Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2870

Date: 16-Mar-21
From: Steve Leimberg's Estate Planning Newsletter
Subject: Marc Soss on Ochse v. Ochse: How Does a Trust Determine Who Your Wife Is

"Ochse is a perfect example of why it is important to specifically identify the parties listed in an estate planning document and what will happen in the event of future events (divorce, death, remarriage, etc.). Had the grantor merely identified the terms spouse to only mean her son's current spouse or included a lapsing provision, in the case of a divorce, this litigation could have been avoided."

Marc Soss provides members with his analysis of *Ochse v. Ochse*.

Marc Soss' practice focuses on estate planning, probate and trust administration, and corporate law in Southwest Florida. Marc is a frequent contributor to **LISI** and has published articles in the Florida Bar, Rhode Island Bar, and North Carolina Bar. Marc is also a retired United States Navy Supply Corps Officer.

Here is Marc's commentary:

EXECUTIVE SUMMARY:

The Texas Appellate Court case of *Ochse v. Ochse*, involved the William W. Ochse III Family 2008 Trust, an irrevocable trust (the "Trust") and a dispute among a former and current spouse as to who was the intended beneficiary of the Trust. In *Ochse* the Trust provided that the trustee was authorized to make distributions to her son, her son's descendants, and her son's spouse during their lifetimes. At the time of the trust's execution, the son was married to his first wife. He was subsequently divorced and remarried.

The case initiated from a lawsuit filed by the son's children, from his former wife, against the trustee for breach of his fiduciary duties. The children joined their mother, the former wife, as a necessary party. The former wife and the son then filed competing summary judgment motions on whether the former wife or the current wife was the son's "spouse" referenced in the Trust agreement. The trial court ruled in favor of the former spouse and found that she was the correct beneficiary at the time of the suit, and the current wife and William appealed.

On appeal, the former wife argued that "in the absence of an expression of contrary intent, a gift to a "spouse" of a married person must be construed to mean the spouse at the time of the execution of the instrument and not a future spouse." Ultimately, the court of appeals concurred with the former spouse and affirmed the trial court ruling.

FACTS:

In 2008, Amanda Ochse created the William W. Ochse III Family 2008 Trust. The Trust named her son, William, as the Trustee, and authorized and directed the trustee to distribute to or for the benefit of the primary beneficiary, the primary beneficiary's descendants and the primary beneficiary's spouse, out of the income, and if income is insufficient, out of the principal of such trust from time to time such sums as are reasonably needed for their health, including medical, dental, hospital, and nursing expenses, and expenses of invalidism, and such sums as are reasonably needed for their education, maintenance and support in their accustomed manner of living. . . .

In 2012, William divorced his first wife and remarried again in 2015. In 2018, William's children, from his former wife, sued him as trustee for breaching his fiduciary duties to the beneficiaries of the Trust. The children joined their mother as a necessary party in the proceedings. The former wife then sought a declaration that the terms "primary beneficiary's spouse" and "son's spouse" in the Trust solely referred to her because she was William's spouse at the time the Trust was executed. The current spouse intervened and sought a declaration that the terms "primary beneficiary's spouse" and "son's spouse" applied to her from the date of her marriage to William in September 2015 to present.

The former wife and William then filed competing summary judgment motions on whether the former wife or the current wife was the son's "spouse" as referenced in the trust agreement. The trial court applied the four-corners rule and found that the grantor's unambiguous intent was to benefit her son's then-spouse, the former spouse, at the time the Trust was executed with the verbiage "spouse," "primary beneficiary's spouse," and "son's spouse", and not to include any subsequent spouse.

The Appeal:

While both parties concurred that, at the time the Trust was executed, the term "spouse" unambiguously referred to Cynthia (the former spouse), they offered conflicting constructions of the term as a result of the son's divorce and remarriage. The appeal centered on the current wife and William's argument that (i) the use of the term "spouse" in the trust document did not mean the former spouse's actual name, but that the term meant a class of whoever was currently married to the son, (ii) the failure of the instrument to specifically name the former spouse when referring to her son's "spouse" indicated the grantor's intent for the term "spouse" to be descriptive of a status rather than a particular individual, and (iii) the former spouse lost her status as "spouse" upon her divorce from William in 2012 and that the current spouse gained that status when William married her in 2015. In contrast, the former wife argued that "in the absence of an expression of contrary intent, a gift to a "spouse" of a married person must be construed to mean the spouse at the time of the execution of the instrument and not a future spouse."

Law:

In interpreting a will or a trust, the court must ascertain the intent of the testator or grantor from the language used within the four corners of the instrument. That appellate court found it did not need to redraft the Trust instrument to vary or add provisions "under the guise of construction of the language" of the trust to reach a presumed intent.

Grantor's Intent:

Using the rules of construction, the appellate court found it must only determine the grantor's intent in 2008, when she executed the Trust for the benefit of her son's "spouse." At the time the Trust was executed, the grantor's son was married to Cynthia and had been married to her for approximately thirty years. As a result, the grantor's use of the term "spouse" referred to William's spouse at the time the Trust was executed, and did not refer to a class of persons including future spouses.

Determination:

The issue of contention addressed by the appellate court was whether the term "spouse" identified only the son's former wife, his wife at the time the Trust was created and executed, or whether it includes the son's second wife, to whom the son is now married. William's interpretation would have the Court view the term "spouse" as a status or class gift. A class gift is defined as a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift (a gift to "lineal descendants"). However, this interpretation is inconsistent with Texas precedent regarding the use of classes in trust instruments and wills and, further, fails to harmonize all provisions of the Trust. The appellate court construed the language of the Trust to unambiguously reflect the grantor's intent to identify her son's then "spouse" as a beneficiary to benefit from the Trust at the time the trust was executed and declined to redraft the Trust to reach a presumed intent to benefit a potential replacement "spouse."

COMMENT:

Ochse is a perfect example of why it is important to specifically identify the parties listed in an estate planning document and what will happen in the event of future events (divorce, death, remarriage, etc.). Had the grantor merely identified the terms spouse to only mean her son's current spouse or included a lapsing provision, in the case of a divorce, this litigation could have been avoided.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

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CITES:

Eckels, 111 S.W.3d at 694; *Hurley*, 98 S.W.3d at 310; *Hysaw v. Dawkins*, 483 S.W.3d 1, 7 (Tex. 2016); *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 639 (Tex. 2000).