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COMPLEX COMMERCIAL LITIGATION

YEAR-END THOUGHTS ON FORCE MAJEURE, WHERE CONTRACTS AND APOCALYPSES MEET

BY DEREK DOMIAN

"Force majeure" — French for "is this year over yet?" — exploded onto the legal scene in 2020. Formerly the eye-glazing boilerplate of commercial contracts — as if *this* would ever happen — force majeure has become a deciding factor on whether and how contractual relationships will endure in a pandemic. Many of us have blown the dust off of force majeure clauses, scrutinized their every word and reckoned with their real-word implications. So, with 2020 in the books, what have we learned? In short, these clauses are no panacea. They have their limits. To understand their limits, we need to understand their origin.

I. A BRIEF HISTORY: CIVIL LAW, COMMON LAW, CONTRACT

We start where many brief histories do, with Napoleon. The Napoleonic Code codified the concept of force majeure, literally "superior force," and incorporated this concept into contracts. Contracting parties did not need to worry about spelling out this relief themselves. Not surprisingly, one of the earliest discussions of force majeure by the U.S. Supreme Court came in the context of the Louisiana Code, a descendent of the Napoleonic Code.[1] The question in that case was whether the code's concept of "*cas fortuit ou force majeure*" excused a lessee of a sugar plantation from its obligations under a lease after the Mississippi River reclaimed much of the plantation. The Supreme Court held that this flood proved to be a "fortuitous event of irresistible force" that relieved the lessee of its lease obligations. In doing so, the Supreme Court distinguished the gentler civil law from the harsher common law, seemingly indifferent to the brutal world that contracting parties inhabit.

Lord Blackwell would soften the common law when he ruled in his landmark decision that "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[2] At last, the common law acknowledged that such matters as death and destruction could impact contracts. Thus, the doctrines of "impossibility" and "frustration of purposes" evolved into their current state as formulated in Sections 261 and 265 of the Restatement (Second) of Contracts, respectively. These doctrines relieve some of the harshness of the common law, but its stubbornness persists. Impossibility demands substantially more than inconvenience, especially financial inconvenience. In Massachusetts, "[t]he type of circumstances envisioned by courts when applying the doctrine of impossibility generally involve extreme or unreasonable difficulty or expense that make it virtually, if not scientifically, impossible for a party to perform its obligations under a contract."[3] Frustration of purpose demands more than the dashed expectations of a single party. The frustration must destroy the essential purpose of the contact.

If impossibility and frustration of purpose sprouted up as light versions of the civil law concept of force majeure, force majeure clauses responded to the limitations of these common law doctrines. Parties took it upon themselves to define the events that would excuse them from their contractual duties. While informed by common law notions of impossibility and frustration of purpose, force majeure clauses are not limited by them. Living and breathing people know best the worlds they inhabit and the risks they are willing and unwilling to assume.

The roots of force majeure highlight two important lessons. First, force majeure clauses are creatures of contract and, as such, the language used by parties matters. Precision in drafting is crucial. Second, as much as they are contractual efforts to escape the pull of the common law, the common law continues to exert an influence over force majeure clauses. These clauses define an exception to the normal strict liability of contractual performance. Parties should not expect this exception to be construed generously.

II. FORCE MAJEURE CLAUSES DISSECTED

Force majeure clauses have two main features: they define what constitutes a force majeure event, or the cause; and they define the relief made available by a force majeure event, or the effect. As a cause-and-effect clause, there is also a causal requirement. The verbs used in the clause — delayed, prevented, etc. — will define the required causal showing.

When we all went running for our force majeure clauses, the very first thing we looked for was the word "*pandemic*." Many of us did not find this word. Some found close approximations — plague and pestilence, for example, in contracts apparently drafted by Middle Age historians or excessively somber parties. Others found catchall phrases like "Acts of God" or "events beyond the reasonable control of the parties." But before we had to trace the etymological roots of each noun found in the laundry list of force majeure events, state and local governments began passing sweeping orders closing businesses and offices, freezing construction, banning travel, ordering people to stay home, etc. Whether or not a force majeure clause contained the word pandemic became less important when it did contain more prevalent language concerning governmental orders. The intervention of government into daily and commercial life became the force majeure event.

When it comes to the definitional component of force majeure clauses, therefore, we have learned a few things. First, we should be deliberate and precise about how we define force majeure events. As the fossilized residue of the worst fears of past generations, these clauses need a thoughtful update. Second, we should be careful about relying on catchall phrases. The Latin *ejusdem generis* — "of the same kind" — works to limit catchall phrases to the same kind or class of events as those specifically enumerated. Even in jurisdictions that do not strictly apply this rule of construction, we should not expect a generous reading of force majeure clauses and therefore should not expect to find in "Acts of God" or "other causes" what we cannot find in the enumerated causes. Third, defining force majeure events in terms of the *effects* of more abstract occurrences like "pandemics" — e.g., travel restrictions, governmental restrictions, construction moratoria — will help ground these clauses in the immediate

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and practical problems affecting performance and thus establish a clearer causal nexus between the force majeure event and the relief sought.

Indeed, the battleground these days is not whether a force majeure event has occurred, but whether it should relieve a particular obligation. The latter calls into question the scope and nature of the relief made available by a force majeure clause. Regarding scope, the common law has reared its head and driven a wedge between an obligation to *do* something and an obligation to *pay* something. Force majeure clauses more readily excuse the performance obligation versus the payment obligation. This is because the common law notion of impossibility is not really moved by performances that have become more expensive or less economically desirable. Impossibility requires something approaching an absolute hindrance to performance. Unless the banking system has crashed, a party can cut checks and wire money, even in a pandemic. On the other hand, a construction moratorium makes it impossible to perform construction work, and retail and restaurant closures make it impossible for retailers and restaurants to operate. Thus, a force majeure clause in a commercial lease might excuse a tenant's failure to continuously operate, but not its failure to pay rent.

Regarding the nature of relief, there is a big difference between excusing and postponing an obligation to perform. Most force majeure clauses do not cancel the obligation or give the party invoking force majeure the right to terminate the contract. Rather, they provide a temporary freeze of the obligation due — sometimes delimited by a notice requirement and/or stated period of time or deadline — that either becomes unfrozen when the force majeure event has abated or provides for a reorganization of the relationship, including termination, if the freeze persists beyond a stated deadline. While many parties will be focused on sharpening the definition of a force majeure event, they should pay at least equal attention to the *effect* of that event on their contractual undertaking.

III. FORCE MAJEURE ALTERNATIVES

Transactional lawyers will be focused on breathing new life into these fossilized clauses so that they better respond to the new world that 2020 heaved us into. Litigators will have to make do with the fossils they have been handed. As litigators battle over the limits of force majeure clauses, are there other claims, not so limited, to be made or defended? Given their close ancestry, impossibility and frustration of purpose are often invoked alongside force majeure. Together, they have formed the trident wielded in litigation and pre-litigation skirmishing over the enforceability of contractual obligations. A fulsome discussion of these common law doctrines is beyond the reach of this article. But we should spotlight an important feature of the intersection of these doctrines with force majeure clauses. The common law doctrines rely on an element of unforeseeabilty. As background rules for allocating unanticipated risks, they have little room to operate where the parties have already allocated risks in their contracts. A force majeure clause is an explicit allocation of risk by contracting parties. If the parties allocated the risk of a pandemic or governmental intervention in their force majeure clause by stipulating, for example, that in no event would either party ever be relieved of a financial obligation, an appeal to common law doctrines to claim that relief should have little chance of prevailing.

We can expect the events of 2020 to have a lasting impact on force majeure clauses. They have demanded the attention of parties, lawyers and courts alike. As we turn the corner from 2020 into 2021, let us hope that we are one trying year closer to these clauses turning back into the eye-glazing, inconsequential, French they used to be. ■

1. *Viterbo v. Friendlander*, 120 U.S. 707 (1887).
2. *Taylor v. Coldwell*, EWHC QB J1, (1863).
3. *Gurwitz v. Mercantile/Image Press Inc.*, 2006 WL 1646144 (Mass. Super. May 15, 2016).

PROBATE LAW

DON'T GET CUTE WITH NON-MASSACHUSETTS QTIP PROPERTY: REVIEW OF THE *M. CHRISTINE SHAFFER, EXECUTRIX V. COMMISSIONER OF REVENUE* CASE

BY KAREN L. WITHERELL

In July of last year, the Supreme Judicial Court of Massachusetts (SJC) issued a decision in the *M. Christine Shaffer, executrix v. Commissioner of Revenue* (485 Mass. 198, 148 N.E. 3d, 1196, July 10, 2020) matter, which held that a New York QTIP trust was includable in the Massachusetts decedent's Massachusetts taxable estate. The *Shaffer* case has given trust and estates practitioners in Massachusetts additional insight into how the Massachusetts Department of Revenue views the taxability of non-Massachusetts qualified terminable interest property (QTIP) consisting of intangible assets for estate tax purposes.

As background, Adelaide and Robert Chuckrow were a married couple residing in New York. When Robert died in 1993, a QTIP trust (federal and New York QTIP elections were made) was established for Adelaide's benefit under his estate plan. Adelaide later moved to Massachusetts and was a domiciliary of the commonwealth at her death in 2011. The personal representative of Adelaide's estate filed both a federal and Massachusetts estate tax return. Although the federal return included the QTIP trust assets, the Massachusetts estate tax return did not. No estate tax return was filed in New York, nor was estate tax paid in New York.

The Massachusetts estate tax return was audited, and the Massachusetts commissioner of revenue assessed an additional $1,809,141.88 in Massachusetts estate tax due to the value of the QTIP trust. The estate paid the assessed amount and filed an abatement application, which was denied by the commissioner of revenue. The denial of the abatement application was then appealed to the Appellate Tax Board (the Board), which upheld the denial. The estate then applied for direct appellate review of the matter by the SJC.

The estate raised two primary arguments against the inclusion of the QTIP assets in the Massachusetts taxable estate: "(1) that there was only one transfer of the QTIP assets, which took place when Robert died in New York, and therefore the Massachusetts assessment violates the Fourteenth Amendment to the United States Constitution and art. 10 of the Massachusetts Declaration of Rights; and (2) that the QTIP assets were not includable in the decedent's estate because 'the definition of 'Massachusetts gross estate' in [G.L. c. 65C § 1(f)] excludes QTIP property for which a Federal, but not a Massachusetts, QTIP election was made." *Shaffer* at 202, 1200-1201 (internal citations omitted).

The Board countered the estate's constitutional argument by relying upon the *Fernandez v. Weiner* case (326 U.S. 340, 66 S. Ct. 178, 90 L. Ed. 116 (1945)) and the *Estate of Brooks v. Commissioner of Revenue Servs.* case (325 Conn. 705, 159 A.3d 1149 (2017)), in which the courts gave the term "transfer" a broad construction. Additionally, the Board set forth that, under the tax code, QTIP property is treated as property passing from the surviving spouse, and that several sections of the tax code treat the surviving spouse as the transferor of the QTIP property. *See Shaffer* at 202, 1201. The Board used this analysis to contend that there was a second transfer of the QTIP property at Adelaide's death from Adelaide to the designated successor beneficiaries. Based on this reasoning, the Board held that there had been no violation of constitutional principles because a second transfer of the QTIP assets had occurred within the commonwealth. *See Shaffer* at 202, 1201. (As a side note, the one dissenting commissioner concluded that the only transfer occurred at Robert's death and that the assessment did violate constitutional principles. *See Shaffer* at 203, 1201)

With regard to the estate's argument that the QTIP assets were not includable under the definition of the Massachusetts gross estate, the Board countered that, under the Legislature's enactment of G.L. c. 65C, §§ 1(f) and 3A, the definition of a Massachusetts gross estate only applies when a Massachusetts QTIP election has been made. In the current case, as no Massachusetts QTIP election was made at Robert's death, G.L. c. 65C, § 1(f) was inapplicable. In the underlying decision, the Board found that Adelaide's estate was taxable "under the unambiguous terms of [G.L. c. 65C, § 2A(a)]." *Shaffer* at 203, 1201.

The SJC's decision stated that "[i]n reviewing decisions of the [B]oard, '[w]e review conclusions of law, including questions of statutory construction, *de novo*.' 'However, because the [B]oard is an agency charged with administering the tax law and has expertise in tax matters, we give weight to its interpretation of tax statutes…" *Shaffer* at 203, 1201-1202 (internal citations omitted).

Upon review of the constitutional issue, the SJC sided with the Board in agreeing that a transfer of the property had also occurred at Adelaide's death and that the imposition of Massachusetts estate tax was not constitutionally improper. The SJC additionally found that, since the QTIP property consisted of intangible assets and Adelaide died a domiciliary of Massachusetts, there was a nexus for Massachusetts to impose an estate tax on the QTIP property. *See Shaffer* at 204, 1202. With regard to the issue of whether or not a transfer occurred at Adelaide's death, the SJC confirmed the Board's reliance on the *Fernandez* case, which established that "an estate tax is not limited to literal transfers at death but 'extends to the creation, exercise, acquisition, or relinquishment of any power of legal privilege which is incident to the ownership of property.'" *Shaffer* at 204, 1202-1203 (internal citations omitted). "We therefore agree with the [B]oard that two transfers of QTIP property occur for estate tax purposes, with the first occurring when the predeceasing spouse makes the QTIP election and the second occurring upon the death of the surviving spouse. Therefore, the decedent's domicile in Massachusetts at the time of her death, and therefore at the time of the second transfer, provided the connection to the Common-

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DON'T TELL MOM THE BABYSITTER'S DEAD: MAXIMIZING THE MASSACHUSETTS TEMPORARY AGENT STATUTE

BY AMANDA MULHALL

Abstract: When planning for families with minor children, it's critical to utilize G.L. c. 190B § 5-103, permitting parents and guardians to appoint "temporary guardians." This statute allows temporary guardians to act with full authority on behalf of a minor for up to 60 days without requiring a trip to the probate court. Appointing these "emergency responders" could prevent children from entering the Department of Children and Families (DCF) if their parents die or become incapacitated, mitigating the impact on children during a family crisis.

Estate planning for clients with minor children presents unique challenges for the attorney. These clients often arrive in the lawyer's office with different priorities than those who have adult children, no descendants, or charitable inclinations. They regularly view themselves as parents first, their role as protectors paramount to the myriad tax minimization, probate avoidance, or gifting considerations when crafting an estate plan.

G.L. c. 190B § 5-103 is an underutilized provision of the Massachusetts Uniform Probate Code (MUPC) that addresses these fears. Formally named "Delegation of powers by parent or guardian" (colloquially known as the "temporary agent statute"), this section permits parents or guardians of minors or incapacitated persons to appoint a temporary agent who may act with full legal authority on behalf of a minor or incapacitated person for up to 60 days from the death, incapacity or consent of both principals. The nomination requires only a signature by each client in front of two witnesses and an acceptance by the agent; no trip to the probate court is required by the agent to invoke the powers. Although it goes without saying that the appointment of a permanent guardian is required in the event of the clients' deaths or incapacity, the nomination of a temporary agent adds a layer of security for the clients in an emergency.

To illustrate this point, imagine that your clients are out to dinner together, leaving their young children at home with a teenage babysitter. Now imagine that your clients are involved in a car accident. When the police officer who is dispatched to the couple's home arrives there to find a high schooler in charge, what is the officer to do? Certainly not leave the children with the babysitter or with a neighbor — who knows who is living next door? In fact, in the absence of instructions to the contrary, the officer should call DCF, as there is no legal guardian capable of caring for the children and no clear path forward with respect to custody.

Planners should be aware of this scenario and how it speaks directly to the fears of the client. Even if the planner thoughtfully guides the client through the exercise of nominating guardians in a will in the event of death and a nomination of guardian in the event of incapacity, these documents do not address the immediacy of the need as outlined above. In fact, they are terribly inefficient. The appointment of a guardian requires filing a petition for guardianship with the probate court that must wind its way through the court's docket until it can be heard by a judge. Who is making decisions for the children in the meantime? Who can pick them up from school or bring them to the doctor?

By utilizing the temporary agent statute to nominate an agent, the planner can assuage the clients' fears about their children in an emergency scenario. Temporary agents may exercise "any power that the parent or guardian has regarding the care, custody or property of the minor child" (with the somewhat obvious exceptions of marriage or adoption of the minor). Once invoked, the power lasts for up to 60 days, allowing time for a petition for guardianship to be filed and considered by the court, if necessary, without leaving the children's care in a state of limbo. Because the powers may be invoked without court involvement, the planner is able to nimbly prepare for inefficiencies inherent in the system and alleviate chaos in the lives of the children. The clients may also opt to appoint a temporary guardian based on proximity to the family itself; this is critical for clients who have nominated a permanent guardian who lives in a faraway state or country, making it impracticable for them to reach the children at the drop of a hat.

Furthermore, nominating a temporary agent is likely to prevent an officer from contacting DCF to take custody of the minors, so long as the planner considers practicality. The planner should include the contact information of the agent so that the caregiver or police officer may call them promptly. Clients should name alternative temporary agents in the event that the first agent listed fails to answer the phone. (While the statute clearly states that powers may be given to "a temporary agent," it does not limit the client from nominating alternative agents so long as only one agent invokes the power.) Once executed as part of the clients' estate plan, the planner should make such document available to the clients and their caregivers by issuing a physical "Guardianship Folder" that includes a copy of the temporary agent nomination and other helpful resources, such as "Important Health Care Information" relevant to each child. This ensures that the document can be quickly located by a caregiver, easily relied and acted upon by an officer, and immediately invoked by the agent.

The temporary agent statute is a critical planning tool for practitioners who regularly engage clients with minor children. As outlined in the statute, these powers extend to parents and/or guardians of incapacitated persons as well; attorneys working with families with special needs and disabilities should also take note of the solutions available to clients with legal authority over others. Though the exercise of designing an estate plan can seem hypothetical to many young clients who consider themselves far from death, it is the duty of the planner to identify and address the areas of difficulty for the clients and their children if the inevitable occurs sooner than expected. The temporary agent statute is but one important tool that all practitioners should consider for clients with minor children. ■

AMANDA MULHALL is a solo practitioner in Natick whose practice is centered around estate planning for young families with minor children, as well as estate and trust administration. Mulhall has observed that many traditional estate plans are not properly tailored to reach the goals of families with minor children, so she has created a practice with these families in mind. She also recognizes that the estate planning process can be intimidating for clients and strives to create a supportive environment that fosters empowered decision-making. In addition to planning, Mulhall helps guide her clients through the probate and estate administration processes, including estate and fiduciary income taxation.

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wealth to allow Massachusetts to impose an estate tax on the QTIP assets." *Shaffer* at 206, 1203-1204.

Upon review of the issue of whether or not the QTIP property was includable in Adelaide's Massachusetts gross estate, the SJC agreed with the Board in that G.L. c. 65C, § 1(f) does not apply to the estate's estate tax obligation under G.L. c. 65C, § 2A. "[T]he definition of 'Massachusetts gross estate' in §1(f) applies only where the predeceasing spouse makes a Massachusetts QTIP election for property that is included in the Massachusetts gross estate of the predeceasing spouse under § 3A. Because Robert's estate did not make a Massachusetts QTIP election, nor was there otherwise any Massachusetts QTIP property as defined in G.L. c. 65C, § 3A, the [B]oard did not err in determining that G.L. c. 65C, §§ 1(f) and 3A, do not bear upon the estate's Massachusetts estate tax obligation under G.L. c. 65C, § 2A." *Shaffer* at 207, 1204-1205. The SJC affirmed the Board's determination that, under the "plain meaning of [G.L. c. 65C,] § 2A," the QTIP assets are includable in the estate for Massachusetts estate tax purposes. *Shaffer* at 207, 1205.

Particularly interesting is that, in footnote 10, the SJC decision set forth that "[i]n addition, the estate's contention that the current Massachusetts estate tax does not eliminate the potential of double taxation is without merit under the present circumstances. The estate is not subject to double taxation, as the QTIP assets in Robert's estate were not subject to Massachusetts or New York tax before the decedent's death." *Shaffer* at footnote 10.

A petition for certiorari in this matter was filed with the U.S. Supreme Court but was denied on Nov. 25, 2020. Regardless of whether one agrees with the SJC determination in the *Shaffer* case, this decision stands as the most current determination in Massachusetts as to the taxability of intangible, non-Massachusetts QTIP assets in an estate of a Massachusetts domiciliary. When dealing with non-Massachusetts QTIP assets within the estate of a Massachusetts domiciliary, practitioners would be well advised to review the *Shaffer* case before considering omitting such QTIP assets from a Massachusetts estate tax return. ■

HARRY DE PRINS V. MICHAEL J. MICHAELES: A SUMMARY OF SJC-12865

BY SHEILA GIGLIO

In the case of *Harry De Prins v. Michael J. Michaeles* (SJC-12865), the Supreme Judicial Court (SJC) decided the following issue of first impression certified to the court by the U.S Court of Appeals for the First Circuit: Are the assets of a self-settled discretionary spendthrift irrevocable trust governed by Massachusetts law protected from a reach and apply action by the deceased settlor's creditors?

The SJC held that the assets were not protected and could be reached post-death by the settlor's creditor after the death of the settlor.

The analysis of this case rested on both the court's review of the Massachusetts Uniform Trust Code (MUTC) and Massachusetts common law. While G.L. c. 203E, § 505 (a) (1) and (a) (3) provide that the assets in a self-settled revocable trust are reachable by a creditor during the settlor's lifetime and after the settlor's death, (a) (2) refers only to the ability of a creditor to reach the assets held in a self-settled irrevocable trust during the settlor's lifetime. The statute does not address the issue of the ability of a creditor to reach the assets held in a self-settled irrevocable trust after the death of the settlor.

Absent statutory authority for its decision, the court noted that G.L. c. 203E, § 106, provides that the MUTC is to be supplemented by the "common law of trusts and principles of equity." The court then cited Massachusetts case law supporting the well-established principle that a settlor cannot place property in trust for the settlor's own benefit and keep it out of the reach of the settlor's creditors.

In addition, the court noted that its decision was based on the circumstances presented by the case under consideration only. In this case, the settlor set up the trust for his own benefit during his lifetime and for the benefit of his child following his death. Shortly after establishing the trust, the settlor murdered the parents of the plaintiff. The plaintiff sued the settlor's estate in a wrongful death action and obtained a judgment that he then sought to satisfy from the trust's assets. The court noted that it would be inequitable to allow the decedent's child to benefit from his criminal behavior while preventing the child of the settlor's victims from reaching the assets the settlor had set aside for the settlor's own offspring. ■

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PROVIDING A VALUABLE SERVICE OR CREATING AN INDEFINITE OBLIGATION: THE ARGUMENTS FOR AND AGAINST ATTORNEYS RETAINING CLIENTS' ORIGINAL ESTATE PLAN DOCUMENTS

BY FRANCIS R. MULÉ

On Sept. 1, 2018, the Massachusetts Rules of Professional Conduct were amended. Among the changes was the addition of Rule 1.15A, which clarifies an attorney's obligations regarding the retention, maintenance and destruction of client files. Although the general rule permits an attorney to destroy a client's files six years after the completion of the matter or the termination of the representation, there is an important exception that is particularly relevant to estate planning attorneys — "intrinsically valuable documents" (e.g., original wills, trusts and other estate plan documents) must either be appropriately safeguarded and delivered to the client or "retained until such time as [they] no longer possess intrinsic value."

This new rule has added to the already wide-ranging discussion and debate among estate planning attorneys regarding whether to hold on to clients' original estate plan documents or return such documents to the clients after the completion of the engagement. While there is no right or wrong answer on this issue, there are strong arguments on both sides, and it is in estate planning attorneys' best interests to familiarize themselves with these arguments in order to make informed decisions regarding their own policies surrounding clients' original estate plan documents.

The goal of this article is not to persuade people one way or the other, but rather to present the most compelling arguments on both sides in order to help estate planning attorneys evaluate, and possibly update or change, their own practices regarding their clients' original estate plan documents.

PROVIDING A VALUABLE SERVICE: THE CASE FOR RETAINING CLIENTS' ORIGINAL ESTATE PLAN DOCUMENTS

Original estate plan documents are incredibly valuable to clients and, like their other valuables, they need to be stored safely and securely. Unlike most of a client's other valuables, original estate plan documents also need to be accessible, sometimes on fairly short notice, in emergency situations, meaning that the fiduciaries named in the documents need to have the ability and authority to access them when the time comes. Thus, storing original estate plan documents requires balancing the need for them to be safe and secure from, e.g., fire, flood and theft, with the need for them to be accessible when they are needed.

The need to balance these competing factors can easily overwhelm individual clients, who may not have the time, space, mental bandwidth, or resources necessary to implement a practical solution. Additionally, a client may change the location of their estate plan documents and forget to update their fiduciaries on where the documents are located, leading to a mad scramble to find them in an emergency.

By retaining clients' original estate plan documents, attorneys relieve clients of the burden of figuring out where and how to store them and needing to know exactly where the documents are stored. All clients need to remember is that the documents are "with the attorney," and, in the event the client forgets that, it's likely that their fiduciaries will think to call the attorney when they are trying to track the originals down.

Additionally, attorneys who store all of their clients' original estate plan documents can take advantage of economies of scale to bring down the cost of such storage. Fireproof storage can be expensive, but it is typically far cheaper, on a per-client basis, for an attorney to either purchase a large fireproof cabinet capable of holding many clients' documents or utilize an offsite storage service than it is for individual clients to invest in their own storage system. Further, by holding clients' original documents, attorneys can act as a last backstop against someone attempting to access a client's original documents for nefarious purposes by only releasing the original documents to the named fiduciary(ies) and, in some cases, requiring proof that the original documents are needed before releasing them.

Thus, retaining clients' original estate plan documents can be seen as a valuable service the attorney is providing as part of their representation.

CREATING AN INDEFINITE OBLIGATION: THE CASE FOR RETURNING ORIGINAL ESTATE PLAN DOCUMENTS TO CLIENTS

While retaining clients' original estate plan documents can be seen as a valuable service to provide clients, it is a service that can create an indefinite obligation on the attorneys themselves.

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As discussed previously, Rule 1.15A provides that attorneys who retain intrinsically valuable documents, such as original estate plan documents, have an obligation to maintain such documents "until such time as [they] no longer possess intrinsic value." This can leave attorneys on the hook for storing original estate plan documents for a long, long time. Although certain estate plan documents, such as durable powers of attorney and health care proxies, expire upon the death of the client, others, such as wills and trusts, can potentially maintain their intrinsic value long after the client (and the attorney) are dead and gone.

Because of this potential indefinite obligation, none other than the Board of Bar Overseers (BBO) itself strongly recommends that attorneys return original documents to clients rather than retaining them. In two articles written by the BBO's bar counsel and general counsel, "Talking Trash Recycled (Again): Guidelines for Retention and Destruction of Client Files" and "New Rule on Client Files Will Provide Clear Guidance for Lawyers," both of which are available on the BBO's website, the BBO recommends that original documents be "copied and immediately returned to clients," with both articles emphasizing that this includes wills and other estate plan documents.

The primary argument made by the BBO in both articles is that any original estate plan documents retained by an attorney must be returned to the client upon the attorney's death, disability or retirement. If the attorney isn't keeping up-to-date records on the

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WORDS MATTER

BY JENNIFER Z. FLANAGAN

As trust and estate attorneys, we are acutely aware of the importance of language and word usage in our drafting. A sloppy sentence in a will or a trust may cause ambiguity, leading to expensive litigation after the client's death. We need to determine the correct words and use them in the proper context and with appropriate punctuation to produce a clear and concise document that will not be open to multiple interpretations years after we have stopped practicing. While our use of words in drafted documents is critical to our practice, our use of language when speaking with clients is equally important. As our vocabulary evolves and changes, it is important to be aware that words and phrases that we have historically used may have dubious underlying or historical meanings.

Footnote 11 in a recent case decided by the Massachusetts Appeals Court is a perfect example of a commonly used word that many are not aware has racist beginnings. *Comstock v. Zoning Board of Appeals of Gloucester*, a zoning dispute that would usually only mean something to law students and lawyers looking for precedent, actually made an appearance in *The Boston Globe* and *The New York Times*. The court referred to a section of the General Laws that "provides a certain level of protection to all structures that predate applicable zoning restrictions." The footnote to that sentence states as follows:

> Providing such protection commonly is known — in the case law and otherwise — as "grandfathering." We decline to use that term, however, because we acknowledge that it has racist origins. Specifically, the phrase "grandfather clause" originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring voters to pass literacy tests or meet other significant qualifications, while exempting from such requirements those who were descendants of men who were eligible to vote prior to 1867.

We often use "grandfather clause" or "grandfathered" to describe situations where a new law or rule exempts structures that were in existence prior to the passage of the new law or rule, such as "grandfathered generation-skipping transfer (GST) trusts." Over the past few years, and especially as we as a society try to become more informed and sensitive, more attention has been drawn to the history of the term, and many are attempting to find an appropriate substitute so as to move away from the use of such racially insensitive terminology. Many people and companies are now using "legacy" or "legacy clauses" in place of "grandfather" and "grandfather clauses." Perhaps it is time to take the Appeals Court's footnote to heart and refer to grandfathered GST trusts and grandfathered laws as "legacy GST trusts" and "legacy laws," or find another appropriate word.

Another set of terms that trust and estate lawyers must grapple with is "husband and wife." We have many clients in same-sex marriages or relationships where the terms husband and wife are not appropriate. Using the neutral term "spouse" in all documents addresses the issue in our drafting. In our meetings with clients, colleagues and business partners, it is also important to remember to use the word "spouse" rather than husband or wife, unless you know that the individual is married to or partnered with an opposite-sex person. Making assumptions about a prospective client's personal situation (especially if representing only one spouse/partner) or the family members of a client could end the relationship before it even starts.

We are also more often working with families who have transgender or non-binary family members. Sometimes the clients themselves are just learning about a transgender or non-binary child or other relative. Being able to use the appropriate terminology (such as preferred pronouns or preferred names) with them reflects a level of care and respect beyond simply being a client.

The GLAAD website has a helpful glossary of terms related to transgender people that we urge those reading this article to consider thoughtfully. Some of the basic terms that all should be aware of are as follows.

Sex: The classification of a person as male or female. The term intersex applies to a person born with reproductive or sexual anatomy and/or a chromosome pattern that cannot be classified as typically male or female.

Gender Dysphoria: The distress resulting from the difference between a person's gender identity and the person's assigned sex.

Gender Identity: A person's internal, deeply held sense of their gender. For transgender people, their internal gender identity does not match their assigned sex at birth.

Sexual Orientation: Describes a person's romantic, physical or emotional attraction to other people. Gender identity is different from sexual orientation.

Gender Expression: Refers to how a person outwardly expresses themselves. This can be a person's name, pronouns, way of dressing, haircut, voice, behavior and body characteristics.

Non-Binary: To be non-binary means to identify yourself outside of the binary definitions, such as male/female or masculine/feminine. Being non-binary can mean different things to different individuals. Often, individuals express it through choice of pronouns or the way they dress, or sometimes by nothing outwardly noticeable. They simply do not feel like they fit into a specific gender role. Some non-binary people experience gender dysphoria and others do not.

Transgender: This is an umbrella term for people whose gender identity and/or gender expression differ from the sex they were assigned at birth.

Transsexual, Cross-Dresser: These are classes of transgender people. "Transsexual" is an older term used to described people who have changed, or seek to change, their bodies through surgery or hormone treatment, and is preferred by some people. Being a cross-dresser is a form of gender expression. Many cross-dressers are heterosexual men.

Trans: Used as a shorthand to refer to a transgender or a transsexual person. GLAAD recommends using the full terms unless the person makes it clear that they prefer "trans."

Transition: "Altering one's birth sex is not a one-step procedure; it is a complex process that occurs over a long period of time. Transition can include some or all of the following personal, medical and legal steps: telling one's family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery. The exact steps in-

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volved in transition vary from person to person."[1]

Some adjustments that we can make as practitioners are simple:

- If you know you are working with a transgender or non-binary person, use "they/their/them" or their preferred pronoun in the notary block.
- Review your estate planning questionnaires and intake forms and use Spouse 1 and Spouse 2 instead of husband and wife.
- Unless you are working with a couple who prefer to be addressed as "Mr. and Mrs. Smith," use "John Smith and Jane Smith" in the address and "Dear John and Jane" in the salutation.

Other considerations, such as referring to an individual by a name that may change if the individual transitions and/or applies for a legal name change, raise more complex drafting issues.

Our drafting will evolve as we work with more clients and families with transgender and non-binary family members. I had a client with a transgender family member for the first time last year. I now have three different clients who have transgender or non-binary family members.

As we learn more about the history of language, as our individual identities are more fully and freely developed, and as new words and phrases enter our lexicon, we as attorneys need to continue educating ourselves so that we can work with our clients and their families in a sensitive, compassionate and respectful manner. ■

1. *See* https://www.glaad.org/reference/transgender.

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whereabouts of the owners of all of the original documents they are holding, figuring out how to return them when the time comes can be incredibly time-consuming and burdensome. This is even more true where the attorney's death or disability is unexpected and the task of tracking down clients and returning their documents falls to a fiduciary who may not be at all familiar with the attorney's practice.

As I stated at the beginning of this article, my goal is not to persuade estate planners one way or the other, but rather to present the most compelling arguments on both sides, as I hope I have done.

Those of us who choose to retain clients' original estate plan documents would do well to ensure that we develop systems to keep track of the whereabouts of our former clients in order to make the process of returning their original documents to them easier, and those of us who choose to return original estate plan documents to clients at the conclusion of the representation would do well to counsel them on how their documents should be stored. ■

YOUNG LAWYERS DIVISION

ON STRESS

BY JASON E. ARMIGER

The 2017 American Bar Association report on lawyer well-being concluded that "[o]ur profession is falling short when it comes to well-being. [S]tudies . . . reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession . . . ."

In December, the Massachusetts Bar Association hosted an impactful program on managing stress and anxiety, featuring stories and advice from attorneys that have suffered from depression, discrimination and substance abuse. These issues are real and present among our colleagues — more than one in three attorneys experience them — but a pervasive stigma against seeking help causes many to suffer in silence. As summarized below, three practitioners and a clinician from Lawyers Concerned for Lawyers (LCL) sought to challenge those stigmas, offering advice and sharing their personal stories.

Gavin Alexander, a former senior associate at Ropes and Gray and current fellow on the Supreme Judicial Court Standing Committee on Lawyer Well-Being, began experiencing symptoms of depression in his early teens. Gavin discussed the relative ease with which he "was comfortable 'coming out' about my [bisexuality] at age 16" compared to "not 'coming out' about, or even seeking any counseling or treatment for, my mental illness until age 30" due to the stigma against mental illness and treatment. Gavin suffered in silence for years because he "didn't see anyone in the profession, in the jobs I aspired to, talking about these issues and their own experiences." He described how his illness "drove me to achieve, but it also nearly drove me to my death." After coming seconds away from ending his own life, Gavin finally sought medical treatment, and with the support of various health care professionals, he "realized that my life meant more than my job." He disclosed his illness to his employer and was surprised to find them "incredibly supportive . . . . People thought I was brave and thought I was taking the steps I needed to actually succeed at my job." He requested and was granted long-term reduced-time medical leave, which helped him succeed more than ever both in his life and at the firm. Gavin recommended seeking treatment from health care professionals (including at the emergency room if necessary) and noted that "when I did prioritize [myself], my job wound up thriving as well."

April English, a 17-year veteran of the Massachusetts Attorney General's Office, opened her presentation asking, "[h]ow many of you have wondered how oppressive it must be for Black attorneys and attorneys of color in a predominately white profession . . . , what anxiety, depression and feelings of isolation me as a Black lawyer, and my other brothers and sisters who are part of the bar, must feel?" With incredible detail and from her own lived experience, April described the systemic discrimination attorneys of color experience in the courtroom, the board room, the conference room, in bar associations, and now on Zoom calls. The theme of her presentation: "We are exhausted." April said she counsels attorneys of color to "speak up and speak out" when subjected to discrimination and microaggression, and reiterated the importance of self-care. "Take time off to reset; take time to rest." She asked employers, organizations and white people to "care, be empathetic and listen," as well as to "read — please read! Knowledge is power. Do not put that on the backs of people of color." She emphasized that being an ally is a "lifelong membership, commitment and journey" and concluded with a question: "The color of my skin will forever define me, so I ask you, how will your allyship define you?"

Laurie Besden, executive director of LCL Pennsylvania, encountered her first mind-altering substance at age 8 in a dentist's office and "chased that feeling . . . until I landed in jail at age 29 as a licensed attorney in two states." Laurie graduated college with a 3.97 GPA but "was a drinking mess," and after a car accident in law school and her first dose of prescription pain medication, Laurie drove "100 mph straight into a drug addiction that I thought I was immune from." During two post-graduation clerkships, Laurie was taking 40 pain pills a day "just to function." She maintained nine false identities to acquire pills from an unscrupulous doctor in Texas, and she entered 2004 with five felony arrests and ultimately her third incarceration. That night, which is now her sobriety date, Laurie was visited by an LCL volunteer who introduced himself saying, "You don't know me, I'm 31 years clean and sober, and I'm going to help you." Today, Laurie leads LCL in Pennsylvania, and after extensive rehabilitation and service to her community, has been fully reinstated to practice law and recently received a full gubernatorial pardon. Laurie's message is clear: "If anyone thinks the legal profession is not about rehabilitation, think again . . . . Our profession cares about your wellness. They want you well. They are not going to penalize you for reaching out and getting help."

Dr. Tracey Meyers, licensed clinical psychologist at LCL Massachusetts, explained the impact of stress on our bodies, the consequences if unmanaged, and the ways we can reduce our own stress and anxiety. She explained that heightened "levels of stress can contribute to anxiety, anger, depression and feeling overwhelmed," but that those feelings are normal: "This is a nervous system response to trauma and stress, so it's not your fault . . . . I think this is really helpful to understand so that we destigmatize this idea that we're doing something wrong and look at it from a nervous system recalibration standpoint." To recalibrate, we can learn skills to "increase our window of [stress] tolerance." Dr. Meyers emphasized the "necessity to look at mental health and mental health services much like you would look at going to your primary care doctor." Improving mental health can include working with a practitioner, talking to a clinician, attending support groups or investing in self-care. She suggested clinically proven methods to increase happiness, one of the most accessible and effective being mindfulness meditation, which she notes "is one of the most potent things we can do." She concluded with the observation that "[s]elf-care can feel selfish, but in actuality, we go into this profession . . . to help people, and by helping ourselves, we actually are more capacitated to help others." ■

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The full recorded program is available for free on the MBA's website at: https://www.massbar.org/events/cle-program?productId=7063.

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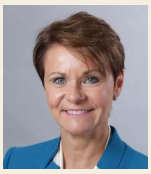

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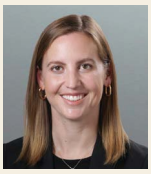

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