

Only Lawful Lineal Descendants. Are You Sure? (buyer beware re boilerplate trust provisions)

10-24-13 by James M. Kane, Attorney

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Based on my 20+ years of lawyering, my view is that clients, as well as some lawyers, give insufficient attention to “boilerplate” document provisions.

The essential point of this email alert is to raise the question: Is the client fully aware of the possible limitations of boilerplate definitions?

Consider the following excerpt from a Will or trust for the definition of descendants: “The term child or descendant shall include only lawful descendants born before and after execution of this documents, but not illegitimates.” This definition controls who is included and excluded under John Doe’s Will.

Now assume John Doe has two daughters. He is a widower. Both daughters are adults and unmarried. One daughter had a long-time boyfriend, well loved by the family. She also has a child from her relationship with this boyfriend. The boyfriend, however, died a few years ago from an unexpected illness.

John Doe (whose Will I refer to above) dies and leaves property in trust for his two adult daughters and their descendants.

In this example, the daughter’s child is excluded and has no possibility of taking property under John Doe’s Will. John Doe’s boilerplate definition excluding a child born illegitimate controls in this situation.

Even changing the above example slightly, if the boyfriend is alive at John Doe’s death, the child is still excluded under this definition. This is because the child was not “born” legitimate as the definition in the Will mandates. Furthermore, as to these examples, there is (or may be) likely no cure or remedy to include this grandchild as a beneficiary.

A recent 2010 Georgia judicial opinion similarly relied on the “lawful blood descendant” definition in a decedent’s Will to exclude a father’s illegitimate daughter. See *Hood v. Todd*, 287 Ga. 164 (2010) (“by defining the term ‘children’ as ‘lawful blood descendants,’ [the decedent] also demonstrated his intent that his child born out of wedlock not be included as a beneficiary under his will”).

As to any boilerplate provision, my view is that every sentence in a trust document (or any legal document) has important substantive meaning and effect. Every

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single sentence must dovetail properly within the specific design of the trust and fit with a client’s intent and desire.

This doesn’t mean the client needs to study and understand each and every sentence and word. But the lawyer must.

Furthermore, the lawyer better know also how each sentence affects the design and operation of the trust, particularly in the face of later conflict and disputes centering on the trust.

As an ongoing matter, I persistently ponder, study, tweak, and redesign these types of boilerplate provisions in response to changes in the law and to clients’ particular circumstances. These provisions are progressive and malleable. Not merely hard-stamped boilerplate.

Back to the above example. The above “born to . . . no illegitimates” provision gives the appearance of being fairly straightforward, almost like a clause from a Sunday School lesson or good-citizen profile.

However, my personal view is that habitually excluding illegitimates in a trust document can in some cases result in an unintended ousting of a loved family member as a beneficiary.

But, this needs to be a decision each client understands and makes with adequate informed consent. In other words, these types of boilerplate provisions cannot simply be buried in the document as a longstanding matter of unattended habit.

By contrast, I typically use a much broader definition of descendants with each client having an opportunity to discuss and tweak this definition as desired, such as:

[Individuals] who were either (i) born in wedlock, (ii) born out of wedlock to parents who thereafter marry each other, (iii) born out of wedlock to a descendant of that person who does not marry but who acknowledges by signed written instrument reasonably acceptable to the Trustee making express reference to this section 20.2 that such person is his or her natural child, (iv) born as a result of posthumous conception as to such person by artificial insemination or in vitro fertilization [whether done using sperm or stored ova], or (v) any minor person adopted before the age of majority. A child in gestation who is born alive shall, for all purposes hereunder, be considered to be living during such period of gestation; provided, however, in addition to the preceding provisions of this section 20.2 references to my children shall include only children who are born to or adopted by both me and my husband John.

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