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General Practice, Solo & Small Firm

The newsletter of the Illinois State Bar Association's General Practice, Solo & Small Firm Section

Chair's column: Considerations for building strong attorney-client relationships

BY EBONY R. HUDDLESTON, ESQ.

Greetings! I hope that this new bar year is off to a great start for you. While we are still in the days of summer vacations, take some time to reflect on the great service you provide to your clients. After your vacations and long weekend getaways are over and you are back in the office, consider the strength of your client relationships. Analyze the cases you accept and the level of communication you have with your clients. Take stock in how comfortable you are with those cases and clients.

Practicing in a solo or small firm presents a unique opportunity to become

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2016 amendments to the health care power of attorney

BY LAUREN EVANS DEJONG

On January 1, 2016, the new amendments to the Short Form Power of Attorney for Health Care became effective. The law providing for the health care power of attorney was initially enacted on September 22, 1987 and has been continuously and significantly revised since then.

The short form power of attorney was radically amended in 2014, effective January 1, 2015. Essentially, the language of the entire statute was replaced after the enacting clause. Faced with criticisms and concerns from attorneys and consumers following its enactment, the legislature once again amended the statutory form.

The new power of attorney form contains a savings clause which provides that the revisions to the statutory form do

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Chair's column

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intimately familiar with the client's life as it pertains to the legal issue at hand. Essentially, the client drops his or her legal problems at our front door and trusts our legal analysis and recommendations in order to secure the best outcome possible. Whether we are navigating a client through a divorce or working to reduce the amount of tax liability assessed against a business by the Internal Revenue Service, it is advantageous for us to build a strong relationship with our clients. By building a strong relationship, the client will feel comfortable sharing information with you, the client will be more inclined to accept your strategy for handling the issue and motivated to pay you for your services in a timely manner. All of these positive reactions make our job more manageable and less stressful.

We have the ability to choose the area(s) of law in which to practice. At the same time, we have the advantage of determining which clients we are comfortable representing. Just as all money is not good money, all clients that seek our services are not the right client for us. Evaluating the client as well as the strength of the case prior to entering into a formal attorney-client contract is key. Observe the body language of the client and evaluate the veracity of the information provided by the client. Closely review the documentation provided to you by the client, investigate the circumstances surrounding the client's claims, and keenly listen to what the client says. I have found that by encouraging the client to engage in verbally reviewing the most relevant and critical parts of the information provided, the client has additional information relevant to the case which provides additional clarity to some aspect of the facts. I have encountered several potential clients that I chose not to represent because the information provided to me was questionable or the client sought to advance the case by using methods I felt were unethical.

Failure to do your due diligence at the outset of the attorney-client relationship will most likely lead to a strained relationship wherein both the client and practitioner become disengaged. The client becomes frustrated with the amount of time it takes to resolve the issue and ultimately projects his or her frustration with the issue or opposing party onto you. Encourage the client to tell you about anything he or she believes to be important to the issues at hand. At the same time, be honest about your analysis of the information you have reviewed. If the information provided to you does not align with the goals or outcome the client is requesting or how you chose to run your practice, tell that to the client right away. This will allow both parties to decide whether the representation should continue or end. Both parties save time and money by being honest and upfront with one another at the beginning of the consultation.

Once you and the client reach a mutual understanding about the scope of your representation and agree upon reasonable expectations for the outcome of the case, communication and transparency between the parties throughout the duration of the case must occur. Many of my past and current clients regularly thank me for keeping them informed about the status of the case and are even more thankful for providing them with copies of correspondence, pleadings, orders and other documentation filed and exchanged while their case is pending.

All too often I hear comments from those who have had negative previous experiences with some attorneys about how difficult it was to get in contact with the attorney either by phone or in person, the secretary or assistant did not provide much help in understanding what actions are being taken on their files, the client had no idea about the status of their case at any given time and they did not receive any updates on how long the case would continue. A major concern for the client is receiving invoices requesting payment from the attorney but the invoice does not clearly

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
John T. Phipps
Hon. Edna Turkington-Viktora

MANAGING EDITOR / PRODUCTION
Katie Underwood
✉ kunderwood@isba.org

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indicate what work has been done by the attorney. In some instances, the attorney requested that the balanced owed was paid by a certain date otherwise the attorney would withdraw from the case. Certain clients would receive a number of invoices, make payments on those invoices and still be left without a reasonable understanding of the status of the case. While we know we cannot spend several hours out of each workday talking to one client about the legal procedures of their case, we must provide a response to the client inquiries, even if the response is brief. The threat of withdrawing from the case if payment is not made is only reasonable if the practitioner has kept the client informed and the client simply will not pay the bill.

Solo and small firm practitioners must prioritize our schedules to allow for a proper amount of communication with our clients. Not only do our clients enable us to remain in practice, our clients are oftentimes our greatest advertisers. There are many ways to balance the needs of our clients while efficiently running our practice. Some of those methods may include email or weekly or monthly conference calls. Whatever methods we choose, we have an ethical duty and responsibility to ensure that our client receives the best representation possible which includes keeping our client informed about the service we are providing.

The Illinois State Bar Association and Attorney Registration and Disciplinary Commission are just two of the various resources that offer a variety of reference materials to assist and guide practitioners on the importance of building and maintaining a healthy relationship with our clients. For more information, visit www.isba.org and www.iardc.org. Also, this section council will be presenting a CLE addressing these issues in more detail the near future.

If you have an experience or helpful tips you would like to share on this subject please submit an article or contact us through the section officers or newsletter editors. ■

About the Author: Ebony R. Huddleston is Assistant Vice President at Farrell, Hamilton & Julian, P.C. in Godfrey, IL. She is admitted to practice in the State of Illinois, Southern District of Illinois, Central District of Illinois and the United States Tax Court. Some of her areas of practice include civil litigation, taxation, bankruptcy, estate planning, real estate and family law. As an active member of the Illinois State Bar Association, Ebony is the Chair of the General Practice, Solo & Small Firm Section Council and is the council's CLE coordinator, and she serves on the Assembly. She is also a member of the Racial & Ethnic Minorities and the Law Standing Committee. Some of her other activities include serving on the board of directors for Land of Lincoln Legal Assistance Foundation and IMPACT CIL in Alton, Illinois. She has coordinated and presented on a variety of issues such as Navigating the Residential Foreclosure Maze, Hanging Out Your Shingle, Credit Union Convention and Expo, Nuts & Bolts of the Firearm Concealed Carry Act. She has been recognized as an Illinois Super Lawyer Rising Star for the past several years.

2016 amendments to the health care power of attorney

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not invalidate any prior health care power of attorney. Any prior power of attorney remains valid and effective and does not require an amendment.

The 2015 form omitted the language nominating the agent as guardian of the person. This provision is now added back to the 2016 form and is located directly below the nomination of the agent.

In the new form, the provisions nominating a successor agent were moved from the end of the form, following the principal and witness signatures, to immediately below the principal's nomination of the initial agent. This certainly is better placement of the successor agent provisions, as before the successor agent appeared almost as an afterthought.

An additional option has been included as to when an agent may begin making decisions for a principal. Instead of only when a physician decides the principal cannot make his own decisions, or immediately upon execution of the power of attorney, the principal has the option to allow the agent to make decisions for the principal only when the agent cannot make them for himself, determined by a physician, but allowing the agent to have complete access to the principal's medical and mental health records, the authority to share the records with others as needed and the complete ability to communicate with the principal's physicians and other health care providers, including the ability to require an opinion of the principal's physician as to whether the principal lacks the ability to make decisions for himself.

Witness restrictions were eased and the attestation block corrected in the 2016 form. The list of those persons restricted from witnessing the execution of a power of attorney for health care was changed to substitute "psychologist" for "mental health provider." Moreover, the witness attestation clause was amended to match the statutory provisions. The form now provides that advance practice nurses, dentists, podiatric physicians, optometrists and psychologists are impermissible witnesses to the health care power of attorney.

The 2016 amendment addresses some of the concerns raised with the 2015 rewrite of the statutory short form power of attorney for health care. While some concerns have not yet been addressed, many see the new form and its amendments as a step in the right direction. If you haven't done so already, now is a good time to update your office forms to comport to the amended statute. ■

About the Author: Lauren Evans DeJong is a member of the General Practice, Solo and Small Firm Section Council, practicing at Stahl Cowen Crowley Addis, LLC, Chicago, Illinois, in the areas of estate planning and administration, tax and business planning.

In re Estate of Agin—Deceased beneficiary of uncle's land trust outlived uncle but died before distribution of trust sale proceeds. Decedent's trust share held to be an asset of his estate and did not pass to his children under trust agreement

BY MARY ANNE GERSTNER

On April 10, 2014, Stephen M. Agin, decedent, died at the age of 82 without a will. *In re Estate Of Stephen Michael Agin, Deceased v. Janice M. Marzovillo, Stephen L. Agin, Cynthia M. McKennas, and Mary L. Agin,* 2016 IL App (1st) 152362, involved the interpretation of an Illinois land trust ("the trust") established by Michael Yergovich, decedent's Uncle. Yergovich was beneficiary of the trust and retained sole power of direction. An amendment to the trust provided: "[i]n the event of death of said Michael Yergovich prior to termination of this trust or prior to other disposition of his interest hereunder, then all interest of said Michael Yergovich shall immediately pass and vest, as follows, per stirpes." The amendment then listed a 20% interest to each of Yergovich's four then-living siblings, and a 4% interest to each of five named nieces and nephews, including the decedent.

Yergovich died on January 5, 2014. The real estate in the trust was sold on November 18, 2014. Decedent's wife, as supervised administrator of his estate, claimed decedent's share of the funds from the sale as an asset of decedent's estate. Respondents, decedent's four children from a prior marriage, objected, and claimed that decedent's share of the funds passed to them directly under the trust as decedent's per stirpal descendants. The probate court determined that upon Michael Yergovich's death, the interest of the decedent in the trust "*** vested, it became his, and Mr. Agin could have done whatever he wanted to do with it." An Order entered finding that the trust agreement was not ambiguous, that the funds in issue were an asset of decedent's estate, and ordering that the funds be disbursed to the estate.

Respondents filed a motion for reconsideration which asserted new facts and new arguments. They claimed, *inter alia*, that subsequent to Yergovich's death, at the request of Yergovich's attorney, decedent and other contingent beneficiaries signed a ratification of the trust agreement and assigned their power of direction to two individuals in order to sell the property held in the trust. Respondents argued that since decedent transferred his share of the power of direction, and the trust still existed at the time of decedent's death, that upon his death decedent's interest in the trust passed under the terms of the trust to his per stirpal descendants. The motion was denied. Respondents appealed.

Respondents argued on appeal that the probate court failed to consider Yergovich's intent in entering into the trust. In its analysis, the Appellate Court reviewed the applicable law in the interpretation of trusts. This review included the legal principle that in interpreting trusts, which are construed according to the same principles as wills, the goal is to determine the settlor's intent, which the court will effectuate if not contrary to law or public policy.

Respondents claimed that the inclusion of the "*per stirpes*" language in the trust amendment meant that Yergovich intended that if one of the individuals identified by him was not alive at the time of distribution, that person's share would go to his/her per stirpal descendants. The Appellate Court, however, could find no error in the finding by the probate court that the trust was not ambiguous, and that under the terms of the trust, decedent's interest in the trust vested upon Yergovich's death. "Under the express language of the trust amendment, in the event of Yergovich's death prior to termination of the trust, 'all interest of said Michael Yergovich shall *immediately* pass and vest' (emphasis added) in the way set out in the amendment. Thus, a 4% beneficial interest in the trust passed to decedent at the moment of Yergovich's death." (Citation omitted). 2016 IL App (1st) 152362, ¶23.

The Appellate Court found that there is no reason this would change with the inclusion of the *per* stirpes language. *Per stirpes* is a term used to specify the method of distribution of property, and denotes a taking by right of representation of that which an ancestor would take if living. The term has no application in determining who those entitled to share in the estate are.

The Court concluded that the express language of the trust itself sets out a dividing line between the time prior to Yergovich's death and the time after Yergovich's death. As the Court stated: "...-at the moment of death, Yergovich's interest would pass to those named in the amendment, *per stirpes*. This means that if decedent was not alive at the moment of Yergovich's death, his 4% interest would pass to his descendants, *per stirpes*. However, because decedent *was* alive at the moment of Yergovich's death, his 4% interest passed to decedent directly." 2016 IL App (1st) 152362, ¶25.

The argument that decedent had assigned his share of the power of direction in the trust after Yergovich's death and thus his interest in the trust had not vested at the time of his death, was rejected. Unlike a situation where it is the settlor who retains the power to direct the trustee to the exclusion of a beneficiary, here, a beneficiary voluntarily assigned his power of direction to another after the settlor's beneficial interest had passed to him. Further, the terms of the trust only concerned themselves with the status of the beneficiaries at the time of Yergovich's death.

With respect to the claim that the probate court ignored the actions taken by Yergovich's attorney after Yergovich's death to effectuate Yergovich's intent, and overlooked decedent's ratification of the trust, the Court stated that in construing a trust, the settlor's intent is to be determined solely by reference to the plain language of the trust itself, and extrinsic evidence may be admitted only if the language of a trust is ambiguous and the settlor's intent cannot be ascertained. The Court pointed out that the probate court found that the trust agreement was not ambiguous and respondents do not argue that it was ambiguous. The probate court properly focused on the trust agreement itself, and not on the actions of Yergovich's attorney after Yergovich's death. Further, it is within the discretion of the trial court to deny a motion for reconsideration and ignore its contents when the motion contains material that was available prior to the hearing at issue but never presented. The determination of the probate court was affirmed.

This Opinion demonstrates the importance of a clear expression of the settlor's intent in the trust language itself, the meaning of the term *per stirpes*, and reflects the impediments which exist to presenting extrinsic evidence in interpreting a trust. ■

About the Author: Mary Anne Gerstner is a principal with the Law Offices Gerstner & Gerstner, 53 W. Jackson Boulevard, Suite 1538, Chicago, Illinois 60604. Telephone: 312-435-0040; E-mail: magerst@sbcglobal.net. She is engaged in the general practice of law, primarily in the areas of civil litigation, employment law, wills and trusts, real estate, family law, and bankruptcy litigation. Mary Anne currently serves as the Vice-Chair of the Illinois State Bar Association General Practice, Solo, and Small Firm Section Council.

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Springfield, Illinois 62701-1779
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