The

Estate Analyst®

May 2010

Murder With a Twist

Slayer Statutes Produce Unpredictable Results

Also: A Sample Client Letter on Estate Tax Reform

By Robert L. Moshman, Esq.

It is a common law principle that murderers should not profit from their crimes. Most states have codified these rules in "slayer statutes." Thus, if Jack kills Jill, a typical slayer statute would bar Jack from inheriting assets from Jill's estate.

As simple as that sounds, life situations are anything but straightforward. Jack may own property jointly with Jill. Jack may know that Jill is about to get married and change her will and that her current death will benefit his daughter, Jane. Should Jane benefit if Jack kills Jill before Jill can change her will? What if Jack commits murder and is found not guilty by reason of insanity? What if Jill was terminally ill and asked Jack to assist her in ending her life?

What if Jack falls down, breaks his "crown" and Jill comes tumbling after in a murder/suicide combination with uncertainty as to the order of death? Can Jill be presumed to have died first so that she can inherit from Jack's estate?

Presented With Our Compliments

It's not so simple, after all. There are dozens of other situations and circumstances that continue to arise. Even the IRS has gotten into the discussion with a recent ruling on IRA distribution calculations when the intended beneficiary is disqualified under a slayer statute.

Inheriting From a Slayer

Should the descendant of the slayer also be barred from inheriting from the victim's estate? There are different outcomes in different jurisdictions, and one has to wonder if the results are actually tied to differing philosophies in different state legislatures or simply based on the specific cases that have arisen.

In the Maryland case of, *Cook v. Grierson, 380 Md. 502 (2004),* the Court noted that previous Maryland cases had concluded that "persons who are the natural object of the slayer's bounty are disqualified from taking directly from the victim's estate, as well as through the slayer's estate," and that "anyone claiming through the slayer, even though innocent of any wrongdoing, may not share in the victim's estate."

Assisted Suicide

Adding another dimension to this discussion, consider the Wisconsin case of Edward Schunk, who was terminally ill with non-Hodgkins lymphoma. His will left most of his $500,000 estate to his wife and youngest daughter, while leaving little or nothing to his six older children. Yet his primary beneficiaries, his wife and youngest daughter, had allegedly helped Mr. Schunk commit suicide.

Even though assisting Mr. Schunk with his suicide was illegal in Wisconsin and may have contributed to or caused Mr. Schunk's death, the Court concluded that the wife and youngest daughter were not barred from inheriting from Mr. Schunk's estate under the state's slayer statute.

The wife and daughter checked Mr. Schunk out from the hospital on a one-day pass, took him to his cabin, and provided him with a shotgun, ostensibly for turkey hunting, even though he was allegedly suicidal. For purposes of the suit that was brought by Mr. Schunk's other children, the Court made the assumption that the wife and youngest daughter had assisted in the suicide but concluded that even if they had assisted with a suicide their actions did not meet the slayer statute's requirement of a person who "unlawfully and intentionally kills or participates in procuring the death of the decedent." *In re Estate of Schunk, WI App 157 (2008).*

Wrongful Death

A child is killed, breaking the heart of her biological father. Father had begun documenting injuries to the child sustained while she was in the care of the mother and her husband. Both the mother and her husband pled guilty to the crime of child abuse by enabling injury. Could mother share in a wrongful death award?

No, said the United States District Court for the Western District of Oklahoma. A conviction for murder was not essential for the slayer statute to apply, and the existence of the statute did not prevent the common law principles of the slayer statute to apply. The Court explained as follows:

> "The common law rule is neither limited nor abrogated by the statute; courts may continue to apply the common law rule where a beneficiary has played a part in causing the death, even though the beneficiary has not been convicted of murder or manslaughter. Under the doctrine, it is the beneficiary's felonious act causing the decedent's loss of life, rather than a conviction of the killing, that warrants a disqualification from recovery. *See id.* at 832. Further, it is an age-old maxim of equity that one who seeks equity must come to court with clean hands." The child's father was entitled to the entire wrongful death award. *Briggs v. State Ex Rel., Oklahoma Dept. of Human Svc. (W.D.Okla. 2-9-2010).*

Missing Persons

Kathryn Butterfly-Biles reported her husband missing in 2001. Five years later, Donald Biles's remains were discovered in a forest with a bullet to the head. Butterfly-Biles then filed a claim as the beneficiary on her husband's life insurance policy.

The insurer then filed an action to determine the correct beneficiary because it was impossible to conclude whether Butterfly-Biles would be accused, convicted, or exonerated in the death of her husband. The action made the alternate beneficiaries the plaintiffs (because they would bear the burden of proof) and named Butterfly-Biles as the defendant. The insurance proceeds were placed with the Registry of the Court. Butterfly-Biles then challenged the evidence that would be admissible at trial.

The District Court concluded that the Detective's statement that Butterfly-Biles remained a suspect in her husband's homicide would be admissible as testimony. *McCormick v. Butterfly-Biles (N.D.Okla. 3-31-2010).*

In another case, an insurance company filed a legal action to determine the rightful beneficiary of a $95,000 life insurance policy issued in 2005 for Loa Vang that named her husband, Fong Yang, as beneficiary. In 2008, Loa Vang was killed by knife wounds; Fong Yang fled and remains a fugitive.

The Court determined that North Carolina's slayer statute could not be applied yet: "Here, there has been no determination as to whether Fong Yang unlawfully killed Lao Vang be-

cause he is a fugitive and no criminal prosecution has commenced." Life insurance proceeds were paid to the Registry of the Court and invested in interest-bearing accounts. *New York Life Insurance Company v. Vang (W.D.N.C. 1-5-2010).*

Legal Fee Boomerang

The time delay of determining the guilt of a slayer, and hence the application of the slayer statute, can lead to any number of problems. One serious issue is where, as in the previous cases, there is a suspicion of someone who may have murdered a spouse. What if the victim's assets are not only received by the slayer but consumed in full before the slayer is convicted?

In one dramatic example of this, two lawyers for a person who was ultimately determined to be a slayer had been paid legal fees that the slayer obtained from the estate of the victim. The attorneys were hired to defend Debra Post, who was accused of murdering her husband, Jerry Post. Debra deeded and transferred life insurance and real estate from her deceased husband's estate to her defense attorneys; then, six months later, she pled guilty to murder and was sentenced to life in prison without possibility of parole. The two attorneys were then arrested and charged with theft for taking and receiving $320,000 in property for their legal fees. Coverage of this case appeared in *Trusts & Estates* (November 2008) in an article entitled "Stung by the Slayer Statute," by Samantha E. Weissbluth and Erika A. Alley. The article suggested having legal fees approved by the Court.

Insanity Exception

An exception to the rule against slayers inheriting from their victims applies if the slayer is insane at the time of the slaying. A New Jersey court reached this conclusion as a matter of first impression in, *Campbell v. Ray, 102 N.J. Super. 135 (1968),* based on existing New Jersey case precedents and those of other states, including Michigan, Ohio, Missouri, New York, and Texas. A number of states began adopting versions of the Uniform Probate Code (UPC) in the late 1970s.

New Jersey's version of the UPC was adopted in 1977, and the section on slayers was examined in the context of an insane slayer in, *In Re Vadlamudi Estate, 183 N.J. Super, 443 A.2d 1113 (1982)*. In that case, Mrs. Vadlamudi suffered a "brief reactive psychosis" one Valentine's Day and dispatched her husband, Desapathi, with an ax. There, the Court once again concluded that the insane slayer could inherit from the victim.

However, an intriguing argument was made by an attorney for one of the decedent's children. "[T]he killer, although suffering from a disease of the mind so as to escape criminal responsibility, may nevertheless have intended the homicidal act so as to bring the homicide within the provisions of N.J.S.A. 3A:2A-83(a) through (d)," wrote the Court in summarizing the attorney and added: "He further argues that, in any event, the Probate Court in a civil action such as this should hold a plenary hearing on the issue of insanity and arrive at its own independent findings."

In, *Turner v. Estate of Turner, 454 N.E.2d 1247 (Ind. App. 1983),* the Indiana Court cited Vadlamudi, as well as cases from California, Florida, and Minnesota. However, in a very recent case from Illinois, *Dougherty v. Cole, 4-09-0658 (Ill.App. 4-29-2010),* a different outcome took place. Jane Dougherty was stabbed to death by her son, Jack, during a manic episode with psychotic features—he was following the directions of voices inside his head. Jane Dougherty died intestate and was survived by her two children, Jack and Alycia.

As administrator of her mother's estate, Alycia filed an action to bar her brother, Jack, from inheriting from the estate. She also filed a wrongful death action against him. She won on both counts, and this decision was affirmed on appeal. The Court noted that the Illinois slayer statute had been amended and that the word "convicted" had been deleted. It concluded that Jack acted intentionally and therefore could not inherit from his mother's estate.

The Slayer as IRA Beneficiary

What happens if the slayer is the beneficiary of an IRA? Under a typical slayer statute, the slayer cannot benefit from the estate of the victim. This raises a number of issues. As a threshold issue, will the IRA be treated as the "estate" of the victim?

The answer is almost certainly "yes." Although an IRA passes outside the probate estate, it is still an asset of the victim. A comparable asset would be insurance owned by the victim that names the slayer as the beneficiary. The slayer is generally treated as though he has predeceased the victim and is disqualified from benefiting.

A more challenging question could be constructed, however. What if there was a trust that the victim established for the benefit of the slayer? What if the trust were already funded? What if the trust were irrevocable? Is the slayer truly benefiting by murdering the victim if the trust is already set up? Would it not be comparable to a completed gift? An action to freeze and recover the assets for wrongful death might be necessary if the slayer statute is not applicable to such a circumstance. But we digress.

As to the IRA that names a beneficiary who is disqualified under a slayer statute, the next inquiry is whether the slayer will still be considered the beneficiary for purposes of determining required minimum distributions. Is the slayer to be the measur-

© R. Moshman 2010.5

ing life? The IRS provided a humane and reasonable approach with great sensitivity…no, just kidding. The IRS used the disqualified slayer as the measuring life at the expense of the ultimate beneficiary. This adds a strange and ironic wrinkle. The IRS has caused the age of the perpetrator of the crime to be utilized to determine the required minimum distributions, even though the perpetrator will not be qualified to benefit from the IRA. *PLR 201008049*.

When an IRA beneficiary murders the IRA grantor, it is not necessarily an expression of disappointment in the size of the IRA or even related to the IRA at all. On the other hand, an IRA grantor who is murdered might not appreciate having an alternate beneficiary being restricted or disadvantaged for tax purposes by having the perpetrator's age utilized as a measuring life. Although beneficiary designation forms don't include provisions for how an IRA owner would like assets distributed if they are murdered by their primary beneficiary (i.e., "To Jack, but if he kills me, to Ted"), such forms do provide for alternate beneficiaries.

ERISA Preemption

Several cases, most recently, *Atwater v. Nortel Networks, Inc. (M.D.N.C. 2005),* have established that slayer statutes are not preempted by ERISA. So the slayer can be barred by the slayer statute from receiving benefits from the victim's pension plan.

However, the slayer statute did not serve to change the order of death in, *Caterpillar, Inc. v. Estate of Velton Lacefield-Cole 520 F. Supp.2d 989 (N.D.Ill. 2007).* In that case, Anthony and Velton were found dead by gunshot wounds. The coroner determined that Anthony had murdered Velton and then committed suicide. Anthony had designated Velton and his two children from a previous marriage as the beneficiaries of his retirement plan. The slayer statute did not apply, for purposes of requiring that Anthony be deemed to have predeceased Velton. Since Velton's death was ruled to have come prior to Anthony's, the retirement plan assets went to Anthony's two children as the surviving beneficiaries.

Interestingly enough, the Court's discussion included the following observation: "Though there is no federal slayer statute, the equitable principle that underlies such statutes is unquestionably part of federal common law. See, e.g., *Mutual Life Ins. Co. v. Armstrong, 117 U.S. 591, 598, 6 S.Ct. 877, 880 (1886)* (holding that a beneficiary of an insurance policy could not obtain insurance proceeds after feloniously killing the insured).

A similar result applied in an equally gruesome case from Mississippi. Husband murdered wife and then committed suicide. Wife was not treated as the surviving spouse under the applicable slayer statue. As a result of Mississippi's adoption of the Uniform Simultaneous Death Law, Husband's child from a previous marriage was the only heir to the slayer's estate. *In the Matter of the Estate of Miller (2003).*

A Sample Client Letter About Estate Tax Reform

The National Association of Estate Planning Counsel (NAEPC) has a sample letter from Atlanta attorney John J. Scroggin on its website to help explain and warn clients about the current estate planning situation. This is a 3- or 4-page letter with 1,262 words. It is very well done and thorough. It may be critical to include all such details to protect the attorney from malpractice claims and to fully serve clients. On the other hand, such an extensive explanation be beyond the understanding or patience of many clients.

What follows is a streamlined alternative version that may be appropriate for some clients. This should be modified based on the type of estate planning professional utilizing it and further tailored to the individual client receiving it. It may be used at one's own risk. It is simply offered as a general approach that may provide helpful ideas for practitioners to build upon in preparing their own approach to reviewing these critical issues.

Dear Client,

Your estate plan has been affected by a series of highly unpredictable legislative developments. The Federal estate tax has been repealed for 2010 but is likely to be reinstated in one form or another, either this year or in 2011.

As a result of these radical changes, standard provisions of many wills, such as transfers to a surviving spouse, formula clauses apportioning assets, decisions on choices of where to live or locate your assets for tax purposes, and decisions on which long-term assets should be retained or transferred for purposes of minimizing capital gains tax, should all be reconsidered in light of changing circumstances.

Every estate is different, and your objectives may also have changed. It is important to remain vigilant over the next several months and adjust estate plans, investments, and wills to fully protect your assets.

I will do my best to answer any questions you may have. I strongly advise you to set aside time to review your estate plans with me in the near future and remain engaged in this dynamic process.

Very truly yours,