was common belief.

Reviewing the governing authority, including Probate Code Section 21115, subdivision (b), the court noted that historically, the law long before the execution of the Trusts would have excluded all children born out of wedlock from the definition of "grandchild," but the law in effect now has liberalized to the point of including only out of wedlock grandchildren who have lived as regular members of the household of the natural parent through whom they claim. The court concluded that Probate Code section

21115, enacted in 1983, also effected the likely interest of testators in 1980, when Peter created the Trusts.

Ultimately, the court found that the Trusts were reasonably suspectable to the Trustee's interpretation, which excluded out of wedlock children who had not lived while minors as a regular member of the household of the natural parent.

COMMENT:

Modern Families, Modern Drafting

Cases like this focus attention on the need of estate planners to discuss "standard" definitions used in estate planning documents to ensure they reflect intent. Certainly, relying on state default statutes, many of which have struggled to keep pace both with technology and the rapidly changing construct of the modern family, may not effectuate intent. Particularly given the tremendous advances in medical technology, where a child can be born not only out of wedlock but in fact after the death of one or both of the child's genetic parents with stored genetic material, this matter has become increasingly important. Prerequisites to inheriting, like a minor's living a substantial time in the home of their genetic parent, would seemingly automatically disqualify a posthumously conceived child (PCC) from inheriting, so much thought will need to be given to a definition that works under myriad circumstances.

The importance of focusing on the definition of issue can be especially critical when those provisions can be applicable both to the testator/grantor *and* to their descendants. In the context of dynasty trusts, set up to last for successive generations that extend into the future when unimagined technologies may be available, these matters take on increased importance. *In re Martin B,*[6] for example, two PCC were born to the wife of a decedent who had stored his sperm before cancer treatment, and later died. The father of the decedent (the grandfather of the PCC) had created trusts for the benefit of classes that included the decedent's "issue" and "descendants." The question for determination was whether the decedent's PCC qualified as members of the classes. Ironically, although the surrogate noted that the controlling factor was the grantor's intent, she pointed out that when the trusts were created in 1969, the grantor could not have contemplated that his issue could include PCC. Under the specific

circumstances of that case, the court determined that grantor intended all members of his bloodline to receive their share.

The estate planner will have a key role in exploring and reflecting their clients' intent in dispositive documents.

Not for Nothing…but Could Grandpa's Trust Planning Have Saved the Day?

Recall that Stephen apparently inherited $600 million outright at age 18 from his grandfather, yet died with $300,000 in his name. Had Stephen's grandfather instead created a trust for Stephen, the family's wealth would likely have had a significantly better chance of finding its way down to Stephen's children, perhaps making the disposition of Peter's Trusts much less important. With professional management and a fiduciary gatekeeper to protect Stephen from his reported wildly extravagant spending and often poor financial investments, $600 million growing over 37 years could potentially have grown into the billions. Bing's case is perhaps a poster child for the importance of trust planning. Bing(o) to that!

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Sharon L. Klein

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such advice is required, the services of a competent professional should be sought. Statements of fact or opinion are the responsibility of the authors and do not represent an opinion on the part of the officers or staff of LISI.

CITES:

In re the Peter S. Bing GC-5 Trust, Los Angeles County Super. Ct. No. 19STPB01623 (July 16, 2019); *Ellis v. Hurley*, No. B3000799, 2020 WL 6816605 (Cal. Ct. App. Nov. 20, 2020), as modified on denial of reh'g (Dec. 21, 2020), review denied (Mar. 10, 2021); *In re Martin B*, 841 N.Y.S.2d 207 (Sur. Ct., 2007); Cal. Prob. Code § 21115(b).

CITATIONS:

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[2] *In re the Peter S. Bing GC-5 Trust*, Los Angeles County Super. Ct. No. 19STPB01623 (July 16, 2019).

[3] *Ellis v. Hurley*, No. B3000799, 2020 WL 6816605 (Cal. Ct. App. Nov. 20, 2020), as modified on denial of reh'g (Dec. 21, 2020), review denied (Mar. 10, 2021).

[4] Citing *Trolan v. Trolan,* 31 Cal. App. 5th 939, 949 (2019) [citing *Estate of Newmark,* 67 Cal.App.3d 350, 355-356 (1977)].

[5] Citing *Trolan v. Trolan*, supra, 31 Cal. App. 5th at 939 at 949 (2019) [citing *Estate of Avila,* 85 Cal. App. 2d 38, 39-40 (1948)].

[6] *In re Martin B*, 841 N.Y.S.2d 207 (Sur. Ct., 2007).