Peacock Tales

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Non-Disparagement Clauses: Making Your Bad Vacation Worse

Vacations are intended to be a time of fun and relaxation. However, they do not always go as planned. In an attempt to have their trips go as smoothly as possible, vacationers will often spend hours on travel websites reading reviews to ensure they will have the best possible vacation experience. One such popular website is **vrbo.com**, which allows owners of vacation properties to post their listing on the site and in turn, allows consumers to select properties and book directly with the property owner.

Frequently, once guests rent these properties they will return to the website and review their experience to either encourage future travel goers to rent the property, or conversely, warn them against doing so. Obviously, rental properties with good feedback are more likely to be rented by future visitors to the site, while others may tend to avoid properties with negative reviews. But in reality, do we really know the accuracy of those reviews?

Our firm was recently approached by a client who had rented a vacation home. Upon arriving, they discovered the property had been double-booked which left them without a place to stay. Upon returning to Pennsylvania, the client went to the listing website and posted a negative, but entirely truthful review, detailing their experience and cautioning other people against making the same mistake.

Several months later, our client received an e-mail from the property owner alerting them to a confidentiality provision in their rental agreement which prohibited any review from being posted to any website without first obtaining authorization from the property owner. This provision, known as a "non-disparagement clause," included a term that any violation of the clause would result in an immediate charge of $500 to their credit card. It also contained a liquidated damages provision stating that any violation of the non-disparagement clause would result in an automatic judgment in the amount of $50,000 if a lawsuit was initiated by the property owner.

Rather than litigate the validity of the contract, our client offered to remove the review from the website in exchange for the $500 charge to their credit card being refunded. They were also able to avoid having a judgment obtained against them for the liquidated damages amount.

Proponents of these clauses argue that they are needed to protect their business from fraudulent or misleading reviews; they reason that even one harmful review could result in the inability to rent the property, thus leading to foreclosure of the property and/or bankruptcy of the business. Property owners argue that rather than an outright ban on reviews, these clauses simply provide a resolution process for any problems, which requires the consumer to work with the owner directly rather than posting a review online for the world to see.

Unfortunately, these types of experiences are occurring far too often. In response, the United States Senate has unanimously approved the Consumer Review Freedom Act, which, if passed into law, would prohibit businesses from contractually restricting a consumer's ability to write an online review about a particular product or service. Specifically, the Act provides that any form contract which: (i) prohibits or restricts an individual who is a party to a contract from engaging in written, oral, or pictorial reviews of the goods, services, or conduct of a person or business who is also party to the contract, or (ii) imposes penalties or fees against individuals who engage in such communications, will be considered void from its inception.

Until this law prohibiting such restrictions is passed, consumers should remain cautious in posting online reviews where they may be subject to such a clause.

The Act is currently with a subcommittee within the House of Representatives and must pass a House vote before it becomes law. Once enacted, the proposed law will require the Federal Trade Commission to provide businesses with best practices for compliance with the law. Until then, businesses may want to consider revising any terms within their contracts which restrict or prohibit consumer reviews.

By: Andrew S. Chumney

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New Amendment Expands Disability License Plate Eligibility

By: Eva H. Ahern

On June 23, 2016, Pennsylvania adopted an amendment that expands the group of individuals permitted to apply for a disability license plate. Prior to the amendment, only the disabled individual, as defined by the statute, or a person *in loco parentis* (in place of a parent) of the disabled person could apply for a disability license plate. The amendment allows parents, including adoptive or foster parents of a disabled child or adult child, and the spouse of the disabled individual, to apply for a disability license plate. The statute requires the parent to have "custody, care or control of the child or adult child" in order to be eligible under the statute. The amendment becomes effective sixty days after it was adopted.

The disabled individual must still satisfy the remaining requirements of the statute to qualify for a disability license plate. An eligible applicant is anyone who "is blind; does not have full use of an arm or both arms; cannot walk 200 feet without stopping to rest; cannot walk without the use of, or assistance from, a brace, cane, crutch, another person, prosthetic device, wheelchair or other assistive device; is restricted by lung disease to such an extent that the person's forced (respiratory) expiratory volume for one second, when measured by spirometry, is less than one liter or the arterial oxygen tension is less than 60 mm/hg on room air at rest; uses portable oxygen; has a cardiac condition to the extent that the person's functional limitations are classified in severity as Class III or Class IV according to the standards set by the American Heart Association; or is severely limited in his or her ability to walk due to an arthritic, neurological or orthopedic condition." (75 Pa. C.S.A. §1338.)

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The Living Trust: The Illusion Continues

Editor's Note:

This article is an updated version of one first published in the Spring of 1992 and first updated in the summer of 2004. The author's photograph has been "updated" also.

Americans are accustomed to the coming and going of various trends. In the 60s it was love beads, in the 70s disco dancing, Yuppies in the 80s, rap music in the 90s and social media in the 21st century. Lawyers also run into trends. One continuing trend that frustrates many attorneys is "living trusts" (not to be confused with a living will).

Since this article first ran over two decades ago our clients, especially our more mature ones, continue to be flooded with flyers on windshields, inserts in Sunday papers, mailboxes and email boxes and countless radio commercials and seminars promoting living trusts.

A "living trust" is one that is created and takes effect during a person's lifetime. A living trust is not a new creature. It has been around since the early days of the English legal system. Briefly, a trust is created when you transfer your assets and their control to a trustee. The trustee is given directions on how, when, and to whom, to pay out income and/or principal. A person who sets up a trust may also be the trustee and recipient of the income. The trust usually directs the distributions after your death.

There are differences between "revocable" and "irrevocable" trusts. The simplest form of revocable trust is an "in trust for" account. You have full use of it until you die. Only then does it become irrevocable. Revocable trusts are 100% taxable for death tax purposes.

On the other hand, an irrevocable trust, once established, is almost set in stone. You cannot change beneficiaries, trustees, or your mind, without the consent of all present and future beneficiaries. These may be useful for large life insurance policies, and for wealthy clients, including those with substantial oil and gas holdings, who intend to make a gift but with strings attached. If you continue to receive income from the trust or have control over the final distribution, that portion of the income stream or control you retain will be taxable at your death.

A trust allows others to manage your assets when you do not want to be bothered or feel you can no longer do so. It also allows a trial run to see how your children behave while you are alive and can still make changes. A living trust may or may not protect your assets from creditors, or it may save some of your assets for your children should you need long-term nursing care. Living trusts may be recommended to clients who own real estate in more than one state.

You may have heard claims that with a living trust you can avoid inheritance and estate taxes. Assurances are made that they avoid the probating or filing of the will and related costs and attorney's fees and they keep your affairs private. Such claims often are misleading, so much so that at least one attorney who was prolific in promoting and selling them was disbarred.

The only sure-fire method to avoid death taxes are to spend everything while you are alive, give everything away before you die, or give it all to charity after your death.

Many of the legal and accounting fees that will be incurred by an estate will also be incurred with a trust. The total cost related to filing and recording a will in most estates is less than $1,000.00. Fees for a lawyer and the executor are controlled and carefully observed by the court. In Washington County, the Court has set the fees of an attorney handling an estate at 6%.

The creation of a trust has its own costs. The trust agreement must be prepared and all trust assets must be transferred to the trustee. The costs and fees involved may be, conservatively, two thousand dollars or more, depending on the assets involved. If you decide to end the trust, you have the cost of putting all assets back in your own name.

The only way a living trust will avoid the need for a will (and probate) is if **everything**, you own, is transferred to your trust. You must transfer your home, your cat, your thimble and your baseball card collections. If anything is overlooked, an estate will be needed. Notably, a car may be difficult to title in the name of a trust.

Finally, you say: "But I don't like people knowing my business. Isn't a probate estate public?" Except for a legal notice that you may see in the newspaper, no one except those directly involved know the details of an estate. Most financial information in estates may not be filed until nine months or so after a person's death. It is unlikely your curious neighbors will check the courthouse records nine months after your flowers have wilted.

Is a living trust right for you? Our estate planners are prepared to help you, and your accountant or financial planner, analyze your specific needs and goals and help you make the right decision . . . for you.

By: Richard J. Amrhein

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In Memoriam

Frank G. Adams

1964-2016

Frank G. Adams, longtime attorney and friend at Peacock Keller, died suddenly and unexpectedly on Tuesday, June 28, 2016. He will be sorely missed.

Frank was born in Parkersburg, WV, on May 2, 1964, to the late Harry and Frances Adams. He married Kimberly Burwell in 1993, and together they have a daughter, Lindsey. In addition to his wife and daughter, Frank is survived by his brother, Paul Adams. Frank was a dedicated family man, and his passing will leave a significant void for them.

Frank spent his childhood years in several places - Puerto Rico, Oklahoma and West Mifflin, Pennsylvania. He graduated from Penn State University with a pre-law degree. He worked as a paralegal while he put himself through law school. He earned his law degree from Duquesne University in 1995. While in law school, Frank was a published member of the Duquesne Law Review. After law school, Frank worked as a law clerk to the late Honorable David L. Gilmore, then President Judge of the Court of Common Pleas of Washington County, where his imposing presence and gentlemanly manner were appreciated by the lawyers and parties appearing before Judge Gilmore.

Peacock Keller first hired Frank in 1997, and he worked with the firm as an associate attorney for two years. He briefly left the firm to work elsewhere, but was welcomed back to Peacock Keller in 2000. At Peacock Keller, Frank worked primarily in litigation, handling cases on a wide variety of subjects and in a number of jurisdictions in the Pennsylvania state courts and the Federal courts.

In the office, Frank was known as a hard worker, a peerless researcher, and a consummate writer. He had a remarkable memory for details of cases that he had worked on years earlier. His analysis of legal issues was always thorough and precise. His ability to synthesize and make sense of seemingly inconsistent legal concepts was unparalleled.

But more importantly, Frank was a friend to all of us at Peacock Keller. He always had time for one more question, one more convoluted issue, and one more brainstorming session. Frank had a great sense of humor, and although at times he compared himself to Eeyore, the *Winnie-the-Pooh* character, he more often exhibited a true love and respect for his co-workers, and a fascination with the world and universe around him, particularly deep space.

Peacock Keller will not be the same without Frank. We will do our best to carry on without him, and to emulate his skills and insight, and we will hope and pray for peace and comfort for his family.