

Title

Employing the term “family” in trust instruments and trust-related legislation is asking for trouble

Summary

Employing the term “family” in trust instruments and trust-related legislation is asking for trouble. In §8.15.6 of *Loring and Rounds: A Trustee’s Handbook* (2016) the authors explain why the meaning of the term in a given context is as a practical matter often difficult to parse. In §8.14 of the Handbook, the authors explain how the term as employed Section 305(c) of the Uniform Trust Code can serve in a given situation to divide the loyalties of the guardian ad litem. The relevant excerpts from the Handbook are set forth verbatim below.

Text

§8.15.6 *Parol Evidence and Plain Meaning Rules* [from *Loring and Rounds: A Trustee’s Handbook* (2016)]

Words with multiple meanings. Words that cause confusion are not necessarily ambiguous.¹⁸⁷ The word *family* is a good example. A provision for the benefit of X’s family may mean X’s spouse and children.¹⁸⁸ Or it may be more expansive in scope encompassing perhaps X’s siblings and parents as well.¹ In any case, the word has only one intended meaning within the particular context. It may take a court, however, to divine its contextualized plain meaning.¹⁸⁹ Ordinarily the court does so without the benefit of parol evidence.

§8.14 When a Guardian ad Litem (or Special Representative) Is Needed: Virtual Representation Issues [from *Loring and Rounds: A Trustee’s Handbook* (2016)]

¹⁸⁷See, e.g., *Citizens Bus. Bank v. Carrano*, 117 Cal. Rptr. 3d 119, 126 (2010) (there being no latent ambiguity attached to the term *issue* as employed in the governing trust instrument, “Christopher’s issue” included his illegitimate biological son, even though the biological mother was married to someone other than Christopher).

¹⁸⁸2 Scott & Ascher §12.14.3.

¹ See, e.g., the Legislative Note in the official commentary to § 5 of the Model Protection of Charitable Assets Act (musing that “family member” is not a “precise” term and inviting the state to clarify for purposes of the Act whether the term includes, with respect to an individual, “a spouse, descendants, ascendants, siblings, spouses of family members, an unmarried domestic partner, or step-relatives.”)

¹⁸⁹See generally Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35(4) Real Prop. Prob. & Tr. J. 813 (Winter 2001). See also the quotations that introduce this section.

The Uniform Trust Code would divide the GAL's loyalties. Uniform Trust Code's §305(c) provides that a guardian ad litem may "consider in making decisions" the "general benefit" accruing to the living members of the "family" of the unborn or unascertained individual whose equitable property interests the guardian ad litem has been charged with representing. The term "family" in this context is not defined, a glaring and unfortunate oversight.² Moreover, when the economic interests of the individual and those of "the family" diverge, as we suspect they usually will, how is the guardian ad litem expected to square the circle? No guidance is provided. Sorting out the conflicting and competing equitable property interests, we suggest, is best be left to the court. A court that is endeavoring to effect a fair, efficient and lawful resolution of a contested trust matter needs the benefit of robust advocacy on behalf of the economic interests of the unrepresented, not advocacy distracted and diluted by nebulous, speculative, and open-ended collateral "family" considerations. Whether an express trust provision negating the guardian ad litem's §305(c) discretionary authority is enforceable remains to be seen. If settlor intent is the lodestar that should guide a court in sorting out the rights, duties, and obligations of the parties to a trust relationship, then it ought to be.

² Cf. the Legislative Note in the official commentary to § 5 of the Model Protection of Charitable Assets Act (musing that "family member" is not a "precise" term and inviting the state to clarify for purposes of the Act whether the term includes, with respect to an individual, "a spouse, descendants, ascendants, siblings, spouses of family members, an unmarried domestic partner, or step-relatives.")