The Busy Practitioner's Guide to Student-edited Law Journals

Which articles appearing in student-edited law journals should we be familiar with? We identified three recent articles that we think could be of great interest to you. We selected topics that cover the stranger-to-the-marriage doctrine; the donor advised fund strategy; and the evolving challenges of legacy stewardship. We then asked our board members to review the articles for your benefit and to determine if they are "must reads." We hope you enjoy the reviews.

Anna Sulkin, associate legal editor, Trusts & Estates

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AUTHOR: Lee-Ford Tritt, law professor at the University of Florida Levin College of Law in Gainesville, Fla.

ARTICLE: "The Stranger-to-the-Marriage Doctrine: Judicial-Construction Issues Post-*Obergefell*," 2019 *Wis. L. Rev.* 373 (2019)

In 1851, Massachusetts enacted the first modern adoption statute; today, most states allow adoptees to inherit under intestacy and include adoptees in class gifts to children or descendants absent an express contrary statement in the governing instrument. Such wasn't always the case. Early on, even though adding children through adoption was a legal possibility, adoptees were disfavored and generally barred from inheriting from third-party donors under the stranger-to-the-adoption doctrine. An adoption was certainly valid among the parties involved but didn't, necessarily, change the manner in which the law treated dispositions by third parties.

Professor Lee-Ford Tritt has written a crisp and thorough survey of the ways in which the doctrine was first created, then narrowed and finally abolished (almost everywhere) until today. He believes most courts would hold that only "eccentrics" wouldn't include adoptees absent some clear indication that the testator or grantor intended such an unusual result (citing *Wheeling Dollar Savings & Trust Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977)). How long did such a transition take? At least 125 years and in fits and starts. As an illustration, it's worth noting that only six years before *Hanes*, the U.S. Court of Appeals for the District of Columbia decided *Riggs National Bank of Washington, D.C. v. Summerlin*, 445 F.2d 201 (D.C. Cir. 1971), in which it refused to apply retroactively a statute that abolished the stranger-to-the-adoption doctrine to a will executed in 1929. The article notes that "[a]s justification for its decision against retroactive application, the court pointed to the assumption that an average testator of the time would not have wished for a non-blood individual to take under his will" (citations omitted).

Although Prof. Tritt's article is in many ways a fun and interesting joy ride through legal history, that isn't his point. The article makes a strong case that the creation, limitation and ultimate demise of the stranger-to-the-adoption doctrine should interest us because it can be an analogy to which courts can look when confronted, post-*Obergefell*, with instruments that might include same-sex spouses, or might not, depending on the approach a court takes. For that sort of situation, Prof. Tritt has coined the phrase "stranger-to-the-marriage" doctrine! Examples of the sort of transfers in question would be one to A and A's huband, or A and A's wife, or A and A's spouse or perhaps the ability of A to appoint to his/her husband, or wife or spouse. Would a court interpret the word "husband," "wife" or "spouse" to include a same-sex spouse, or would the testator or grantor be a stranger-to-the-marriage?

Considering various circumstances in chronological order helps illustrate the issues and potential analogous treatment. Prof. Tritt believes that a "spouse" includes same-sex spouses in a will executed after the 2015 case

of *Obergefell*. An interesting aside to consider is that probate isn't a "state action" and thus there would be no constitutional objection if a court didn't adopt a different rule post-*Obergefell* than it would have before. But, what if the will had been executed before *Obergefell* and in a state where same-sex marriage wasn't then permitted? Would a court follow a *Hanes* or *Summerlin*-type approach? Would it matter if the marriage occurred before the testator's death? Often, in the adoption context, a court would conclude that the testator could have changed the will and the failure to do so indicated approval, but plenty of courts reached the opposite conclusion. In deciding whether a testator or grantor approved of the same-sex marriage, could a court look to extrinsic evidence—attendance at the wedding, for instance, or other indicia of acceptance or approval? Prof. Tritt thinks the answer is yes, noting that the Uniform Probate Code Section 2-805, the *Restatement (Third) of Property* Section 12.1 (2003) "and several courts allow the introduction of extrinsic evidence to both clarify and reform the terms of a will."

How might a court construe more limited language? "My son may appoint to my son's wife?" Or, "my granddaughter may appoint to my granddaughter's husband?" That language isn't especially common in my opinion, so perhaps a court would be likely to consider a narrow construction excluding a same-sex spouse. Again, however, extrinsic evidence could inspire a court to reach a different result. Prof. Tritt wonders if some of the states that were most opposed to same-sex marriage are likely to adopt by statute rules of construction that attempt to limit application of traditional terms like "husband," "wife" and "spouse" to exclude same-sex occupants. He notes that there's some overlap between the states that were among the last to abolish stranger-to-the-adoption doctrines and those seemingly most opposed to same-sex marriage, although the parallels may be tenuous (Michigan, for instance, didn't legalize same-sex marriage before *Obergefell* yet was one of the earliest states to abolish the stranger-to-the-adoption doctrine, doing so in 1966, just nine years after California had become the first state to take the step). All politics are local and how much can be learned from when which states changed any particular legal rule may be debatable, but Prof. Tritt is right to raise the question for our consideration.

In many ways, among the bar, it appears that same-sex marriage is now old hat. Yet, as this timely article points out, there are many interpretive miles to log before we have certainty. When a testator and grantor are living, a practitioner or trustee would do well to ascertain, if possible, what meaning should be given to the words "spouse," "wife" and "husband" and where their deceased information should be obtained about what they might have meant where it can be. Indeed, if all the currently living parties agree, then perhaps an amendment of a trust under applicable state law to define a term, if there's no directly contrary direction from the testator or grantor, would be in order to limit future controversy.