SMOLENPLEVY
EST. 1977

Report From Counsel

Insights and Developments in the Law **Summer 2014**

Hollywood Icons Put Spotlight on End-of-Life Planning

Elder Abuse and What We Can Learn from Casey Kasem and Mickey Rooney

Casey Kasem was the iconic voice of American Top 40. Mickey Rooney was a celebrated actor. But as they aged, the news became about their medical, financial and legal end-of-life issues. For Kasem, it was the battle between his children and their stepmother over his care as he suffered from Lewy Body dementia. For Rooney, it was claims of elder abuse against a stepchild, a will that disinherited his children and estranged wife, and a modest $18,000 estate upon his death, despite his 80-year career.

Jason Smolen

"These cases demonstrate the problems that can occur regardless of whether you're a celebrity or not," said SmolenPlevy co-founding Principal and estate planning attorney Jason Smolen. "The key is to plan so none of your family has to face these kinds of heartbreaking situations."

Dan Ruttenberg

Smolen said conflicts can erupt between spouses from second (or subsequent) marriages and children from prior marriages. They can also occur

Continued on page two.

Accolades for SmolenPlevy

Jason Smolen and Alan Plevy have been rated "AV Preeminent" by Martindale-Hubbell, confirming that their legal abilities and professional ethics meet the very highest standard. Because of their "AV Preeminent" rating, Smolen and Plevy have been selected to the Washington, D.C. and Baltimore's Top Rated Lawyers of 2014 list, which will be published in several regional and national publications.

Plevy and Kyung (Kathryn) Dickerson have been selected to the 2014 Washington, D.C. Super Lawyers list

Continued on page four.

SmolenPlevy in the Media and in the Community

"Cyberspying" by a parent who uses technology to monitor what their children are doing when they are with their other parent is a disturbing trend among divorced couples and parents who do not share a home. SmolenPlevy Principal Kyung (Kathryn) Dickerson explained on-air with WTOP how parents are using mobile and smartphone technology to cyberspy. Listen to the segments at *www.smolenplevy.com/radio.*

Principal Daniel Ruttenberg appeared on a recent episode of *Money Matters* to discuss estate planning, specifically updating your beneficiary

Continued on page four.

FIFTH FLOOR • 8045 LEESBURG PIKE • VIENNA, VIRGINIA 22182
TELEPHONE: 703.790.1900 • FAX: 703.790.1754
SMOLENPLEVY.COM

Real Estate Deals Gone Wrong

The ageless advice to read, understand, and expect to be bound by language in a contract you sign is as sound now as ever. It is especially important with respect to contracts to buy real property, where the financial stakes are often high. Jerome contracted to buy property, delivering a $5,000 deposit to be credited toward the purchase price. An addendum to the contract agreed to by the parties stated that in the event the seller breached the agreement or defaulted, Jerome was entitled to the return of his earnest money and cancellation of the contract, as his "sole and exclusive remedy."

When the seller did not close on the deal within the time set by the contract (according to Jerome, because there had been a defect in its title to the property that was later remedied) Jerome sued to enforce the contract. That is, he sued to force a sale of the property to him, as he was not content with the prospect of simply getting his $5,000 back, terminating the deal and returning to square one.

A court held Jerome to the terms of the contract addendum, ruling that he was entitled to no more than his money back from the seller. In some cases, an aggrieved party may be relieved of the limitations or burdens of a contract when the unequal bargaining positions of the parties are such as to deprive the aggrieved party of a meaningful choice and where the terms of the contract are unreasonably favorable to the other party. Jerome made this argument in an attempt to rid himself of the limitation on his contractual remedy, to no avail.

The problematic addendum, in bold language no less, warned the parties to read it carefully before signing and included an acknowledgment that Jerome was knowledgeable and experienced in financial and business matters and able to assess the transaction's merits and risks. The court also declined to find that limiting Jerome to the return of his earnest money deposit was unreasonably tilted in the seller's favor. It simply restored the parties to their positions prior to signing the contract. In a loose sense, Jerome may have been the "victim" of a broken contract, but he was not such a disadvantaged victim under the law as to be entitled to set aside any of the terms of his contract, including the one that boxed him in when he was seeking a remedy.

No less important than reading and understanding all parts of a real estate sales agreement is the need to be up front with the other party to the transaction about the condition of the property, especially as to a problem that is not obvious. In another case, this was an expensive lesson to learn for a seller of a home who was less than forthright with the buyer about defects in a basement wall.

In the litigation that ensued when the buyer sued the seller for fraud and negligent misrepresentation, the buyer testified that at first he was actually impressed with the finished basement in the house, with its drywall all around and a polished floor you could eat off of. But some months after he moved in, the buyer noticed a worsening problem

Continued on page three.

Planning

Continued from page one.

between siblings, especially when one child primarily cares for an ill parent and the others are less involved. In Mickey Rooney's case, it was reported that the actor claimed he lost most of his fortune because of elder abuse and financial mismanagement by one of his stepsons. Rooney executed a new will just before he died in which he left the little he had to another stepchild.

"Wills can be considered political statements," said Smolen. "If the reports are accurate, Rooney's is especially so." Smolen opined that Rooney may have been sending a message to his ex and his children: They didn't take care of him, so he cut them out. However, the more important and potentially divisive issue is the decision as to who will serve as caretakers for aging parents.

Smolen said the Rooney case highlights the need to confront these issues early. If one child is going to be the primary caretaker, the decision has to be made as to which child. How much will that child be allowed to spend of the parent's assets—and will that access cause issues with the other children? For instance, if the caretaker takes the parent to dine out often, and uses the parent's money to pay for the meals, will that become an issue that will cause problems with the other children?

Smolen said the Rooney situation also points out the need to update wills, trusts and estate documents. At SmolenPlevy, absent a significant change in the law or a client's request, the attorneys review clients' documents with them every three years. Sometimes changes need to be made repeatedly. After all, Rooney was married eight times, divorced seven and separated from his current wife when he died. Each change in marital status should have resulted in changes in beneficiary designations and potentially trustees, and the execution of new advanced health directives and guardianship designations. While Rooney's case is extreme, everyone should have and maintain up-to-date estate plans.

Continued on page four.

Ensure Your Financial Privacy

There is a federal law that affords consumers significant say over the privacy of their financial information while still allowing financial institutions to share information for normal business purposes. This Act covers banks, savings and loan institutions, credit unions, insurance companies, securities firms, and even some retailers and automobile dealers that extend or make arrangements for consumer credit.

There may be more forms of personal information gathered by the institutions than you realize. They may have credit reports and records of how much you buy and borrow, where you shop, and how well or poorly you pay your bills on time.

The Act protects your financial privacy in three basic ways: First, in a privacy notice, the institution must tell you what kinds of information it collects and the types of businesses that may be provided with it. Institutions must send out a privacy notice once a year. Second, if the institution is going to share your information with anybody outside its corporate family, it must give you the opportunity to "opt out" of that kind of information sharing. The third layer of protection requires the institutions to describe how they will go about protecting the confidentiality and security of your information.

A privacy notice from your bank may not be the kind of mail you rip open with eager anticipation, but you should take the time to look it over carefully all the same. Somewhere in the formal verbiage you should look especially for these items:

What kinds of information may be shared, both with affiliated companies and with outsiders? Don't expect great specificity on this in the notice itself. The Act requires only a description of basic categories of information, with some examples.

What information can you not prevent your financial institution from sharing? Recognizing some circumstances in which the institutions should be allowed to share financial information with outsiders without the consumer's consent, the Act does not allow you to stop the sharing of information that is needed to help conduct normal business (such as for outside firms that process data or mail statements); to protect against fraud or unauthorized transactions; to comply with a court order; or to comply with a "joint marketing agreement" entered into with another institution.

How do you go about "opting out" of the sharing of information of outside entities? Sounds simple enough, but the institution may require you to exercise this option by calling a specific phone number or by completing a form and mailing it to a particular address. If you opt out by phone, to be safe you may want to follow up with a written version, keeping a copy for your records.

Real Estate

Continued from page two.

with water leaking from one of those basement walls. When workers removed the drywall to explore further, they exposed a basement wall that was bowed, had cracks both small and large, and had mold and mildew. Layers of caulking in some of the cracks suggested that someone had tried in vain to fix the problem on the cheap. The new owner then did fix the problem, but at great expense.

Although the seller had answered "no" on a disclosure form to questions about any known water problems or cracks and settling issues in the basement, other evidence suggested that the real answer should have been "yes." The seller claimed that he just happened to put up the drywall in the basement as the last item on a to-do list, at a time when he was not intending to sell the house. Records showed that there was no drywall when the house was first listed and did not sell, but that the drywall was in place less than a year later for the second listing that resulted in the sale.

For his lack of candor, the seller paid a high price. An appeals court upheld an award of tens of thousands of dollars in damages to the buyer. In addition to damages for mental anguish, there was compensation to the buyer for those costs of repair he incurred for such items as the installation of an exterior drainage system, the repair of the footer drains, and the installation of multiple straps to repair the bowed wall. Last but not least was a significant award of punitive damages, based on the trial court's conclusion that the seller had acted with "conscious disregard" for the rights and safety of the buyer, where there was a great probability of causing substantial harm. All in all, the case stands as an object lesson: In selling real estate, as in most undertakings, honesty is the best policy.

Planning

Continued from page two.

In the Casey Kasem situation, Smolen said conservatorship and guardianship issues often become the equivalent of custody battles. While the courts have discretion when it comes to deciding what's in the best interest of the ill parent, Smolen said it's best to confront these issues early. "The minute a person is diagnosed with a potentially life-ending illness, you need to have this difficult conversation," said Smolen. "The more matter-of-fact you handle the talk, the better."

Among Smolen's suggestions to reduce complications:

- The parent needs to determine who should hold the medical power of attorney, and appoint a trustee to manage the assets and someone to serve as conservator and/or guardian.
- Make sure the wills and trusts are updated to reflect the parent's wishes.
- Communicate with family members to make sure they understand everyone's roles and what the documents state.
- Keep in mind that subsequent marriages can require special planning. As the Kasem situation shows, sometimes the current spouse is not the children's parent. So decisions such as where the parent will be buried, who will make the ultimate medical decisions, and where the parent will live as a parent ages and possibly becomes infirm become important.

"It's never easy to discuss these issues," said Smolen. "But the key is to be candid, not cruel. Suggest what could happen if the illness progresses. Focus on solutions, not the illness. And most of all, remind the parent that it's best to take care of these matters now, so their spouse or children can better take care of them."

Jason Smolen and Dan Ruttenberg can assist you with all of your estate planning questions and concerns. Please contact SmolenPlevy at 703-709-1900.

Accolades

Continued from page one.

for excellence in family law. Super Lawyers also named Plevy, Dickerson and Daniel Ruttenberg 2014 Virginia Super Lawyers for their achievements in family law, and estate planning and probate.

SmolenPlevy congratulates Dickerson for recently being elected the 2014-2015 president of the Virginia Women Attorneys Association. Founded in 1981, VWAA advances the interests of women attorneys in Virginia, encourages their mutual improvement and social interaction, and promotes the interests of women under law.

SmolenPlevy also congratulates Gretchyn Meinken for recently being elected the 2014-2015 president of the Northern Virgina Chapter of the Virgina Women Attorneys Association.

Media and Community

Continued from page one.

designations. In 2013, Ruttenberg presented an oral argument before the Supreme Court of the United States. In the landmark estate planning case of *Hillman v. Maretta,* a husband had life insurance and named his then-wife as his beneficiary. When he divorced and later remarried, he failed to change who was designated the beneficiary of his policy. Upon his death, his ex-wife received the insurance proceeds. His widow sought to recover the insurance benefits from his ex-wife.

In late March, Dickerson participated in the George Mason University School of Law's recertification interviews. Law schools must be certified every seven years. She also served as a judge in the semi-final rounds of the law school's First Year Moot Court Competition in early April. Dickerson is the past president of the George Mason University School of Law Alumni Association.

SmolenPlevy was a proud "Hero" sponsor for the Fairfax Law Foundation's *Heroes v. Villains—Run for Justice 5K* on April 6. Associate Joshua B. Isaacs serves on the Foundation's board of directors.

On April 29, Associate Gretchyn Meinken was a panelist for the Junior League of Northern Virginia's Preparing Women for Civic Leadership workshop. Meinken discussed how her involvement in the Junior League enhanced her understanding of the needs of Northern Virginia residents and encouraged her to be a force for change in the community.