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Estate Planning: A Continuous Process

Christopher G. Schultz

Estate planning is a continuous process and estate plan documents should be reviewed at least every decade and upon any major changes in lifestyle or family structure.

A basic estate plan includes a Will, a Medical Power of Attorney, and a Durable General Power of Attorney for financial matters.

- A Will addresses the distribution of assets, paying debts and taxes, and providing guardians and conservators for any minor children.
- A Medical Power of Attorney designates the individual to be consulted for medical treatment issues in the event a person is not capable of making medical decisions for themselves. A Medical Power of Attorney can also contain specific instructions for personal preferences, such as anatomical gifts, life sustaining treatment or treatment consistent with your religious beliefs.
- A Durable General Power of Attorney for financial matters allows a person to name an agent to make financial and legal decisions, which is important in the event a person become incapacitated, temporarily or permanently, or are not available to perform certain regular tasks for banking, bill paying, etc.

Additionally, estate plans often include a Revocable Living Trust (Trust).

- A Trust is created for several purposes, including planning for potential tax issues, controlling the timing of distributions or setting contingencies for distributions, and avoiding probate. A Will is administered through the probate court addressing the assets that are titled in a person's name upon their death. A proper Trust can avoid the time consuming and expensive probate process.

Without proper instruction to a probate court through a Will or to a successor trustee through a Trust, the assets will be distributed in accordance with a statutory scheme that essentially follows a genealogical rule of inheritance. Simply, the assets would first go to parents, if surviving. If not, the assets would be distributed to siblings in equal proportions.

Those who are not married and do not have children may think they do not need an estate plan. This is not true, especially if they plan to donate assets to a charity, such as a church, college or other qualified charitable organization. Without an estate plan, assets will be distributed according to a statutory plan with the beneficiaries being immediate family members.

Blended families where one or both spouses have children from previous relationships, creates additional reasons to prepare an estate plan. Following the statutory genealogical rule of inheritance is not going to be the result intended. Consideration has to be given to making special provisions and allowances for children from prior relationships, former spouses, and possibly a separate allocation of assets.

Complicating matters even further are individuals who live with a significant other and may or may not have children. In almost every circumstance, without an estate plan, your intended disposition of assets will not be consistent with the actual distribution of assets. An estate plan is necessary in order to guide a probate court or a successor trustee with the proper allocation and distribution of assets.

Estate planning for the elderly becomes even more complex due to concerns for long-term care and the potential need for Medicaid. Medicaid is a need-based program and Medicaid planning is needed in order to qualify for eligibility. More and more reviews and reports are being published that recommend purchasing long-term care insurance. In most circumstances, it appears this is a more viable financial option than planning for Medicaid eligibility. Medicaid planning is a method organizing the assets and income into categories of countable or non-countable assets. Non-countable assets are assets that are not counted in determining your eligibility for Medicaid benefits. Proper Medicaid planning can assist in sheltering your countable assets, preserv-

continued on page 2

in this issue

Estate Planning: A Continuous Process (cont.)

ing assets to pass to your heirs, and providing for the care and financial support of your spouse.

Estate planning has become more complex over the years, however the estate plan itself does not have to be complex. Attorneys in our Estate Planning and Elder Law practice group are available to assist in creating or updating your estate plan to ensure the plan benefits you and your loved ones.

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Department of Education and Transgender Facilities

Elizabeth Rae-O'Donnell

On May 13, 2016 the U.S. Department of Justice and the U.S. Department of Education issued a "Dear Colleague" letter to all schools in the country receiving money from the federal government directing that "when a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." Gender identity refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth. The Department of Education says schools cannot require a medical diagnosis or other documentation to prove transgender status.

Although the "Dear Colleague" letter is not a congressional statute, executive order, or even a regulation, it is a directive that the federal government refers to as "significant guidance." School districts, including the country's 16,500 public school districts, post-secondary colleges, 7,000 universities and trade schools, charter, and for-profit schools are now on notice regarding how the federal government interprets Title IX, the 1972 law that prohibits sex discrimination in education, as it relates to the rights of transgender individuals. As a condition of receiving federal funds, a school must agree that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX. The "Dear Colleague" letter noted that as consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students. The directive carries with it the implied threat that failure to follow the federal government's interpretation could result in the loss of federal education funding.

The directive noted that when a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.

From a practical standpoint, the directive states that schools cannot require transgender students to use their own private bathrooms unless it does the same for all students. A school may come up with alternate facilities, for example a single-user restroom, as long as these options are available for all students who voluntarily seek additional privacy. Other practical solutions could include putting up curtains in locker rooms for more privacy or allowing differing schedules by transgender students to use facilities as long as these differing schedules are not required.

Additional considerations addressed in the directive include that teachers and staff cannot use a transgender student's birth name or pronoun and school records must reflect the student's chosen name and gender identity. Schools with sex-segregated accommodations for overnight field trips must allow transgender students to sleep with students of their chosen gender. Schools may offer single-occupancy sleeping rooms, but transgender students may not be required to use them unless all students have access to them. Athletic teams are allowed to segregate by sex, as long as they provide equal opportunity for both sexes.

Additionally, on April 19, 2016, the U.S. Court of Appeals for the Fourth Circuit deferred to the U.S. Education Department's position that transgender students should have access to bathrooms that match their gender identities rather than being forced to use bathrooms that match their biological sex. This case is entitled *G.G. v Gloucester County School Board*, No. 152056, and concerns a high school junior's complaint that transgender students should have access to bathrooms that match their gender identities not their biological sex. In a 2-1 decision, the Fourth Circuit ordered the lower court to rehear the student's claims that the school board's policies, which restricted transgender students to using a separate unisex bathroom, violated Title IX. The Court also ruled that the lower court should reconsider a request that would have allowed the teen to use the boy's bathroom at the high school while the case was pending. The Fourth Circuit is the highest Court in the country to address the question of whether bathroom restrictions constitute sex discrimination and could be persuasive for the Sixth Circuit, which includes Michigan. CMDA will continue to monitor this issue.

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Sixth Circuit Holds that Police Must Protect Free Expression of Unpopular Views

Douglas J. Curlew

The "freedom of speech" protected by the First Amendment encompasses both actual speech and expressive conduct. *R.A.V. v. City of St. Paul, Minn.* (S.Ct. 1992). Embodied within the concept of "free speech" is recognition that advocates of unpopular views must be protected, even though their speech may provoke anger in persons who hear it. *Terminiello v. City of Chicago* (S.Ct. 1949). When a speaker passes the bounds of mere argument the point of seeking to incite a riot, police may intervene against the speaker for the protection of public safety, *Feiner v. New York* (S.Ct. 1951), but this threshold is reached only where the speaker's advocacy "is directed to inciting or producing eminent lawless action and is likely to incite or produce such action." *Hess v. Indiana* (S.Ct. 1973). "Government officials may not exclude from public places persons engaged in peaceful expressive activities solely because the government actor fears, dislikes, or disagrees with the views those persons express." *Wood v. Moss* (S.Ct. 2014).

In two recent opinions, the United States Court of Appeals for the Sixth Circuit has addressed this balance between free speech and public safety. In *Occupy Nashville v. Haslam* (2014), protestors seeking to bring "attention to disparities in wealth and power in the United States" established a 24-hour-a-day protest encampment on the plaza of a public war memorial in Nashville, Tennessee. As the days passed and the number of protestors grew, problems arose dealing with human waste and trash, together with "an increase in the number of assault complaints and damage to public property." After three weeks, State officials decided to address these problems by imposing a curfew under which "the plaza would close to the public from 10:00 p.m. until 6:00 a.m. daily." Protestors arrested for attempting to continue their 24-hour-a-day protest in defiance of the curfew sued the officials for violating the protestors' First Amendment rights. The Sixth Circuit held that the officials could not be found liable to the protestors, because there is no clearly established constitutional right to occupy public space for an indefinite period and no "unfettered right to threaten the health and safety of the public or the security of public property."

In *Bible Believers v. Wayne County* (2015), law enforcement officials also invoked public safety concerns to justify ouster of Christian "evangelists" from a public Arab cultural festival. The evangelists targeted the many Muslim attendees with a provocative, anti-Islamic speech and signs (particularly insulting the Muslim prophet Mohammed), while carrying a severed pig's head on a stick through the crowd. Some festival attendees threw bottles and other objects at the evangelists. The deputy chief of the sheriff's department asked the evangelists to leave, with justification that he did not have enough officers at the event to protect the evangelists from the crowd. He warned the evangelists they would be ticketed for disorderly conduct if they refused to leave.

After originally approving the sheriff's actions, the Sixth Circuit re-heard the case and found the sheriff to have violated the evangelists' First Amendment rights. The Court held that law enforcement officials have an obligation to protect those who publicly express an unpopular viewpoint from the hostile reaction of those upset by the message. In this instance the sheriff's course of action allowed the hostile crowd to silence the evangelists. Citing the previous Sixth Circuit case of *Glasson v. City of Louisville* (1975), the Court admonished that "a police officer has the duty not to ratify and effectuate a heckler's veto."

The lesson to be drawn from the *Occupy Nashville* and *Bible Believers* opinions is that concerns for public safety cannot justify the complete silencing of a speaker in a public forum. The cases fail to provide any "bright line" to discern when public safety concerns become sufficiently compelling to justify restriction of speech, but a total exclusion such as effectively occurred in the *Bible Believers* case will almost certainly be rejected by the courts, even where a compelling public safety concern exists.

The *Occupy Nashville* decision confirms that health and safety concerns can justify limited restrictions that do not entirely prevent a speaker from continued speech or expressive conduct in a public forum the speaker has chosen. The Supreme Court has long recognized that content-based regulation of speech in a public forum is permissible only "to serve a compelling state interest" and only when the regulation "is narrowly drawn to achieve that end." *Perry Ed. Ass'n. v. Perry Local Educators Ass'n* (1983). Yet "reasonable time, place or manner restrictions on expression are constitutionally acceptable." *Clark v. Community for Creative Non-Violence* (S.Ct. 1984). The overnight exclusion of speakers from the plaza in *Occupy Nashville* was sufficiently narrow in its timeframe and scope.

Conversely, the effectively total exclusion of the evangelists in the *Bible Believers* case was not. The *Bible Believers* opinion admonishes that law enforcement officers must protect the right of speakers to express unpopular views in their chosen public forum, even though this might require affirmative intervention by law enforcement officers against those who oppose the speakers. Law enforcement officials must seek alternatives that maintain public safety, while still allowing provocative speakers to speak.

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