

DEPLETION OF EVENTUAL PROBATE ESTATE OF INCAPACITATED PERSONS THROUGH INTER VIVOS TRANSFERS BENEFITTING A PERSON IN A CONFIDENTIAL RELATIONSHIP TO THE GRANTOR

Ayers v. Shaffer, 286 Va. 212, 748 S. E. 2d 83 (2013) held there is a rebuttable presumption of fraud in administration or probate or intestate estates in which the property of mentally or physically incapacitated persons is found to have been significantly depleted through lifetime transfers in the period just prior to death benefitting the fiduciary. *The presumption of undue influence will arise independently of any evidence of actual fraud or of any limitations of (mental) capacity in the other party to the confidential relationship.* Here, the fiduciary had the senior execute pay-on-death forms at several banks. The Virginia Supreme Court set out guidelines, what allegations should be set out in the complaint to set aside (rescind) a contract or other transaction.

PREGNANCY DISCRIMINATION UNDER THE PREGNANCY DISCRIMINATION ACT (PDA)

In *Young v. United Parcel Service*, 135 U. S. 1338 (2015), the Court abandoned a strict, textual analysis of the statute and proclaimed that the PDA affords a pregnant worker the ability to show disparate treatment through indirect evidence via application of the *McDonnell Douglas* framework. As a result of this decision, the Equal Employment Opportunity Commission (EEOC) modified its Enforcement Guidance on Pregnancy Discrimination and Related Issues. U. S. EEOC, *EEOC Notice No. 915,0003* (June 25, 2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

COURTS GENERALLY FAVOR APPLICATION OF THE LONGER OF TWO STATUTES OF LIMITATIONS

A product causes personal injury (tort, 3 years), and suit is filed for breach of warranty (Uniform Commercial Code (UCC), 4 years). *Badilla v. Wal-Mart Stores East*, 357 P. 3d 936 (N. M. 2015).

FAMILY LAW – UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) – AFTER ALL PARTIES LEAVE THE STATE

If a trial court has home-state jurisdiction to issue an initial custody determination under the UCCJEA at the time the action was filed, then the court still exercises that jurisdiction after all parties had left the state. *Upton v. Wallace*, 3 A. 3d 1148 (D. C. 2010).

THE DENVER POST, SATURDAY, 02/20/16 – a Help Source -

Page 3C – Trouble with a product or company? Go to *publications.usa.gov*. There are hundreds of federal publications helping consumers make informed decisions on many topics, including cars, computers, education, employment, family, federal programs, food, health, housing, money, small business, travel, and more. “The crown jewel is the *Consumer Action Handbook*, with helpful information on consumer purchases, including how to handle problems and complaints. In addition, the book lists consumer contacts for hundreds of companies, trade associations, government agencies, and national consumer organizations. You can download any of the publications or order them online (with free shipping).”

THE DENVER POST, SUNDAY, 02/21/16 - Relationships; Retirees IRS Flags

Page 6K – Steve Rosen, citing a 2015 Federal Reserve Board extensive research report - “People tend to form serious relationships with people whose credit scores are in the same range.”

Page 7K – Joy Taylor, Kiplinger – “IRS Audit – Red Flags for Retirees” –

1. Making a lot of money – over \$200,000
2. Failing to report all taxable income, including 1099-R payouts from retirement plans
3. Taking higher-than-average deductions – keep proper documentation
4. Claiming large charitable deductions – if you don’t get an appraisal for donated property, fail to file Form 8263 for noncash deductions over \$500
5. Not taking required minimum deductions from retirement accounts

6. Claiming rental losses – two important exceptions – if you actively participate in renting your property, you can deduct up to \$25,000 against other income (this phases out at higher income levels); if you are a real estate professional who spends more than 50% of your working hours and more than 750 hours annually participating in real estate, you can write off losses without limitation.
7. Failing to report gambling winnings or claiming big losses – professional gamblers must use Schedule C, and casinos report amounts on Form W-2g.
8. Writing off a loss for a hobby – you must report income, you can claim deductions, but you can't write off losses – unless, you show you're running it like a business and have a reasonable expectation of making a profit.

DENVER POST, SUNDAY, 03/06/16, BUSINESS SECTION

Page 4K – Anya Kamentz, “Have You Planned to Take Care of Your Parents?” The lifetime economic hit can be \$324,014. Enlist help from all family members. Price out and try out care options – check A Place For Mom, an eldercare resource website. In-home aides can be \$3,360 to \$5,760 per month. Have phone numbers for your parents’ pastor, friendly neighbor, handyman. If you quit your job to care for parents, optimize career benefits and strategies.

Page 5K – Steve Rosen, “New Investment Account Aims to Help Disabled Young People” –ABLE accounts (Achieving a Better Life Experience) are similar to college 529s. These savings accounts will soon – not yet – become available to help families that have young members with disabilities sock away money for education, housing, transportation, and other major expenses, up to \$100,000 in one account only, without losing benefits through Medicaid and Supplemental Security Income. Check the guidelines. One-time or regular contributions grow tax-free. Annual contributions are capped at \$14,000 per beneficiary. (Higher income families may prefer more flexibility through a special needs trust.)

FRIENDS – MEN AND WOMEN – BOND WITHOUT PASSION

AARP Magazine, February/March, 2015, page 46 – review of “Learning to Drive” which it rated as “best buddy picture” – final sentence:
“Here is an anti-*When Harry Met Sally* moral: Men and women really can develop profound bonds without surrendering to a passionate clinch at the fade-out.”

STATE AND LOCAL SALES TAX ON INTERNET SALES OF GOODS

American Business USA Corp. v. (Florida) Department of Revenue, 151 So. 3d 67 (Fla. 4th DCA 2014) discussed the constitutional issues presented by distinct but parallel restrictions imposed by the Commerce Clause and the Due Process Clause. The Court upheld Florida's taxation of Internet sales of *prepaid telephone cards* to out-of-state customers via the Internet, where delivery is effectuated by the taxpayer sending an authorization code directly to the consumer via the Internet. This did not violate the Due Process Clause. However, the sales tax on the sale of flowers, gift baskets, and other items of tangible personal property outside of Florida to out-of-state customers for out-of-state delivery violated the Commerce Clause.

MEDICAL MONITORING CLAIM WITHOUT PRESENT PHYSICAL INJURY

Sadler v. PacifiCare of Nevada, 340 P. 3d 1264 (Nev. 2014) concluded the plaintiffs' negligence claim (unsafe injection practices) properly sought recovery of damages for the costs of medical monitoring even in the absence of present physical injury. (The economic loss rule did not apply; the plaintiffs alleged an exposure to the risk of diseases, which is a noneconomic injury.)

THE DENVER POST, WEDNESDAY, APRIL 6, 2016 - CHILDREN

Page 2C – Colby Itkowitz, The Washington Post – “Compassion is at play” – a German school a trend to overcome loneliness on the playground. It was called “the buddy bench,” a bench with those words. If a child was sitting on it alone, it was a signal to the other kids to ask him or her to play. The project went viral, was covered by the national news, and resulted in a Ted Talk in February, 2014. There are about 2,000 schools with benches in the United States, including schools in Denver, Boulder, and Northglenn.

Page 10A – Emilie Rusch – “Easing Breakups – A Nonprofit Offers Flat-Fee, Out-of-Court Divorce Services for Parents.” Co-parenting is at the center: only

couples with children are eligible for the services. There is a flat fee of \$4,500. It is the Center for Out-of-Court Divorce, 4201 E. Yale Avenue. It was previously called the Resource Center for Separating and Divorcing Families, and is a spin off from the Institute for the Advancement of the American Legal System at the University of Denver.

**THE DENVER POST, SUNDAY, APRIL 17, 2016, BUSINESS SECTION
(new fiduciary rules, and Social Security disability benefits)**

Page 5K – Jane Bennett Clark, Kiplinger, “The Surprising Costs of Downsizing Your Home”

6K – Elizabeth Leary, Kiplinger, “Retirement Savers Get New Legal Protections” – On April 6, 2016, the U. S. Department of Labor (DOL) unveiled a final rule that raises the bar for investment advice provided to retirement savers. “The new rule also raises the bar even for advisers who already act as fiduciaries because the DOL’s standard has sharper teeth than the existing legal standards.” Firms and advisers have until January 1, 2018, to fully comply with the rule.

Although the DOL’s rule applies only applies to retirement accounts, it may spread to brokerage and other adviser firms. The Securities and Exchange Commission (SEC) is working on its own fiduciary rule and is expected to issue a proposed rule before the end of 2016.

6K – Terry Savage, “Fiduciary Rule, Meant to Protect Investors, May Cost Them Dearly” – more discussion of the new DOL rule intended to give baby boomers good advice they can trust, rather than being rolled into high-commission, expensive products.

7K – Elliott Raphaelson, “How to Apply to Social Security Disability Benefits”

THE COLORADO LAWYER, MARCH, 2016

Page 49 – Tueller and Smith, “Buyers and Brokers Beware: The Contract – Deeding Trap for the Unwary.” The Colorado Division of Real Estate Form

Contracts provide forms for ordinary day to day real estate transactions. This article focuses on problems with Section 13's mandate to specify exceptions, problems that may arise, a couple scenarios, and suggested solutions.

Page 55 - Rebecca Klock Schoer, "The Dangers of Relying on Trust Language." This article provides guidance and caution to trustees and estate planners regarding trust language that purports to alter fiduciary duties and liability.

Page 76 – Bruce Schilken, review of *Working with Aging Clients: a Guide for Legal, Business, and Financial Professionals*, by Carolyn L. Rosenblatt, ABA, 2015 – he especially liked the chapters dealing with illness, communicating with the elderly, and handling family conflicts. "It is a must-have for any attorney who represents aging clients."

Page 77 – Psychiatrist Dr. Gregory Kirk, "The Paradoxes of Self-Awareness and Self-Preservation" – he discusses why highly-educated professionals have higher rates of depression, anxiety, and substance abuse disorders; why "**attorneys** have the highest rates of mental health problems...approximately twice the general population's rate of drinking problems..." (emphasis added)

THE COLORADO LAWYER, APRIL, 2016

Page 35 – Ellie Lockwood, "Litigating Claims under the Colorado Uniform Transfer Act" (CRS, 38-8-101, et seq).

Page 45 – Georgine M. Kryda, "Trusts as Entities under *Restatement (Third)*: A Conceptual Framework for Drafting – Part I" (Part 2 will be in the July issue.)

fps\elder law – April, 2016