From the Desk of the President

It has been my pleasure to be a member of the National College of Probate Judges for 10 years, of which seven have been as a member of the NCPJ Executive Committee.

At NCPJ conferences, I have enjoyed the wisdom, knowledge, analyses, approaches, and humor that have been bestowed on me by other members of the judiciary and court administrators.

In the pandemic, however, I have gained new perspectives about our members and our organization as a whole. I have watched the judges and staff of the courts with jurisdiction in probate, guardianship, and mental illness matters confront and weather the pandemic while maintaining a firm grip on our mission. We have all seen first-hand that, while adversity is challenging, it can inspire transformational leadership, foster the creation of adaptive and efficient solutions, and motivate constructive and imaginative changes in behavior.

Along with technology, we have applied our backgrounds, persevering minds, and energy to overcome and advance in the administration of our courts despite the difficulties we have encountered because of the pandemic. It has been said that adversity builds resilience. Our members have demonstrated the truth of that statement through action.

I am so very proud of the dedication and continuous effort exhibited by our membership to protect vulnerable people from fraud, abuse, and exploitation. I am proud of the unceasing endeavors to respect the rights and personal dignity of persons in our courts and to administer “justice for all.”

I am so very grateful to have had the opportunity to serve as NCPJ President. As I conclude my term as President of NCPJ, my hope is that we will maintain our conscientious service to vulnerable persons despite the many obstacles.

Most important, be encouraged. President Franklin Roosevelt once said, “To reach a port, we must sail. Sail, not tie at anchor. Sail, not drift.” May you sail on.

Attorney’s Fees in Trust Litigation

By: Daniel F. Blanchard, III, Esquire, Rosen Hagood, LLC Charleston, South Carolina

In 2000, the Uniform Law Commissioners approved the Uniform Trust Code (“UTC”) as a national effort to provide the states with a comprehensive model for codifying their law on trusts.¹ The UTC adopted several changes to the normal rules of trust litigation. One of the more significant changes involves UTC § 1004, which provides that “[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.”² Thus far this section of the UTC has been enacted either verbatim or with some modifications in twenty-five states and in the District of Columbia.

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UTC § 1004 departs from the well-known “American Rule,” which holds that the parties are responsible for the payment of their own attorney’s fees regardless of the outcome of the litigation.3

Unfortunately, § 1004 provides little guidance in deciding when “justice and equity may require” an award of fees and costs. Fortunately, an extensive body of case law has developed in jurisdictions with versions of § 1004. These decisions can help guide courts and practitioners confronting requests for attorney’s fees and costs under § 1004.

Although a comprehensive discussion of the case law is beyond the scope of this article, several concepts have emerged.4 As a threshold point, it is clear that the right embodied in § 1004 is not absolute.5 The statutes based on § 1004 are discretionary statutes—they involve a permissive rather than mandatory statutory right.6 A trial judge is not required to award fees and costs under § 1004 and “need not adhere to a rigid analysis.”7

Should a trial judge decide to award fees and costs under § 1004, the “justice and equity” standard encompasses a tripartite inquiry. Under the first or initial step, the court must determine whether a party is entitled to recover fees and expenses. If the answer is yes, the court must make a secondary determination of the size or amount of the award. Finally, the court must undertake a third determination as to who or what should bear the burden of paying the fees and costs—whether one or more of the parties to the litigation, the trust that is the subject of the controversy, or some combination of them.

The Oklahoma Court of Appeals’ decision in Atwood v. Atwood8 is the watershed case in articulating factors that courts should consider in determining entitlement to fees and expenses under § 1004. In that case, the court distilled general criteria from other types of cases to identify five non-exhaustive factors that may help in resolving the entitlement question.9 These criteria, which are often referred to as the “Atwood factors,” include (a) reasonableness of the parties’ claims, contentions, or defenses; (b) unnecessarily prolonging litigation; (c) relative ability to bear the financial burden; (d) result obtained by the litigation and prevailing party concepts; and (e) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation.10

In strict terms, the statutes based on § 1004 are not “prevailing party” statutes because they grant courts the discretion to award or deny fees and costs “to any party,” not simply a prevailing party.11 The fact a party prevailed in the proceeding does not automatically entitle the party to an award of fees and costs under § 1004.12 Conversely, it is unnecessary for a party to be a prevailing party to recover fees and costs under that section.13 Courts nevertheless attach “considerable weight” to the outcome of the litigation in deciding whether to award fees.14 Rather than completely depending on prevailing party concepts, the dispositive inquiry under § 1004 is whether there is a reason, grounded in equity, justifying an award of fees.15 This analysis extends beyond simply tallying who won or lost on the merits of the case.16

Once it is determined that justice and equity require an award of attorney’s fees and costs to a party, then the next or second step is for the court to determine the specific amount of fees and costs to be awarded. This determination is guided by a reasonableness standard. Several courts have utilized the “lodestar” approach in analyzing awards of fees and costs under state versions of § 1004.17 Under this approach, the court must first calculate the base lodestar figure by multiplying a reasonable hourly rate by the reasonable time expended. Courts traditionally apply several factors in determining this lodestar figure, such as (a) the nature, extent, and difficulty of the case; (b) the time necessarily devoted to the case; (c) professional standing of

(to be continued on page 3)
Attorney’s Fees in Trust Litigation (continued from page 2)

counsel; (d) contingency of compensation; (e) beneficial results obtained; and (f) customary legal fees for similar services. The lodestar figure presumptively generates a reasonable fee amount. However, the court may also consider various other factors—extraordinary outlay of expenses, exceptionally protracted litigation, exceptional delay in the payment of fees, or other exceptional circumstances—to justify either a downward or upward adjustment of the lodestar figure by applying a “multiplier” before arriving at a final amount.

The final step in the three-pronged “justice and equity” analysis is to decide who or what should bear the burden of attorney’s fees and costs. Section 1004 authorizes the court to award a party its own fees and costs from the trust’s assets. Alternatively or in combination with such an award, the court may charge a party’s costs and fees directly against another party to the litigation. The court can award fees and costs against a party even though he or she has no beneficial interest in the trust that is the subject of the controversy. In addition to requiring payment directly to another party, the court can satisfy its attorney’s fee award by surcharging, reducing, or denying compensation or reimbursement to the trustee and by surcharging, offsetting, or reducing a beneficiary’s distributive share of the trust. The statute affords the trial judge ample room to fashion creative orders for achieving a just and equitable result under the particular circumstances of the case.

A question that has vexed some courts is how § 1004 interrelates with other sections of the UTC as well as the common-law rules.

“A question that has vexed some courts is how § 1004 interrelates with other sections of the UTC as well as the common-law rules.”

developed under the common law and equity jurisdiction before § 1004 was approved, including a bad faith exception, the common fund doctrine, and the rule entitling trustees to reimbursement from the trust estate for attorney’s fees reasonably incurred in good faith in defending the administration of the trust. This last rule is now codified in UTC § 709(a)(1).

Courts have had difficulty determining whether the fee statutes based on UTC § 1004 supplant, supplement, or modify these traditional common-law and equitable exceptions to the American Rule. For instance, the Reporter’s Comments to § 1004 allude to the common-law rule allowing for the recovery of attorney’s fees in cases of egregious conduct such as bad faith or fraud. This reference has caused some courts to conclude that a showing of bad faith or egregious conduct is a prerequisite to the recovery of fees under § 1004. However, the comments do not indicate that § 1004 was intended to limit the recovery of fees to the same standard applied under the common-law rule. The majority of courts applying statutes based on § 1004 have rejected the claim that fees and costs can be awarded only if bad faith, egregious conduct, or intentional misconduct is shown. Although the presence or absence of bad faith conduct or egregious behavior is a factor to be considered, it is unnecessary to show that a party engaged in such conduct to justify an award of fees and costs under § 1004.

Some courts have held that § 1004 simply codifies or echoes the old common-law exceptions and does not expand the court’s discretion to award attorney’s fees and costs beyond those principles. To adopt this view of § 1004 renders it inutile in most cases because the common-law rules allow for the recovery of attorney’s fees in only limited situations. Other courts have concluded that the “justice and equity” standard of § 1004 is not limited by the common-law and equitable exceptions, but instead expands the court’s discretionary authority to award fees and costs. This latter view is the better reasoned result.

Section 1004 grants trial courts broad authority and discretion to award attorney’s fees and costs to any party “as justice and equity may require” in judicial proceedings involving the administration of a trust. Although the statute itself provides no guideposts to trial judges in applying and interpreting the “justice and equity” standard, case law from jurisdictions with their own versions of the uniform statute do provide useful guidance.
Estate Planning for the Unknown in 2021 and other Difficult Planning Scenarios

By: Lisa Roberts-Mamone, Esq. – Attorney at Baker Hostetler, LLP
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Since President Biden outlined his tax law proposals in early 2021, there have been a lot of unknowns surrounding estate planning. Included in these proposals is the possible substantial reduction in the estate, gift and generation-skipping transfer tax exemptions. However, the lack of any guidance or knowledge regarding what the final tax laws will resemble has caused estate planners to have to adapt their strategies to the possibility of a variety of substantial tax law changes that are potentially forthcoming. In this article, we will outline some of the most common questions we have received in 2021 from clients and advisers regarding the tax law changes and recommended planning techniques and how we have generally answered those questions. In addition, we also address other common planning scenarios we encounter and some of the strategies we often recommend in such situations.

Can my clients continue to use the same type of estate planning strategies they have used in prior years?

For the most part, we have continued to use the same estate planning strategies we used before the possibility of tax reform. However, what has changed is the implementation of those strategies and the inclusion of safeguards in the event the tax law changes are retroactive or unexpected tax laws are passed in the future. Below we discuss in more depth the implementation of these strategies.

What are the most common estate planning techniques that you recommend for an individual to utilize all or a substantial portion of their lifetime gift and generation-skipping tax exemption (assuming they have both exemptions remaining)?

There are a variety of strategies we recommend to clients based on a client’s needs and the nature of the assets they wish to gift. One of the most common strategies that we recommend for a married couple is a Spousal Limited Access Trust (“SLAT”). The SLAT provides the grantor with the peace of mind to know the funds can be accessed by the beneficiary/spouse if the funds are ever needed, while preserving the growth of the assets outside of the grantor’s estate. Often times, the SLAT is drafted to allow the trustee to make discretionary distributions to lineal descendants of the grantor during the beneficiary/spouse’s lifetime. This provides the ability to make distributions to future generations if the grantor’s spouse does not need the funds. One potentially negative aspect of a SLAT is that, so long as the spouse remains a beneficiary of the SLAT, the trust will be treated as a grantor trust for income tax purposes.

If a client is comfortable gifting assets to the next generation, we will often recommend the creation and funding of a dynastic trust for multiple generations. The terms of the dynastic trust will vary depending on the client’s goals, the family structure and the type of asset(s) to be contributed to the trust. Most often, such trusts are drafted to provide the trustee with the authority to make distributions of income and principal to the grantor’s children and their lineal descendants (or other family members if a broader beneficiary-base is desired). In addition, limited powers of appointment are often granted to the beneficiaries at their deaths, which allows the beneficiaries to divert the assets to other family members or to a spouse (usually limited to an income interest for life). A dynastic trust has the benefit of removing the assets from the grantor’s taxable estate and allowing the gifted assets to appreciate estate tax free. Further, as these trusts are dynastic, to the extent the assets remain in trust, the assets can be passed on to future generations estate and gift tax free (this may change in the future with tax reform). Also, as the dynastic trust is a grantor trust for income tax purposes, the grantor will continue to pay the income tax liability on the trust’s assets during their life, allowing the grantor to further reduce their assets. However, grantor trust status may be turned off in the future if the laws regarding grantor trust tax treatment become burdensome.

If a client wants to avoid any complexity, outright gifts to children, grandchildren or the funding of 529 plans for grandchildren are ideal options.
Estate Planning for the Unknown in 2021 and other Difficult Planning Scenarios (continued from page 4)

As a result of the unknowns surrounding tax reform and what the final estate and gift tax laws will be when the dust settles, we have structured many transfers as loans. This approach works for transfers into trusts or outright amounts to individuals. The intent is to forgive these loans as tax reform begins to take shape and the threat of the tax laws being retroactive is minimized. As of the time this article is published, this threat appears to be minimal and many of our clients have moved forward with forgiving the loans and making gifts complete by forgiving the loans. Other planning options we have used to combat possible retroactivity and the unknown are disclaimer trusts and qualified terminable interest property trusts (“QTIP Trusts”). Both of these strategies involve making the gift in trust today and as the tax law changes become clearer, taking the necessary actions to have the trust no longer be solely for the spouse’s benefit. When tax reform was first proposed these were common strategies that we used to minimize the risk that a client would unintentionally incur a substantial gift tax liability.

If a client has no remaining gift tax exemption, but has remaining generation-skipping exemption what strategies do you recommend?

If a client has used all of their gift tax exemption, but has remaining generation-skipping transfer tax exemption, we may recommend that the client establish one or more Grantor Retained Annuity Trusts (“GRAT”). Although, GRATs are not usually good options for generation-skipping transfer tax planning, this is one creative idea. What allows the use of the generation-skipping tax exemption is that a third party is given the power to appoint the “winnings” to a trust for “skipped persons.” This strategy avoids an individual incurring gift tax but allows the grantor to subsequently allocate all or a portion of their remaining generation-skipping transfer tax exemption to those GRAT winnings in the future.

What steps should I take to safeguard my existing life insurance trust in light of proposed tax reform?

Under the current tax law proposals, the annual exclusion amount may be reduced. This will cause significant issues for those clients who own life insurance in an irrevocable life insurance trust (“ILIT”) and rely on the annual exclusion amount to make gifts to those ILITs to pay the life insurance policy premiums. Additionally, suggested changes to the transfer tax rules may make it tax prohibitive to make additions to ILITs. For clients in this situation, we are recommending that they consider “super-funding” their ILITs by making substantial gifts of liquid assets to the trust which can then be invested and used in years to come to pay the life insurance premiums. This strategy will allow an individual to use a portion of their remaining gift tax exemption now as well as to insulate the ILIT from any future changes to the annual exclusion laws.

How do you plan for large diverse families?

Estate planning for large families can pose a unique challenge. Often times parents will have the utopic view that their children will never fight and will continue to get along well into the future. Unfortunately, in reality, large families often do squabble over some aspect of estate or trust administration such as executor or trustee fees or distribution of tangible personal property. The primary strategy that we often use when drafting trusts for large families is building in flexibility. Flexibility often takes the form of a limited powers of appointment which allows a beneficiary to steer the assets away from certain beneficiaries if necessary. Further, we often build in a variety of safeguards such as spendthrift provisions, prenuptial requirements, substance dependency clauses, no contest clauses (where permitted by law) and provisions authorizing trust decanting. Building in maximum (to be continued on page 3)
Estate Planning for the Unknown in 2021 and other Difficult Planning Scenarios (continued from page 5)

flexibility generally allows almost any issue that may arise to be addressed in a meaningful and substantial manner.

Another important aspect of planning for large families, especially if a closely-held family business is involved, is communication and a coordinated plan to divide and manage the trust assets. In the situation where certain members of a family may be involved in the family business while other family members are not, it may be prudent to give only the family members involved in the business the authority to vote the shares or units of the business owned by the trust. While this approach may not be popular with all of the family members, it can be important if there are non-family members who own a minority interest in the business or if there are multiple branches of the family involved.

How do you plan for second, third, fourth, etc. marriage situations and use gift and estate tax exclusions?

Estate planning for second marriages can be difficult as there are a variety of factors that need to be taken into consideration, such as the current and anticipated net worth of each spouse, family composition, and how well the blended family, as a whole, gets along. Often times, if a blended family has a coordinated plan to divide and manage the trust assets, a smooth administration can be achieved and you can decrease the possibility of family discord or litigation in the future.

There are a couple of different types of trusts that we recommend to our clients who want to use their gift and estate tax exemptions and are in a second marriage situation. One of our recommended strategies involves the SLAT (also often used with first marriages and discussed earlier). When drafting a SLAT in a second marriage situation, we often do not build in the same level of flexibility as we would if this were a first marriage. For example, the second spouse may not be granted a limited power of appointment and if a limited power of appointment is included, it may be limited to only the grantor’s descendants. If a prenuptial agreement is in place, a SLAT might be a good vehicle to satisfy any prenuptial requirements in favor of a new spouse.

How do I make gifts when my net worth predominantly consists of a closely-held business?

When a client’s net worth is concentrated in a closely-held business or investment entity, we often recommend that the client establish a family limited partnership (or limited liability company). The client will retain the voting interest in the company or partnership while gifting or selling the non-voting interest to a dynastic trust which benefits their family and/or possible non-family partners. If the client requires an income stream for a number of years, he/she can sell the nonvoting interest(s) to the trust in exchange for a promissory note with an applicable federal interest rate (or a higher interest rate, if desired). This strategy allows the client to remove a substantial portion of their interest in the business from their taxable estate while retaining a controlling interest in the business and a steady income stream for a term of years.

To alleviate a potential dispute with the Internal Revenue Service (“IRS”) with respect to the sale price of the business, we often build in purchase price adjustment provisions. Purchase price adjustment provisions work by increasing the sale price and accompanying promissory note balance to match the value the IRS establishes for the business on audit. If a client wishes to gift shares or units of a business, we often build in formula adjustment clauses which will tie the amount of shares or units gifted to the amount of the client’s remaining estate and gift tax exemption.

How do you plan for litigious and contentious families?

Generally, one important goal of an estate plan is to minimize potential conflict among the beneficiaries upon the death of the settlor/grantor. This goal becomes even more challenging when there are members of the family who have litigious tendencies. This can be further exacerbated if it is a blended family. We often use the same strategies we outlined above for large families as we do for litigious families. A well-coordinated estate plan, which is explained to the family members well before death, helps minimize the possibility of future litigation.

However, there are some family members who no matter
Estate Planning for the Unknown in 2021 and other Difficult Planning Scenarios (continued from page 6)

what is communicated during the formation of the estate plan or what they previously agreed to, will find some aspect of the estate plan to dispute. If we believe this may occur, we may recommend a no contest provision be included in the trust and will (if permitted by applicable state law) or clearly state in the document that any expenses incurred by the estate or trust as a result of litigation initiated by a family member shall first be paid from that family member’s share of the trust or estate inheritance. Even with the inclusion of such provisions, these types of family members can, and often do, make the administration of a trust and estate difficult. Often times, these family members will not object to the underlying documents themselves, but rather take issue with how the trust and/or estate are being administered. Generally speaking, objecting to the administration of a trust or estate will not violate a no contest provision as the person is not challenging the terms of the underlying documents, but rather the actions of the fiduciary.

In addition to the above, in certain cases when a settlor or testator is making substantial changes to their estate planning documents (such as removing family members or including a second spouse) and we anticipate a capacity argument will be asserted by some party, we will recommend that the settlor or testator obtain signed letters of competency from their primary care physician. Having these letters of competency, will minimize or prevent a beneficiary from successfully asserting a cause of action for lack of capacity. When it is almost certain that an estate plan will be challenged, we may also recommend that the documents be declared valid by the relevant probate court before death (if permitted by local law). In Ohio, this is authorized under Ohio Revised Code § 5817.02 and 5817.03. By having the documents validated by the Court before death, this eliminates the argument that the documents were changed due to undue duress or the person was improperly coerced into making such changes. However, one potential negative aspect of having the document declared valid by a Court is that it makes it more difficult and time consuming to update or revise the documents in the future. There is no silver bullet to completely prevent the possibility of family members filing a lawsuit over the terms of the documents and/or the administration of the trust or estate, but utilization of some of the above recommendations may minimize the potential for litigation and make it substantially more costly for the litigious family member.

What Modern Estate Planning Looks Like Through the Eyes of Two “Gen Z” Students

By: Cassidy Ruckel & Jessica Proch, Ohio State Students and Interns at Geauga County Probate Court

Many people have the impression that probate law only applies to older adults and adults who have acquired assets over time, however, probate law applies to Generation Z as much as any other generation. Unless a Gen Z member is in law school or has been engaged in the probate process, the majority of the Gen Z population is unfamiliar with the legal terms and estate planning process. Gen Z should be familiar with the following probate terms: Estate Planning, Living Will, Healthcare Power of Attorney, Durable Power of Attorney, and Transfer on Death.

There are several ways that probate law applies to this young generation. This includes, but is not limited to: people with spouses, children, and/or pets; people with “high-risk” jobs; people with businesses; people who have student loans or credit card debt; people with digital assets. Unknowingly to the Gen Z population, they fall into many of these categories. Having the Gen Z generation think about these categories and how it relates to the probate process will allow them to be better equipped for certain situations that may arise.

In the instance where no estate planning was done before a person’s death, said person’s financial responsibilities, assets, and property will be distributed according to that state’s descent and distribution laws. In Geauga County, Ohio, the Honorable
What Modern Estate Planning Looks Like Through the Eyes of Two “Gen Z” Students (continued from page 7)

Judge Tim Grendell of the Probate and Juvenile Court created the Good Deeds Program, which is an Award-Winning program that explains the probate process and how one can minimize their assets passing through probate. From the Good Deeds Program, “It is difficult enough for a family to deal with the death of a loved one. Without a will, the family is also forced to deal with more paperwork and procedures which could have been avoided with proper planning.” This program is vital in educating the older adults, but also younger individuals, on probate law and estate planning. Every person has specific and unique responsibilities, but every adult should consider a plan for their future assets.

Many individuals assume a person’s family will make decisions on their behalf, but many young people over the age of eighteen do not know that in the case of a medical or financial emergency, their parents or guardians can no longer make decisions on their behalf. If a young individual has a Durable Power of Attorney and a Healthcare Power of Attorney, they may be able to initially avoid the probate process. Any estate planning is smart to do, but it is vital if someone has a life-threatening job such as a policeman, firefighter, military occupation, or construction job. For younger people, they need to ensure that in the case of incapacitation or death, the person of their choice will make their decisions.

Arguably, the most important piece of an estate plan for Gen Z is a will. The will ensures the safekeeping of one’s wishes related to family matters, and material items at death. For example, a will would cover the assignment of guardianship of minor children and/or pets, funeral preferences, the passing of assets to certain designated beneficiaries, and a variety of other topics.

Another major part of successful estate planning is the designation of certain duties contained in a Durable Power of Attorney (“POA”) and the Healthcare Power of Attorney. Having a principal assign duties to an agent to make decisions as to the principal’s financial dealings or healthcare decisions is an important aspect of estate planning. The agent has the authority to make such decisions through the POA or Healthcare Power of Attorney, since he or she was granted the authority by the principal. As for the POA, the principal allows the agent to handle business, real estate, and financial matters. Without these obligations assigned proactively, issues can arise that may impact the principal’s assets. As for specific medical questions and choices, a Healthcare Power of Attorney allows an agent to make decisions in a medical situation on behalf of the principal. If there is no Healthcare Power of Attorney, after the age of 18 years old, healthcare professionals, along with the appropriate spouse or next-of-kin (depending on the situation) will make decisions the way they see best fit, and that is not always the same decision as what the incapacitated person would want.

Another topic that must be thought about, even at a relatively young age, is the “Transfer on Death” portion of estate planning. In Ohio an individual is able to transfer real property by designation. An individual can fill out a form whereby the individual can designate who he or she wants to transfer the real property to upon the individual’s death. This designation will permit the direct transfer of real property to a selected beneficiary upon the death of the current owner, thus avoiding the probate process.

Gen Z has a strong attachment to pets. As Gen Z enters adulthood, many decide to purchase a pet, and many believe their pets to be their family. These young Gen Z families have had to modernize their estate planning due to this newly defined “nuclear family.” A study done by APPA found that Gen Z owned 11% of all pets in the United States. Although that seems like a small percentage, that
What Modern Estate Planning Looks Like Through the Eyes of Two “Gen Z” Students (continued from page 8)

amounts to millions of pets who could potentially be left without an owner if its owner is incapable of caring for them themselves. In Ohio there is a statute that allows for a trust to be created to provide for the care of an animal during the settlor’s lifetime. Thus, Gen Z, with their attachment to pets, can plan accordingly for the care of their animals.

Further, the ASPCA says that “A pet trust is a legally sanctioned arrangement providing for the care and maintenance of one or more companion animals in the event of a grantor’s disability or death.” By having a pet trust, pet owners will be assured that their decisions will be carried out accordingly to their wishes. The Gen Z generation believes that they will not be incapacitated, but with so many unforeseen dangers, one must be prepared. This topic seems distant to Gen Z, but recent studies by Forbes say otherwise. “According to the CDC, drivers under the age of 20 are responsible for the highest proportion of fatal distraction-related crashes. A CDC study conducted in 2017 found that 42 percent of high school students who drove within a prior 30-day period reported sending a text or email while driving. What’s more, drivers who reported frequent texting were found to be less likely to wear a seatbelt and more likely to be drinking and driving.” With these numbers impacting Gen Z, one must plan for unforeseen situations.

As to technological advances, Gen Z is at the forefront. An emerging topic the last decade is digital assets. One’s digital life is extremely important to Gen Z. A study done by the Center for Generational Kinetics discovered that in 2018, 95% of Gen Z had a smartphone. Additionally, 55% of Gen Z used their smartphones for five or more hours a day, and 26% used their phones for 10 or more hours a day. Gen Z was given the nickname “digital natives” since they were born or brought up during the age of digital technology and therefore are familiar with computers and the internet from an early age. With that in mind, it is safe to assume that Gen Z must start thinking about digital assets.

The Ohio Revised Code (“R.C.”) has defined a “digital asset.” Pursuant to R.C. 2137.01(1), a digital asset is, “[A]n electronic record in which an individual has a right or interest.” Examining some digital assets, one example is an online-only bank account. “A recent survey found that Americans of all ages are open to banking with an online-only bank, and the survey further found that about 30% of Americans already bank online or plan to make the switch.” Commonly used online-only bank accounts include Ally Bank, Synchrony Financial, Capital One Financial Corp., Discover, Charles Schwab, and others. As most young adults have online bank accounts, many need to take precautions as to how those bank accounts will be settled after their death. If they do not specify or alter their settings to the online-only bank account functions, the account information may become an issue for a probate court. It is also important to note that because online bank accounts are specifically considered a digital asset, they need a separate custodian over the assets which will then specific powers.

Another example of a digital asset consists of, but is not limited to, email, social media, chat rooms, online dating, gaming, bitcoin (account only), and accounts associated to rent or utilities. These accounts hold value, which can be divided into two categories. The first category, “Intrinsic Value,” has financial importance to it. Intrinsic Value allows for purchasing power. This includes bitcoin, domain names, company logos, and accounts. The second category, “Extrinsic Value,” has a personal appeal to it. Extrinsic Value includes images, videos, social media, email, etc. One issue that arises in the court after a young person’s death is how to access these digital assets. In the Matter of Coleman, Ryan at the age of 24, unexpectedly died and petitioners wanted to access his iPhone but it was locked. On account of Ryan having no estate plan, his family had to petition the court for an order. The order requested that: “(1) the decedent was the user of all accounts associated with the Apple ID; (2) the petitioners are the personal representatives of the decedent; (3) the personal representatives are the "agents" of the decedent, and their authorization constitutes "lawful consent" as those terms are used in the Electronic Communications Privacy Act; and (4) Apple is ordered by the court to assist in the recovery of decedent’s personal data from their accounts, which may contain third party personally identifiable information or data, from their accounts.” Gen Z and their attachment to their phone is unquestionable. With that in mind, Gen Z must be aware of...
their digital assets and how it can impact our family going through probate. Becoming aware of this now will better prepare Gen Z for such events.

Further, R.C. 2137.03(A) states: “A user may use an online tool to direct the custodian to disclose or not to disclose to a designated recipient some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.” People of all generations, especially Gen Z, must think of the magnitude this may have when planning for one's digital assets, where they go, and who may have access to them.

Being a part of probate court this summer has opened our eyes on how much probate law impacts not just the elderly, but young people, such as Gen Z. Learning about how to better prepare how one should think about their assets and how to disburse assets when we are gone has been a learning experience. Gen Z has much to learn about this. For us, we see things through a different lens. Knowing what constitutes as a digital asset or how we are taken care of due to an unexpected event, has been an education this past summer that will not be forgotten.

Award Applications

Nominations are due by December 1 for the Judge Isabella Horton Grant Award that is presented at the Spring Meeting. This award recognizes excellence and innovation in the guardianship area, and nominations are due December 1. Nominations should be submitted to Sydney Rohnow, Association Manager of the National Center for State Courts at www.ncsc.org either via email at srohnow@ncsc.org or by mail to 300 Newport Avenue, Williamsburg, VA 23185.

Article Submissions

The NCPJ Journal is published in the spring and fall and welcomes scholarly submissions for publication. If you or someone you know is interested in submitting an article for publication in a future NCPJ Journal, submissions may be made by visiting the NCPJ website at www.ncpj.org. Questions? Please contact Sydney Rohnow, Association Manager of the National Center for State Courts at www.ncsc.org via email at srohnow@ncsc.org.
Upcoming Conferences

Savannah, Georgia Fall 2021
From November 7-13 join other members of the NCPJ in the historic city of Savannah Georgia, a city abounding in culinary intrigue and architectural grandeur. From its rich history as the colonial capital of Georgia to serving as a principal strategic port during both the American Revolution and the Civil War, being the oldest city in the State of Georgia has its perks.

Colorado Springs, Colorado Spring 2022
May 16-22 will see NCPJ look to the mountains as we take the spring conference back to Colorado Springs, Colorado. From the Garden of the Gods to Pikes Peak, the fullest of Colorado’s natural beauty is certainly on display in Colorado Springs. This town, being as diverse as it is beautiful, will also provide for an unparalleled cultural experience. What is more, it is home to the United States Air Force Academy. We hope to arrange tours of the Academy for NCPJ members, pending local and national protocol.
ATTORNEY’S FEES IN TRUST LITIGATION


4 For a more comprehensive discussion of case law applying statutes based on UTC § 1004, see Daniel F. Blanchard, III, Attorney’s Fees in Judicial Proceedings Involving Trusts, Estates, and Protected Persons: When is an Award Just and Equitable?, 72 S.C. L. Rev. 145 (Autumn 2020).


9 Id. at 947.

10 Id. Numerous other courts have adopted the Atwood factors in applying statutes based on UTC § 1004. See, e.g., In re Tr. No. T-1 of Trimble, 826 N.W.2d 474, 491 (Iowa 2013); Skyline Potato Co., Inc. v. Hi-Land Potato Co., 188 F. Supp. 3d 1097, 1152 (D.N.M. 2016); Shurtleff v. United Effort Plan Trust, 289 P.3d 408, 415-16 (Utah 2012); Garwood v. Garwood, 233 P.3d 977, 985 (Wyo. 2010).

11 UTC § 1004 (emphasis added).

12 Skyline Potato Co., 188 F. Supp. 3d at 1161.

13 In re Gene Wild Revocable Trust, 299 S.W.3d 767, 783 (Mo. Ct. App. 2009); see also George G. Bogert et al., Bogert’s The Law of Trusts and Trustees § 970 (June 2020) (observing that UTC § 1004 grants the court discretion to award attorney’s fees to trust beneficiary even when the beneficiary did not prevail in the proceeding).


ATTORNEY'S FEES IN TRUST LITIGATION (CONT.)

20 UTC § 1004.
23 UTC § 1001(b) (remedies include “compelling the trustee to redress a breach of trust by paying money, restoring property, or other means” and “reducing or denying compensation to the trustee”); id. § 1001 (b) comment (“The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge.”).
25 UTC § 106.
26 UTC § 1004 comment.

WHAT MODERN ESTATE PLANNING LOOKS LIKE THROUGH THE EYES OF TWO “GEN Z” STUDENTS

1 Generation Z or “Gen Z” is classified as people born between 1997 and 2012.
2 https://co.geauga.oh.us/commonpleas/Probate For more information about the Good Deeds Program.
3 R.C. 5302.23
4 https://www.petfoodprocessing.net/articles/13709-appa-provides-generational-insight-into-pet-product-purchasing
5 R.C. 5804.08(A)
6 https://www.aspca.org/pet-care/pet-planning/pet-trust-primer#:~:text=A%20pet%20trust%20is%20a%20grantor's%20disability%20or%20death.&text=Some%20states%20allow%20a%20pet%20maximum%20duration%20of%2021%20years
7 https://www.cdc.gov/transportationsafety/distracted_driving/index.html
8 https://genhq.com/how-obsessed-is-gen-z-with-mobile-technology/