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Who Says TV Doesn't Teach You Anything? Five Estate Planning Lessons Learned from Downton Abbey

Article by Jaclyn S. O'Leary In the first episode of the PBS hit television series *Downton Abbey*, the Titanic sank somewhere in the North Atlantic Ocean, and with it sank the heir to Downton Abbey. This international tragedy set the foundation for the show?-- with the family's closest male relative gone, who would inherit Downton and preserve the home and livelihood of so many? Amid the uncertainty of who would claim the "entail" (an outdated term used to describe the manner of passing real property by inheritance), the show explores many estate planning issues relevant to our lives today. This article highlights five modern-day planning considerations buried within the battle for the entail on *Downton Abbey*. A warning: This article contains spoilers!? **NUMBER 1: Consider a prenuptial agreement.** Lord Grantham married Lady Grantham for her money. Once married, Lady Grantham's wealth was permanently entwined with Lord Grantham's and became destined to pass to *his* family's heir. If Lady Grantham had had the option of entering into a prenuptial agreement, she might have been able to protect her significant fortune from the fate of Downton. Although historically such agreements often had a stigma attached, today couples commonly protect their family wealth (or hard-earned riches) by entering into a prenuptial agreement to provide for the disposition of their assets in certain situations, including death and divorce, and to assign property as separate assets or as part of the marital estate. Lord and Lady Grantham (and the entire Crawley family) undoubtedly would have benefited from a prenuptial agreement to separate Lady Grantham's wealth from that of Downton. **NUMBER 2: Start business succession planning early.** In season three, Matthew Crawley, the heir of Downton, contributed some of his individual (albeit inherited) wealth to save Downton after the bulk of the family's assets were lost in a poor investment. Thereafter, Lord Grantham asked Matthew to participate in the daily operation of Downton. Matthew agreed to do so, and, not surprisingly, what followed was a transition marred with tension and resentment. Anytime there is a transition of power within a family business, the family may face challenges, but such challenges can be mitigated by starting the transition early and identifying each family member's role in the business. An early start also gives the younger generation the opportunity to operate the business, learn the trade and contribute to the family's professional goals while working collaboratively with the older generation. Had Lord Grantham given some of the responsibility to Matthew years earlier when he learned Matthew would someday inherit Downton, this transition of control might have been easier on Lord Grantham and his family. **NUMBER 3: Seize estate planning opportunities when they arise.** In season three, tragedy struck Downton when Sybil died from complications during childbirth. Her sudden incapacity and death left her husband and entire family struggling to identify her wishes for her child's future as well as for her own medical care when she was incapacitated. Even in today's world, a significant life event?-- a new baby, an unexpected inheritance, administration of a loved one's estate, a divorce?-- is what triggers the desire to implement (or update) an estate plan. Whatever that event may be, recognizing and seizing the planning opportunity when it arises is important. With an estate plan, each person has the ability to declare his or her wishes and to exercise some control over the transfer of wealth after death. Had Sybil executed a will or healthcare proxy while she was healthy, she might have diminished some of the uncertainty and stress her family ultimately endured. **NUMBER 4: Use trusts to preserve the family wealth.** When Lord Grantham's daughter Sybil married a (gasp!) chauffeur, Lord Grantham grappled with the idea of cutting off financial support to Sybil and her family. What could he have done instead? He could have set up a trust to pass wealth through generations in a manner that protected the assets from creditors (including an ex-spouse), imprudent investment decisions and spendthrift beneficiaries. If Lord Grantham had set up a trust for Sybil and her children, he could have provided financial support for them while keeping those funds from the reach of Sybil's husband. In

addition, the use of a trust might have prevented the loss of the family's wealth through bad investment decisions. The trustee of a trust has various duties in administering the trust, some of which prevent him or her from investing the bulk of the trust's assets in one venture and risking a significant loss in the event that investment goes sour. If a trustee had managed the family's wealth and overseen investment decisions, the family might not have suffered so great a loss when the Canadian railway, the family's main investment, went bankrupt. **NUMBER 5: Plan for yourself and your family?-- because you can!** Throughout the first season, Lord Grantham struggled with the thought of a distant male cousin, a stranger to the family, inheriting Downton and taking control of the business he had worked so hard to build. Lord Grantham often wished he had earned his fortune himself, in which case he would have had some control over how it would pass to subsequent generations. This wish would have been granted if Lord Grantham could have created his own estate plan. Today, in most cases, individuals have the power to dispose of their own wealth by designing and implementing an estate plan. Absent an estate plan, state law would generally govern the disposition of property upon death, which could result in a situation as unfortunate as Lord Grantham's. As a result, the most important estate planning lesson learned from *Downton Abbey* may be this: If you can "fight the entail" with your own proactive estate planning, you owe it to yourself and your family to do so.

Meeting Electric Generation Need: Through Markets or State-Mandated Contracts?

Article by Eric K. Runge Recently, the Massachusetts Department of Public Utilities answered?-- at least for now?-- the question of whether it would allow market forces to determine where and when new electric generation gets built in the Commonwealth or whether it would bow to legislative pressure and mandate ratepayer-subsidized contracts for such generation. In a March 15, 2013, order,[1][1] the department came down squarely on the side of letting markets work, holding to the course the state set in 1998 when it began restructuring the electric industry in Massachusetts to provide for competitive electricity supply.[2][2] The March 15 order came at the conclusion of an investigation triggered by legislation passed in 2012. That legislation required the department to investigate the need for additional generating capacity in the Northeast Massachusetts/greater Boston area ("NEMA"). The legislation provided that if the department determined there was a need, based on results of the current electricity market auction and other relevant factors, it had discretion to order the regulated electric distribution companies under its jurisdiction to enter into long-term contracts for new electric generation in NEMA. The legislation came about as the result of a strong push by one of the state's lawmakers for the development of new generation at a site in Salem, MA, where a large, old coal-burning power plant will be retired in 2014. That legislator took an active role in the proceeding, advocating for the department to require long-term contracts and supporting the position of the developer of the new generation facility at the Salem site. In connection with the proceeding, Day Pitney represented a generation owner that has invested more than $1 billion in Massachusetts generation assets based on the premise that competitive wholesale markets for electricity in New England will make those investments profitable. The developer of the Salem generation facility wanted the benefits of the markets but also wanted a subsidy for its proposed generation through state-mandated long-term contracts with electric distribution companies that would be paid for by their retail electricity customers. The department opened its investigation on October 1, 2012, held a technical conference on November 8, 2012, and allowed parties in the proceeding to submit comments and reply comments in November and December, setting forth their positions and arguments. Participants in the case included existing generation owners and wholesale market participants, the electric distribution companies serving NEMA customers, the Massachusetts Office of the Attorney General, the Massachusetts Department of Energy Resources, environmental advocacy groups, the generation developer of the Salem power plant, and state legislators. In its March 15 order the department determined there was a "need," as defined in the statute, for new generating capacity in NEMA, thus opening the door to state-mandated contracts. The department, however, exercised its discretion and closed that door, deciding not to require long-term contracts. Instead, the department provided considerable comfort to those market participants that have made major investments in Massachusetts expecting that market competition and not state subsidies would determine the outcome of those investments. Specifically, it recognized in the March 15 order that

> "[electric industry] restructuring shifted the risks of generation development from consumers to generators, who are better positioned to manage those risks. Restructuring represents a clear policy choice that electric generation resources are best developed in response to price signals from a competitive marketplace. The theory is that consumers thereby see the lowest possible prices for electricity and remain insulated from construction, operational and price risks that were inherent in commodity rate regulation."[3][3]

The department concluded it was premature to order long-term ratepayer-subsidized contracts and said "the wholesale market should be given the opportunity to work before taking the extraordinary step of ordering local distribution companies to enter into long-term contracts."[4][4] For now, at least, electricity supply in Massachusetts will continue to be determined largely by the New England-wide wholesale electricity markets and not by legislative mandate and department order. That result should benefit consumers.

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[1] The March 15 order was issued in a proceeding titled "Investigation by the Department of Public Utilities on its own motion into the need for additional capacity in NEMA/Boston within the next ten years, pursuant to Chapter 209, Section 40 of the Acts of 2012, "An Act Relative to Competitively Priced Electricity in the Commonwealth," and pursuant to G.L.c. 164 ? 76" (Docket No. D.P.U. 12-77).

[2] The one area where the commonwealth has deviated from this course is with respect to renewable energy, which is not always the most economic choice of energy supply. By legislation enacted in 2008 and 2012, Massachusetts has required that electric distribution companies enter into certain long-term contracts with renewable energy suppliers to help Massachusetts meet its renewable energy goals.

[3] March 15 order at p. 30.

[4] *Id.* at p. 33.

Employer Investigations: Can They Be Confidential?

Article by Claudia T.?Centomini The National Labor Relations Board (NLRB) continues to render decisions that have a significant impact on nonunion workplaces. Two years ago, employers expressed surprise and apprehension when the NLRB issued several guidance memoranda and conducted hearings on cases in which employers had disciplined employees after they posted disparaging remarks about their employers on Facebook and other social media sites. The NLRB has opined that Section 7 of the National Labor Relations Act (NLRA) protects employees from discipline when they make certain negative comments about their workplace on social media sites.[1][5] (*See our earlier Boston News article on the NLRB's position on social networking*.) Nonunion employers must now change their policies on internal investigations. Specifically, the NLRB has ruled that employers can no longer require employees in nonsupervisory positions to keep internal investigations confidential without a substantial and legitimate business justification for the restriction in each and every investigation. The NLRB views such restrictions as an infringement of employees' Section 7 rights under the NLRA. Employees can now speak with their co-workers and others about their involvement in a company investigation, and they can post certain information about the investigation on social media sites.[2][6] This development began to take shape last July when the NLRB held in *Banner Estrella Med. Ctr.*, 2012 NLRB LEXIS 466 (N.L.R.B. July 30, 2012), that an employer could not have a blanket policy that required employees to maintain confidentiality during an internal investigation even when the employer did not threaten discipline for violating the policy. The NLRB found such a policy would have "a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights," because the NLRB has interpreted Section 7 of the NLRA to protect employee discussions of discipline and disciplinary investigations involving their colleagues. For the employer to restrict an employee from discussing an ongoing investigation, the employer must have a

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specific reason beyond a general intent to protect the integrity of the investigation. The NLRB suggested an employer could prohibit employees from speaking freely about a specific investigation only when the employer can show it is concerned with (i) the destruction of evidence, (ii) the protection of a witness, (iii) tainted or fabricated testimony, or (iv) a cover-up. *Banner Estrella Med. Ctr.*, 2012 NLRB LEXIS 466, at *7-8. The NLRB's acting general counsel further clarified the NLRB's position in a guidance memorandum issued January 29, 2013. He noted an employer must establish the need for confidentiality based on the facts of the particular investigation. Moreover, for the employer to infringe on an employee's Section 7 rights, those facts must give rise to a substantial and legitimate business justification, such as those concerns the NLRB listed in *Banner Estrella Med. Center*. Again, an employer cannot create a blanket policy requiring confidentiality in every investigation it conducts. Many employers fear that permitting employees to speak freely during an ongoing investigation could undermine the integrity of the investigation. The disclosure of information central to the investigation could embarrass the employer, particularly when the investigation involves criminal wrongdoing. Employees might be reluctant to participate in an investigation if they believe their involvement could become public. Furthermore, discussions among employees regarding their testimony and the scope of their interviews could lead to coaching, duplicate answers and fraudulent testimony. Although the NLRB permits an employer to require confidentiality when it fears tainted testimony, an employer might not have enough factual support to overcome the requirements of the balancing test. What should employers do in light of these recent decisions? They should document the nature of each investigation and the reasons why confidentiality is necessary. Employers should also narrowly tailor the scope of the confidentiality requirement to the parameters of the investigation and the subject matter discussed with each witness during the course of the investigation. Employers must also exercise caution before disciplining an employee for breaching confidentiality and confirm they can show there was a compelling reason for requiring confidentiality during the investigation.

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[1] Section 7 of the NLRA provides employees with the right to self-organization; to form, join or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[2] *See Hispanics United of Buffalo, Inc.*, 359 NLRB No. 7 (2012).

An Interview with Karen E.?Spilka, State Senator and Of Counsel at Day Pitney

What is your greatest fear?

Having regrets when I'm old. Even though I may not always succeed, I want to know that I always give my best.

What historical figure do you most identify with?

Abraham Lincoln?-- I greatly respect his perseverance, inner strength and ability to build coalitions from a "team of rivals."

Which living person do you most admire?

Nelson Mandela?-- he has shown how patience, tolerance, and the ability to walk the fine line between political pressure and active negotiations can bring an end to apartheid and change a nation.

What is your favorite journey?

My husband, two sons and I took a trip in an RV throughout the American West for four weeks one summer. We explored most of the national parks and the awesome natural wonders and historical sites of Colorado, New Mexico, Utah, Arizona, Nevada and California. It was wonderful outdoor family bonding time.

What do you consider your greatest achievement?

My loving, caring and motivated sons.

What is your most treasured possession?

My 15?-year-old chocolate Labrador retriever, Sienna. We bred chocolate labs for many years, and my sons each selected a puppy from Sienna's first litter. Many of our friends and local and state elected officials have our puppies?-- they are the best ambassadors! Despite her age, Sienna is always happy and brings joy to our lives.

What do you most value in your friends?

Honesty, sincerity, tolerance, kindness and loyalty.

Who are your favorite writers?

Walt Whitman, J.D. Salinger, Maya Angelou, Dr. Seuss, e.e. cummings, Antoine de Saint-Exup?ry and Doris Kearns Goodwin.

Who is your favorite hero of fiction?

Lisbeth Salander (*The Girl with the Dragon Tattoo*).

What is it that you most dislike?

In individuals?-- manipulativeness and dishonesty. Worldwide?-- hunger and poverty.

What is it that you most like about being a state senator?

The ability to help people is incredibly rewarding, sometimes on a one-on-one basis and sometimes many people at the same time. Being a state senator allows me to use the combination of my professional background and skills as a social worker, attorney, arbitrator and mediator?-- and my personal experiences as the legal guardian of my sister with Down syndrome and now Alzheimer's?-- to be a more effective legislator.

If you weren't a lawyer/legislator, what do you think you would be?

A veterinarian. My mom did not like animals, so we were allowed to have only goldfish or turtles?-- not very affectionate animals! So I never even thought about working with animals as a career. Thankfully, my husband and sons also love animals, so we have had many over the years, including four dogs, five cats, five eastern painted turtles, a blue-tongued skink, leopard geckos, iguanas and a boa constrictor named Mowgli.

What is your motto?

What goes around comes around.