



Steve Mohyla: This is Steve Mohyla and welcome to Mohylava Chat.

Singer: It's a hell of a, it's a hell of a, Mohylava chat. It's a hell of a, it's a hell of a, Mohylava chat.

Steve Mohyla: Today's guest on a hell of a chat is Elizabeth L Gray, principal with the firm McCandlish and Lillard in Fairfax, Virginia. Liz began practicing law in 1996. She's a member of The Bar, the Commonwealth of Virginia, and focuses her practice in the areas of estate planning, elder law, special needs planning, guardianship's, and the administration of estates. This includes drafting trusts like special needs trusts, pet trusts, trust to minimize income taxes, and capital gains. Along with wills, powers of attorney, medical powers of attorney, also known as advanced medical directives and other succession planning documents. She is certified as an elder law attorney by the National Elder Law Foundation and is a member of the Special Needs Alliance. An invitation only nationwide attorney organization. She is past president and the 2011 recipient of the Outstanding Member Award, the Virginia Chapter of the National Academy of Elder Law Attorneys and is a member of their invitation only Counsel of Advanced Practitioners. She's also a former co-chair of three different sections of the Fairfax County Bar Association.

Steve Mohyla: Other accolades include AV Preeminent Ranking by Martin Dale Hubbell. A superb ranking on AVVO listed in Best Lawyers of America since 2012. That's an honor given only to five percent of attorneys. A recipient of the Influential Women of Virginia class of 2012, a super lawyer in elder law for Virginia and Washington DC each year since 2009. One of the top elder law attorneys by Washington magazine every year since 2009 and listed in northern Virginia magazine among the top elder law attorneys in the northern Virginia area every year since 2011. Most recently she was named Lawyer of the Year by US world and news reports Best Lawyers 2015. Now Liz Gray and I in Mohylava Chat.

Steve Mohyla: Where would you say you spend most of your time?

Liz Gray: Estate planning.

Steve Mohyla: When you're doing an estate plan and people show up, what are the top things they forgot to think about or what are the big mistakes they make when they walk into your office?

Liz Gray: Well, the first big mistake is not doing any planning at all. If they're coming into my office and they're going to do estate planning, then the biggest mistake is oftentimes not thinking through who you are picking as your fiduciary. A fiduciary is really just somebody that is in charge of somebody else's personal stuff and they have certain duties and responsibilities, but it is a blanket term for an agent under a power of attorney or an executor under a will, or a trustee under a trust. A lot of the families that come in think, well I've got five kids, I want them all to be co-, I don't want them to fight and I want them all to be co-agents under my power of attorney. Or, I want the oldest because he'll get mad if I don't pick that one or the youngest because she's so sensitive.

Liz Gray: They don't think about what the real issue is, which for the financial power of attorney is, can that person handle the finances? Are they good with money? Can they balance their own checkbook? If they can't balance their own checkbook, believe me, they're not going to be able to balance mom or dad's checkbook. If the kids are fighting or if there's one black sheep that causes family drama, then maybe not appointing any of the kids as the fiduciary, but appointing a professional fiduciary instead. Somebody that's going to be able to have the strength to do what they need to do if there is any family drama.

Steve Mohyla: Wow, that was a lot. So let's talk about one of the things in there, the fiduciary. If someone calls someone and says, I'd like you to be the agent under the power of attorney, I'd like you to be the person who's going to make the medical decisions, I'd like you to be the person who is going to guide my will through probate and work with the professionals there. What are the salient points? Somebody who's about to be a fiduciary should be paying attention to?

Liz Gray: What type of an estate it is. Is it a large estate? What are the assets in the estate? What are the family relationships about? What are the goals of this family? And this person that is asking you to serve as their fiduciary,

Steve Mohyla: let's turn the spotlight the other way. What kind of obligations are they taking on and what is going to be expected of them?

Liz Gray: Well, they're going to be expected to honor the wishes of the person they're acting for. So instead of doing what you want, doing what that person wants, that's asked you to serve. A duty of loyalty. A duty of confidentiality. A duty of fiscal responsibility, I would say. A duty to substitute in that person's judgment for your own judgment. A duty to safeguard the property. Those are the main obligations that the fiduciary would have to uphold.

Steve Mohyla: Sounds a little bit daunting.

Liz Gray: It can be. It really can be. A lot of people don't think about it. They just appoint a child just because that's, they only have one child. I'm going to appoint Johnny even though he's not good with money and expect him to be able to handle all

of this aspect of the finances of his or her parents. And sometimes that can't happen.

Steve Mohyla: So someone says, sure, I'll be the executor, executrix, I know in some states it's called the personal representative, but I'm going to be the one that gets the call and is handed the will and now it's my job. What's my first task?

Liz Gray: As the executor?

Steve Mohyla: Yes.

Liz Gray: The first task basically is to see if you have the original Will. Because you can only probate an original Will. A lot of people don't realize that. If you have the original will you also need a death certificate and in most jurisdictions you have to set up an appointment to probate the will with the court. So usually the city or county in which the individual passed away in. Then you go to court to actually probate the will. A good thing to bring along is a list of what the assets are in the person's estate and who the heirs at law are for this person. So that would be the first step would be figuring out what the estate consists of and who the beneficiaries are.

Steve Mohyla: Where would a fiduciary, where would an executor turn for help?

Liz Gray: An attorney that handles probate administrations. Could be an elder law attorney or a trust and estates attorney. That would be the best bet.

Steve Mohyla: Would it make any sense to try to find the attorney who actually drafted the will?

Liz Gray: Yeah, that would make sense if that attorney is still living and still around. Absolutely. Sometimes there are some attorneys that named themselves in there as the fiduciary or a successor fiduciary. But yeah, finding that attorney because that attorney has all of the notes from when he met with the decedent and should have all the information about the estate assets and who the beneficiaries are.

Steve Mohyla: All right. So you gave some great examples about the emotional reasons why they try to come up with a client tries to come up with. Well, let's have the children be co-trustees, co-executors. I just went through a situation with a client of mine where that proved to be both a blessing and a curse. Had she picked the wrong one, if forced to pick one, it would have been a disaster. And the other one actually wound up suing the co-trustee. So all's well that ends well, but what a mess. And of course, additional estate expenses and everything else. So when you have someone who comes in, you gently guide them to, are you sure that's who you want? And it comes to pass, maybe they're even childless. Maybe they have no brothers and sisters. What kind of advice can you give them as to find somebody who can fill that role?

Liz Gray: Well, the advice I would give is I'm looking at your community. Do you have a CPA that is willing to do it? A trusted friend, a person over in your church or your synagogue or somebody that you've worked with professionally in another capacity that you trust. There are also personal money managers that will sometimes act as a fiduciary. There are two that I know of in the Northern Virginia area that will act as a fiduciary in that way. There are some trust companies that will step in and act as the agent under the power of attorney if they're named as the agent under the trust or the will or some other document. They'll extend it that far. So there are other options out there. For the medical piece, I usually tell people that we don't really care how that person is with money. They just need to have a big mouth and not be afraid of doctors. That's the person that's going to be advocating for you. Sometimes asking the doctor if they'd be willing to serve if this person doesn't have any family members available to serve in that capacity. There are some attorneys that would serve as a fiduciary and in both capacities.

Steve Mohyla: Well I can assure you there are no certified financial planners who will.

Liz Gray: That's true. That's true. A lot of your rules don't let you do that.

Steve Mohyla: Yes, we are allowed to do it for family. But we are not allowed to do it for our clients. Even before that prohibition was in, I always refused and I explain to my clients, you need to be able to fire the financial advisor. If the financial advisor is also the trustee, I'm not sure the trustee's going to fire her. That's also good advice from that standpoint. Okay. Now we've established we are going to use number one son. We've told all the children before we came in here that Bobby was going to be the one who was going to be the executor and trustee and so on and so forth. What's the next thing that you really hope your clients have thought about, decided or done before they sit down with you?

Liz Gray: I don't think that there's much more, other than the little detail things that I ask clients Would you be against a cremation? Do you have any views about and of life and, and pulling the plug, that kind of thing. Do you have a poor sense of borrowing, allowing your fiduciary to borrow money? I think that if they've thought through who the fiduciary might be in the financial and medical sense, then I'm pretty happy. I usually send out a questionnaire where they can put all the financial information, or better yet if they're working with a financial planner, the financial planner is in on everything as well and we're collaborating on this family and how to set up an estate plan that works all around. If they've completed that and they know what their estate consists of, I guess that would be the second step. Do they have an understanding of what their assets, income and liabilities are?

Steve Mohyla: It's not so much that you're there to take notes and effect something. You guide them through the process?

Liz Gray: Absolutely. The first meeting is really for me to see if I can work with them and for them to meet me and see if they even like me and to see if we can work

together. Then I usually go over the difference between a trust based estate plan and a will based estate plan. Because I think that that's a big confusion for a lot of people. They don't understand the differences between a will based estate plan and a trust based estate plan so they don't know how to make a choice. Once I've described the differences and looked over what their estate consists of, I can usually make a recommendation based on what they have, which would be a better match for them. Then we talk about the ancillary documents that we would be doing and if we're doing a trust based estate plan, how that trust is going to get funded.

Steve Mohyla: Well, let's back up. What are the key differences between a trust based estate plan and will based estate plan?

Liz Gray: Well the main difference right now is probate. So a will goes through probate and a trust does not. Probate is really just the court supervising the distribution of your estate. It is really public in that the will gets published and anybody can look at it. But, you do have the court looking over the shoulder of the executor to make sure that the executor is doing what he or she is supposed to do with the estate assets. A trust is really just a contract. I tell people that it's a container for your assets and what you do is you fill up the container with your assets and all of those assets avoid probate. I then describe to my clients how you get assets to your loved one because some assets go directly to the beneficiary. Life insurance, you usually name a beneficiary, it goes directly to the beneficiary.

Liz Gray: It doesn't have to go through probate and it doesn't have to go through a will. Retirement accounts usually have a named beneficiary. Because of a lot of the rules regarding retirement accounts, you may not want anybody other than an individual to be the beneficiary of that asset. Some of my clients that only have life insurance and retirement accounts, they may not need a trust based estate plan. We can get away with doing a will as a safety net to pick up anything that may have failed in going to the person named on the distribution list or for some other reason it can go through probate and get to who it's supposed to go to.

Steve Mohyla: When you were saying distribution lists, the immediate thing that came to my mind is something as silly as furniture. Would you put furniture in a trust?

Liz Gray: Absolutely. Absolutely. We do that with an assignment, so it's a blanket assignment of all of my tangible personal property is going to be transferred or assigned to the trust. Then trustee makes the distributions when the principle passes away. When the principal passes away, then the trustee is required to abide by the terms of the trust. Lots of times you can do that by putting in a reference to a list of assets. I want my diamond ring to go to my daughter, Phoebe, whatever you want to have happen. It's really a great way to give you, as the client flexibility to change these distributions and not have to pay me to do it for you. So if Phoebe makes you upset, you can rip that list up front of her and say you can and then do an another list and give it to somebody else.

Steve Mohyla: Good old schedule A.

Liz Gray: Yes, exactly.

Steve Mohyla: Then something along the lines of if not listed on schedule A divided equally.

Liz Gray: Yep. Well, I changed my wording on that too. I find that as I learn things, as I get more experience, my wording changes. For the personal property, I use, "substantially equal value." Because I've had the occasion where the kids fight over the value of furniture and that, Jane got the piano and that's worth \$2,500 and I only got that antique dresser worth \$2,000. I want \$500 from my sister and I don't want to see that. So I think in substantially equal value makes a little bit more sense.

Steve Mohyla: So now the, let's say you've got the client. Well, let me ask you this. At what point is the cost of probate to the point that the cost of drafting a trust. Is there a crossover point? Should that enter into it or is it more what you own and how you want it to pass more governs whether you use a will or a trust?

Liz Gray: Well, there would be several reasons why I wouldn't recommend one versus the other. If you have family members that might be fighting, you may want a probate because you want the court looking over the shoulder of the executor and making sure everything is done properly. I had been a state right now that is worth about \$50 million and the deceased person wanted it to go through probate because he wanted the court to supervise the distribution of the estate because he was fearful of children fighting. He also has a nice no contest clause in that will, but, regardless, that's what he wanted. That's a lot of money to go through probate. I'm sure the probate court was very happy with those fees, but he had a reason for doing it that way. That was his choice. The other reason you would do probate is if you don't know who all of the beneficiaries are, if you do heirs at law, unknown it president or something like that, then a lot of people will do the searches for you. It's amazing the phone calls you get from people saying they're related.

Steve Mohyla: How enforceable is a no contest clause?

Liz Gray: Well, first, a no contest clause is a clause in a trust or a will that says that if you guys argue, if you fight about it, if you go to court over this estate, then even if you were right, you get nothing. And those are routinely enforceable in Virginia and people routinely make mistakes about going forward on something not realizing the enforceability of this no contest clause. That's one of the first things I look at when I have somebody come in and say, "I think my sibling is stealing all the money out of the estate" And, "I don't like this accounting" and, "could you help me? I want to see the document and look and see if there is a no contest clause." There are ways around that for us lawyers to, that we can do to help that person. But certainly if they want to fight over something, one of the first things I'm going to tell them is that you've got a no contest clause. You

know that if we end up in court, you're going to get nothing. Or some of the no contest clauses say even if you ask questions or you write a letter, you can set it up any way that you want.

Steve Mohyla: And that's the same for a trust and a will.

Liz Gray: Yes.

Steve Mohyla: Shut up and take my money.

Liz Gray: Yes. I don't want you fighting.

Steve Mohyla: You've mentioned that times where one piece of furniture is worth X, and another piece of furniture is worth X plus 200. So the first heir wants to be equalized in cash, but then come to find out when we go and actually have it valued, it's a priceless antique. So it's \$100,000, not \$2,000 or something. To me it would seem unfair that a no contest clause would keep you from arguing that, but would a tightly written no contest clause keep you from arguing?

Liz Gray: Absolutely. And that's what you want in your document. If you're the parent, I don't want you fighting over this painting versus this piano or whatever the assets are. I don't want you fighting over these things. It's certainly if there is a question we didn't know what you meant by this clause that's acceptable to go to court and have a judge and interpret the words. But if you're going to argue over the values and who gets what, the no contest clause kicks in and you get nothing. Some people put in there a dollar or something, just, you know you get a dollar.

Steve Mohyla: Oh, but that brings up an interesting question, at least to me. I've heard it both ways, but what do you recommend when someone wants to disinherit an obvious heir? I've heard, maybe there's other ways, but I've heard, don't leave them nothing because they might argue you forgot. Leave them something, the dollar--\$100 so that everybody knows, well, yeah, they did think of you. They put this minimal amount in to show that this is what they meant as opposed to, that page is missing the page that you were going to get is missing. What do you recommend?

Liz Gray: I think that's a good idea to have some sort of nominal amount in there. I don't always require that. I think that if you put in a good clause saying, I am disinheriting this person. I wouldn't put in a reason why you're disinheriting that person because you don't want them to come back and say, well, let's say the clause was I'm disinheriting my son because he never visited me. Well, he can come back and say, well, I did right before she was dying and I went and visited mom. So this isn't true. I would just do a blanket disinheritance clause. If the parent really wants to give them 100 dollars or one dollar, that's fine. I think that the best thing for us to do as attorneys, when somebody wants to disinherit someone is making sure my file has sufficient notes as to why this parent

doesn't want this child or a beneficiary to inherit anything. Having a letter from the client explaining the reasons why, that's a great idea to make sure that you've got your file well documented that this person thought it through and had legitimate reasons why they wanted to disinherit this person.

Steve Mohyla: Do you find clients reluctant to share the reasons?

Liz Gray: I don't. I don't. I don't have very many clients that want to disinherit a child. Oftentimes they just want an equal, no matter what happened amongst the children or between the children and mom or children and dad or whatever. A lot of people want it to go equal and a lot of children want to see it equal. I get a lot of that in the special needs planning field where parents want to leave the special needs child more than the other children. I often advise them against that because the kids that aren't getting as much feel like mom didn't love me as much. It's kind of heartbreaking. I think there's other ways to get more money to that special needs beneficiary. But certainly I like to see things left equally unless there's a good reason not to.

Steve Mohyla: That ends this episode of Mohylava Chat. Please join us next time when Liz and I discussed special needs and elder law.

Liz Gray: One of the things would be a discussion about guardian. Does the special needs person need a guardian pointed while mom and dad are alive? It could be mom and dad. What happens when mom and dad are deceased? Who's going to step in to protect that special needs person from creditors and predators and all that horrible stuff?

Steve Mohyla: We really appreciate it if you'd share this link with your friends and colleagues and drop us a note with questions and suggestions for future guests. The email to use steve@stevemohyla.com. That's [s t e v e @ s t e v e m o h y l a . c o m](mailto:steve@stevemohyla.com). I'd also like to thank Leigh who wrote and performed theme scene music. Kate Sprague, a former colleague of mine who is now at InsideNova. Kate came up with the name, Mohylava Chat. Until next time.

Singer: It's a hell of a, it's a hell of a, Mohylava chat. It's a hell of a, it's a hell of a, Mohylava chat.



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