



ILLINOIS STATE BAR ASSOCIATION

TRUSTS & ESTATES

The newsletter of the Illinois State Bar Association's Section on Trusts & Estates

In the April issue...

By Darrell Dies & Jacob Frost

This month's newsletter offers readers a discussion by Professor Gerry Beyer regarding how to effectively assist a client with communication challenges when executing estate planning documents. Robert W. Kaufman and Amanda M. Byrne provide an interesting discussion about the recent case of *Carter v. Carter* whereby they emphasize the trustee's fiduciary duties in light of the prudent investor rule. We wish to express sincere thanks to each

and every person that has helped make this newsletter a success by providing informative, substantive and practical articles.

Members of the Trusts & Estates Section may now comment on the articles in the newsletter by way of the online discussion board on the ISBA Web site at <<http://www.isba.org/sections/trustsestates/newsletter>>. We welcome any comments from our audience. ■

Preparing a will for a client with communication challenges

By Gerry W. Beyer

Your client may have difficulty with communication, that is, the client may be unable to see, hear, write, or understand English. To prepare a will effectively for these clients, the estate planner must initially ascertain whether the client has a communication challenge and then take affirmative steps to make certain the challenge does not negatively impact the validity of the will. Extra attention must be given to make certain the requirements of a valid will are satisfied and that individuals displeased with the will do not use the communication challenge as a foundation for claims of undue influence or fraud. Even without other evidence, courts may subject the will of a communicationally challenged client to higher scrutiny. See *In re Estate of Shumway*, 9 P.3d 1062 (Ariz. 2000) (testator's visual impairment was a key factor in determining that the contestants had probable cause for bringing a will contest thus precluding forfeiture under an *in terrorem* provision).

This article reviews a variety of communication challenges and recommends techniques to reduce the likelihood of these challenges playing a part in setting aside the testator's will.

I. Visually Impaired Testator

There are over one million blind individuals over the age of 40 in the United States. See *Vision Problems in the U.S., Prevalence of Adult Vision Impairment and Age-Related Eye Disease in America*, Prevent Blindness America (2008). In addition, 3.6 million older Americans are visually impaired, including over 150,000 citizens of Illinois. Accordingly, it is highly likely that you will encounter a visually impaired client.

A. Testamentary Capacity

Under § 5/4-1 of the Illinois Probate Act of 1975, a person must be of "sound mind and memory" to execute a valid will. The courts

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Preparing a will for a client with communication challenges

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have interpreted this term as meaning the testator must possess testamentary capacity; that is, at the time of will execution, the testator must have sufficient mental ability to do three things: (1) know and remember the individuals who are the natural objects of the testator's bounty; (2) comprehend the kind and character of the testator's property; and (3) make disposition of that property according to some plan formed in the testator's mind. See *Morecraft v. Felgenhauer*, 178 N.E. 877, 879 (Ill. 1931).

"It is well settled at the common law and under modern statutes that testamentary capacity, depending as it does, on soundness of mind and memory, is not effected by the fact that the testator is blind." Annotation, *Will of Blind Person*, 9 A.L.R. 1416, 1416 (1920) (hereinafter Annotation). As long as a visually-impaired person otherwise has testamentary capacity, the fact that a person cannot see will not prevent the person from being able to execute a valid will. See *Goldsmith v. Gates*, 88 So. 861 (Ala. 1921).

B. Knowledge of Contents

Difficulties arise in demonstrating that the visually impaired testator knew the contents of the document which he or she executed. However, the blindness of a testator alone does not rebut the presumption otherwise arising from the due execution of a will that the testator was aware of its contents. See *In re Calo's Estate*, 115 N.E.2d 778, 782 (Ill. 1953).

When probate matters were governed by the ecclesiastical courts, it was necessary to show that the will was read to the blind testator. See THOMAS ATKINSON, HANDBOOK OF THE LAW OF WILLS § 53 (1953) (hereinafter ATKINSON). It is now, however, "well settled that the will of a blind person is valid though it is not read to him at the time of its execution. It is sufficient if he, in any manner, is aware of its contents." Annotation, at 1417. Thus, the estate planner must take steps before or during the execution of the will to ensure that it can be demonstrated that the blind person was aware of the will's contents.

Of course, reading the will to the visually impaired testator in front of witnesses as they carefully track the written will would be a good technique, provided the testator is agreeable to revealing the contents of the will. If the witnesses were members or employees of the attorney's firm, they would be bound by the confidentiality rules of the

Disciplinary Rules of Professional Conduct. Although it may be a good idea to use the same witnesses who attest to the will, there is no requirement to do so because the communication of contents to a blind testator is not part of the execution process.

Voice recognition and text-to-speak computer software may provide another alternative. The visually impaired person could speak and edit his or her own will using the appropriate software. In a related fashion, the computer could vocalize an attorney-prepared will.

C. Attestation in Presence of the Testator

Illinois Probate Act of 1975 § 5/4-3 requires that all wills be attested in the presence of the testator by two or more credible witnesses. Courts have interpreted attestation in the presence of the testator as meaning "the testator must be so situated, both as to the will and the witnesses, that he may, if he chooses, see both in the act of attestation." *Walker v. Walker*, 174 N.E. 541, 543 (Ill. 1930).

The Illinois courts have held that attestation in the presence of a blind testator is sufficient if "all persons were in the actual presence of each other at the time of signing and knew the purpose therefor." *In re Lynch's Estate*, 431 N.E.2d 734, 738 (Ill. App. Ct. 1982). Courts in other states which have ruled on this point "adhere to the general rationale, and insist that the parties should have been so situated that the testator could have seen if he had vision." Atkinson § 72, at 344. Other courts hold that it is "sufficient if the witnesses sign in such proximity to the testator that he can discern their presence by the use of his remaining senses." Annotation, at 1418. Thus, if the testator can hear or touch the other witnesses, the attestation would be deemed done in the testator's presence. "Obviously a court should not be too strict in this regard, for a blind testator can seldom be certain from his other senses that the witnesses he has chosen are signing his will." Atkinson § 72, at 344 (1953). Courts strive to avoid the fraud that could easily be perpetrated upon the blind testator but, on the other hand, are flexible enough so that a blind person is not precluded from executing an effective will.

D. Signature of Testator

The visually impaired testator should sign the will with the testator's name. The attorney should physically place the testator's

hand at the appropriate place on the will and have the testator sign. Consider having the testator make practice signatures so that the testator is aware of the amount of space available for the signature. The testator may appreciate a signature guide, that is, a cardboard, metal, or plastic card with a cut out area in the size of a signature, which you may place over the appropriate spot on the will. You can make a guide yourself or purchase one from businesses selling products for visually impaired individuals such as LS & S Group (<http://www.lssproducts.com/>; 800-468-4789).

If the testator is unable to sign his or her name, consider the options discussed in Section III of this article.

E. Suggestions

The estate planner may consider taking the following precautions to increase the chances of the visually impaired client's testamentary desires being carried out upon death:

- Read the will to the blind testator in front of witnesses as described in subsection B, above.
- The blind testator could execute a Braille will. No Illinois case was located dealing with Braille wills but it seems that statutory law permits such wills. A will must be "in writing," however, what constitutes a writing is not defined in the statute. 755 Ill. Comp. Stat. § 5/4-3. A will must also be "signed." *Id.* A will may be signed by mark, and a signature by mark may be valid even if not accompanied by the testator's signature or the words "his mark." *Bailey v. Clark*, 561 N.E.2d 367, 369 (Ill. App. Ct. 1990). It thus appears that a Braille signature might be allowed. There is authority in other states, however, that Braille signatures would be ineffective. See *Succession of Harvey*, 573 So. 2d 1304, 1307 (La. Ct. App. 1991). Even if a normal print will were executed, a conformed unexecuted Braille copy might be useful.
- The attorney could videotape the execution ceremony. See Gerry W. Beyer, *Videotaping the Will Execution Ceremony — Preventing Frustration of Testator's Final Wishes*, 15 St. Mary's L.J. 1 (1983).

F. Sample Clauses

1. Testimonium

I, [testator], hereby sign my name

to this my last will consisting [number] pages (each of which I am initialing and/or signing for the purpose of identification), all in the presence of the two persons who have at my request and in my presence acted as witnesses on this the [day] day of [month], [year], at [city], [state]. Being unable to read this will because I am blind [visually impaired], I had this will read to me by [name of testator's attorney or computer software product] in front of [witnesses to the reading]. I am therefore fully aware of the will's contents.

2. Attestation

The foregoing instrument consisting of [number] pages was signed, published, and declared by [testator] to be [his] [her] last will. We now, at [his] [her] request, in [his] [her] presence, subscribe our names as witnesses this the [day] day of [month], [year]. For identification, we have each initialed or signed each page of this will. We read this will and heard the full contents of this will read to [testator] by [name of testator's attorney or computer software product] at the express direction of [testator] who was unable to read [his] [her] will because [he] [she] is blind [visually impaired]. We certify that the will was accurately read to [testator].

II. Hearing or Speaking Impaired Testator

More than 35 million people report having some degree of hearing impairment. See *Quick Snapshot of Deaf and Hard of Hearing People, Post-Secondary Attendance and Unemployment*, Gallaudet Research Institute (Oct. 2011). Accordingly, the odds are very high that you will encounter hearing impaired clients. Although hearing impairment alone does not impact a person's ability to execute a valid will, the fact does increase the likelihood of a contest based on undue influence or lack of testamentary capacity. See *Tidholm v. Tidholm*, 62 N.E.2d 473, 477 (Ill. 1945) (deaf testator had testamentary capacity); *Priem v. Adams*, 352 S.W.2d 324 (Tex. Civ. App.—Austin 1921, writ ref'd n.r.e.) (deaf testator had testamentary capacity and was not unduly influenced); *Pariton v. Shipley*, 195 P. 125 (Okla. 1921) (deaf testator deemed to lack testamentary capacity).

You may communicate with a client who cannot speak and/or hear through written means or via sign language. The client may

also be skilled in lip-reading. If the client communicates via sign language and you use an interpreter, you must be aware of several issues. You must endeavor to find an interpreter who will respect the client's confidentiality as well as someone who will accurately translate. Be cautious in using family members of the client to translate. These individuals may have an incentive to translate inaccurately. See *Tuzzio v. Appeal From Probate*, 1995 WL 643145 (Conn. Super. Ct. 1995) (translator, the testator's brother, deemed to have exerted undue influence over the testator). Although somewhat tedious, you may decide to conduct all communications in writing or via a TDD-TTY device to assure privacy and accuracy.

If the client is deaf, you will detect the situation immediately and can take appropriate steps to assure reliable communication as discussed above. A more significant problem, however, arises if the client is not totally deaf but instead has a hearing difficulty which is not readily apparent. As you proceed through the interview process, be alert for comments and answers to questions that are slightly inappropriate or contradictory which may reflect a hearing impairment.

III. Client Physically Unable to Sign

Your client may be unable to sign documents because of an injury, a muscular or neurological disease, or lack of writing skills. How may such a client execute a will?

A. Signature by Mark

A will must be signed. 755 Ill. Comp. Stat. § 5/4-3. A will may be signed by mark, and a signature by mark may be valid even if not accompanied by the testator's signature or the words "his mark." *Bailey v. Clark*, 561 N.E.2d 367, 369 (Ill. App. Ct. 1990). Accordingly, the testator may sign with an "X" or other mark.

B. Proxy Signature Under Probate Code

A will may be signed by a third party on behalf of the testator. See 755 Ill. Comp. Stat. § 5/4-3. A proxy signature must meet two requirements to be valid. First, the proxy must place the testator's signature on the will at the testator's direction. Second, the proxy must sign in the testator's presence.

C. Guided Signature

An assisted signature is one where the testator's hand is guided by a third party's hand in drawing the name. The court is likely to treat this as a proxy signature situation. In determining the validity of a guided signature, Illinois Courts have held, "If a guided or assisted signature is placed on a will at request of person making the will and such

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person thereafter in presence of two witnesses acknowledges the instrument to be his or her will, voluntarily made, the requirements respecting execution have been met." *In re Kehl's Estate*, 73 N.E.2d 437, 440 (Ill. 1947).

IV. The Illiterate Testator

A new client comes to your office and hires you to prepare a will to dispose of the person's sizable estate. During your meeting, the client seems to be of average intelligence and appears in all respects to be "normal." However, something unusual happens at one of your conferences. You hand the client a draft of the will and after flipping the pages, the client says, "It looks all right to me; I trust you." You become insistent and explain that you want the client to read the will carefully to make certain it correctly disposes of the estate. At this point your client, obviously quite embarrassed, admits to you that the client cannot read or write except to make a signature.

Although this situation is less likely to occur today in our highly educated society than it was a hundred years ago, it is probably more common than we care to admit. Twenty-two percent of adults possess no more than the most simple and concrete literacy skills. See *Trends in Adult Literacy*, National Center for Education Statistics (2007). This means that, on average and assuming your client mix is representative of the general population, more than one out of five of your adult clients will be functionally illiterate.

A. Testamentary Capacity

The courts in the United States have generally not exacted any educational standard on testators. See Atkinson § 53. For example, in *Oliver v. Williams*, 381 S.W.2d 703 (Tex. Civ. App.—Corpus Christi 1964, no writ), the court was confronted with a situation where the testator's testamentary capacity was in dispute because, among other things, he was unable to read or write although he could sign his own name. The court stated that "[t]he test is not whether the person who has made testamentary disposition of his property possesses a high order of intelligence * * *. The lack of education or proof of illiteracy has little, if any, bearing on the mental capacity to make a will." *Id.* at 709. "Laymen as a rule do not understand the technical and legal language of deeds and wills, whether they are literate or illiterate." *Naihaus v. Feigon*, 244 S.W.2d 325, 329 (Tex. Civ. App.—Galveston 1951, writ ref'd n.e.).

Thus, a testator's illiteracy is irrelevant as far as testamentary capacity is concerned,

as long as the usual elements can be demonstrated. (Note that in some states, such as Louisiana, the ability to read may affect the capacity to execute some types of wills).

B. Knowledge of Contents

"Where a will is prepared for a testator, and he is not given an opportunity to read it, or if he is unable to read and its contents have not been explained to him, such an instrument cannot be said to be his will, and will not, on contest, be sustained as a will." *Pepe v. Caputo*, 97 N.E.2d 260, 262 (Ill. 1951). This indicates that a testator must have knowledge of the contents of the document and intends those contents to be his or her will. Testamentary intent is lacking if the testator has no knowledge of the actual text of the will. To justify the admission of a will of an illiterate person to probate, many jurisdictions require the proponent of the will to show that the testator had knowledge of the contents of the will. It is usually not necessary to show that the will was read to the testator provided other evidence shows the testator had knowledge of its contents.

For literate testators, the burden of showing that a testator knew the contents of the will is usually made easier by a general presumption. "Where the testator is shown to have executed an instrument as his will, it will be presumed, in the absence of evidence of fraud, imposition or mental incapacity, that he was aware of the contents, and his signature to the instrument is prima facie evidence of his having understandingly executed it." *In re Calo's Estate*, 115 N.E.2d 778, 781 (Ill. 1953). The issue then raised is whether this presumption operates in the case of an illiterate testator.

Some jurisdictions have applied the rebuttable presumption that the testator had knowledge of the contents of the will if the will was properly executed even in the case of the illiterate testator. Other jurisdictions, however, hold that no such presumption arises and that an affirmative showing is required. Illinois has adopted the former approach. In holding that an illiterate testator is presumed to have knowledge if the will was duly executed, the court stated that "evidence tending to prove that he could not read English writing, and could not write it, except to sign his name, would have no tendency to establish either his inability to make a will, or his ignorance of the contents of the will which he executed." *Wombacher v. Barthelme*, 62 N.E. 800, 802 (Ill. 1902).

C. Suggestions

You must determine whether your client

is illiterate. But, how do you do so? Many illiterate people have learned to hide their shortcomings. Thus, illiteracy may be difficult to detect if you are not looking for it. If your client is illiterate, you must make sure the client knows the contents of the will and that such can be shown after his or her death. Although some privacy is sacrificed, a possible way of lessening probate problems would be to have the will read aloud during the execution ceremony. The witnesses should follow along as the will is read, hear the testator agree to the contents of the will, and then watch the testator sign the will. It may be good practice to have the witnesses sign a notarized transcript of the ceremony, including a statement of the testator's inability to read and agreement to what was read, or to have the entire will execution ceremony video recorded.

V. The Non-English Speaking Testator

Another special situation confronts an estate planner if he or she is employed to draft a will by a client who is literate but not in English. People who have recently immigrated to the United States or who are temporarily living here may fit this category. According to the 2010 American Community Survey, 20.6% of the U.S. population age 5 and over speak a language other than English at home. See *Language Spoken at Home, 2010 American Community Survey*, U.S. Census Bureau. This includes 12.8% of the population that speak Spanish at home, which is almost 37 million people.

A. Will Written in Foreign Language

Although no Illinois case dealing with a foreign language will was found, a Texas case is instructive. In *Dieckeow v. Schneider*, 83 S.W.2d 417 (Tex. Civ. App.—San Antonio 1935, no writ), the document in question was a holographic will written in German. The court held that in Texas "it is no impediment to the probate of a will that is written in a foreign language. [Section 59 of the Texas Probate Code], prescribing the requisites for a valid will, contains no provision requiring a will to be written in the English language. Nor is there another article of the statute that prohibits the probating of a will written in a foreign language." *Id.* at 417. Cases from other states are consistent. For example, in *Heupel v. Huepel*, 174 P.2d 850 (Okla. 1946), the court refused to deny probate to a will based solely on the fact that it was German.

The main difficulty with foreign language wills is interpreting their contents. Portions

of the will may be translated differently by different people. There is always a danger of "losing something in the translation," especially with languages of different language groups and with technical matters such as taxes. Although no Illinois case on point was found, it seems that courts would handle the situation the same as with ambiguity; that is, they would admit extrinsic evidence to assist their determination of what was intended by the testator.

The testator may obtain and approve an English translation of his or her will to help prevent such problems. In *Estate of Louis Rosenak*, 710 N.Y.S.2d 813 (Sur. Ct. 2000), the court dealt with a will that the testator executed in both Hebrew and English. Although the court treated the two documents as one will, there was a problem because there was a difference between them on one point. Luckily, the court easily resolved this conflict because the Hebrew will included a clause stating that in the case of discrepancies, the language in the Hebrew will controls.

B. Will Written in English

The situation where a will is written in a language which the testator cannot read is

quite similar to that of the illiterate testator. The first issue is whether this has an adverse impact on testamentary capacity. The general rule is that the inability to read or write English does not affect testamentary capacity or establish ignorance of the contents of a will which the testator executed. In *re Calo's Estate*, 115 N.E.2d 778, 781 (Ill. 1953). The biggest problem, of course, is to show that the testator knew the contents of the document and intended those contents to guide the disposition of his or her property upon death.

C. Suggestions

Precautions such as those discussed for illiterate testators should be taken to help avoid will contest actions. Perhaps a translation of the will in the testator's native language that is approved by the testator would also be beneficial. But, problems could arise if there are inconsistencies between the two versions. It is a good idea to include a clause in one will that states which will controls in the event that there are differences between the two. If both documents are executed as wills, as contrasted with one being merely a conformed copy, additional problems will arise if only one version is located upon the

testator's death. If both versions cannot be produced, the court may determine that the testator destroyed one of the versions with the intent to revoke the will.

VI. Conclusion

An estate planner must be vigilant to ascertain whether a client has a communication challenge. Some challenges will be readily apparent while others may be less noticeable. After detecting communication challenges, the attorney should take steps to be certain that the client's situation is not used to support a challenge to the will. By being alert to these issues and taking appropriate steps during will preparation and execution, you can significantly increase the likelihood that your client's intent will be carried out. ■

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Whither the remainderman

By Robert W. Kaufman and Amanda M. Byrne

The First District, Second Division Appellate Court decision in *Carter v. Carter*, 2012 IL App (1st) 110855, breaks new ground in its treatment towards trust remaindermen.

On February 7, 2012, the Court held that the Trustee, who was also the sole income beneficiary, and who had no power to invade corpus, could in fact make investments solely to increase income, to the detriment of the trust remaindermen. How this case is reconciled with the Prudent Investor Rule is murky at best. Hopefully, it is its unique fact pattern that caused the decision to come out the way it did.

Luther Reynolds Carter created a Living Trust that provided for three separate trusts: a marital trust, a GST trust, and a family trust; the marital trust was the only trust at issue in the case. Audrey Carter, Luther's wife, was named trustee of the marital trust, and her son from a previous marriage was named as successor trustee of the marital trust, as well as trustee of both the GST and family trust. Under the marital trust, Audrey was to receive all of the income during her lifetime, but none of the principal. Upon her death, the principal of the marital trust was to go Luther's daughter Tiffany. Tiffany and her descendants were also the sole beneficiaries of Luther's other trusts.

The marital trust provided Audrey with the power to invest "regardless of diversification and regardless of whether the property would be considered a proper trust investment." Audrey, a sophisticated investor, proceeded to invest in tax-free municipal bonds which generated interest over time, but did not increase the value of the principal. She chose these bonds as they provide "a good safe income in a highly fluctuating and problematic marketplace."

Tiffany filed a complaint for breach of fiduciary duty and unjust enrichment, as well as punitive damages, because the trust, which was funded with \$2 million in 2003, was currently worth approximately \$300,000 less due to inflation. The trial court granted Audrey's motion for summary judgment on all counts, over Tiffany's cross-motion for summary judgment, finding that "although Tiffany does receive a distribution when the trust fund terminates, this allocation does not appear to be for her benefit, but rather guidance of where the money should go

when the trust ceases to exist."

How the Court differentiated this remainder beneficiary as being a "guide" upon trust termination as opposed to any other interested beneficiary is difficult, if not impossible, to comprehend. Tiffany's role as a mere guide of distribution when the trust ends appears to be in stark contrast of case law mandating consideration of remainder beneficiaries' interests; the Court effectively "considered" Tiffany's interests not as compelling as Audrey's, particularly in light of the overall estate plan. Under *Chicago City Bank and Trust Co. v. Lesman*, 186 Ill.App.3d 697, 701, 542 N.E. 2d 824, 826 (1st Dist. 1989), remainder beneficiaries to a trust are "interested persons" who have an interest in maintaining the assets of the estate. Apparently, the Court found Tiffany's interests to be subservient to those of Audrey's. We also know from the Restatement (Second) of Trusts § 183 that a trustee is obligated to treat its beneficiaries impartially.

Tiffany appealed under 304(a), claiming the lower court (1) misinterpreted her father intent in creating the marital trust and (2) Audrey breached her fiduciary duty of impartiality and prudence in her investment choices. She argued under *Bornstein v. First United*, 232 Ill.App.3d 623, 629 (1st Dist. 1992) that "where there are multiple beneficiaries named in a trust, a trustee is under a duty to deal impartially with each of them." However, in the analysis of the grantor's intention, the Court examined the plain language of the trust and the estate plan as a whole. The Court upheld the lower court's ruling, finding that because 1) Tiffany benefited from the other trusts to the exclusion of Audrey, 2) a trustee's discretion provided under the trust instrument cannot be subject to court interference absent proof of fraud, abuse of discretion, and bad faith, and 3) the marital trust only comes into existence if Audrey survived Luther, Luther only intended Tiffany's right to corpus upon trust termination as a "guidance of where the money should go when the trust ceases to exist." Furthermore, because the trust provides that Audrey can invest "regardless of diversification and regardless of whether the property would be considered a proper trust investment," the court will not disturb the plain language interpretation of this provision.

The Court then analyzed the impact of the fiduciary duties under the Prudent Inves-

tor Rule. Tiffany argued under *Northern Trust Co. v. Heuer*, 202 Ill.App.3d 1066, 1070 (1990), "[A] trustee has a duty to deal impartially with all beneficiaries and to protect their interests." The Court acknowledged that based on the language of the instrument, Audrey could very well invest to the detriment of the principal; however, Audrey's authority with respect to income was Luther's intention under the marital trust. Moreover, based on the entire portfolio and Luther's other trusts, the Court would not disturb Audrey's discretion unless she invested in a "wholly unreasonable and arbitrary manner." *Faville v. Burns*, (2011) IL App (1st) 110335, citing *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457, 464 (2008). Interestingly enough, while Audrey was required to be mindful of Tiffany's interests, and prohibited from acting inconsistently with them, that is precisely what she did. However, she was able to do this based on the Court's finding that Tiffany actually had no genuine interest in the Trust other than as a guide upon its termination.

At first glance, this case's treatment of trust remaindermen appears to fly in the face of the Prudent Investor Rule. After considering the estate plan as a whole and that Tiffany would receive distributions from other trusts, her role as a "guide" to the marital trust's termination was not as detrimental to her interests as had there been no other trusts established for her exclusive benefit. What is more interesting to consider is the plain language of the trust authorizing the trustee to make investments without regard to diversification, which would not otherwise be considered proper trust investments. Would the ruling come out the same way if there were no other trusts at play? How the Courts will reconcile trust language that goes against the Prudent Investor Rule with the ultimate distributions to beneficiaries under an estate plan is likely to be a heavily fact-dependent decision. While a trustee must act impartially, it may be the case that all trust beneficiaries are equal; some are just more equal than others. ■

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