Doobie or not Doobie: Planning for the Pothead

By: Lou Harrison and his review of Beyer and Dacus' "Puff, the Magic Dragon, and the Estate Planner"

In order to review Beyer and Dacus' article that advises estate planners on how to advise cannabis users and growers, I had to first stoke up a joint, to get in the proper mood. Actually, I didn't. The article advises that if I did use marijuana, dire consequences could occur, "emotional disturbances, the total inability to direct thoughts, the loss of all power to resist physical emotions," and a few other bad things, like temporary memory loss. I recall seeing those side effects in a 1950s film called, "Reefer Madness." Hence, the review of this lengthy article was accomplished in complete sobriety (much like I lead every day).

And though the authors do talk about the possible negative effects of marijuana (we're friends here, and no need to be erudite, so let's just call it "weed") on testamentary capacity, discussed below, there is a broader theme in the article that is debatable, and that I will challenge in this review. Specifically, that the increased legalization by states of weed is a wake up call to planners to plan for this when talking to clients. For example, throughout the article, the authors imply that practitioners will be asking their clients about their weed use, or even their participation in weed manufacturing.

I suspect client discussion is not going to be the case, any more than it is with the use of alcohol, or even narcotics. "Hey, Bill, you look completely strung out today; before we get into a deep discussion of the generation skipping tax, just want to make sure you are not –insert any offensive substance abuse here-strung out, narcotized, alcohol dazed, or in a weed stupor." People's behavior predilections will be obvious to the planner, but I do not think will be on the forefront of the discussion or on their estate planning questionnaire (check the box "yes" if you use weed more than one time per day).

Though the article is interesting in its discussion of possible negatives with the use of weed, I am guessing that a reading of it will not change any planner's approach with their clients. And here's why.

First, ummm, where was I? What were we talking about? Sorry, just a little joke there. Hard to write a review of a cannabis article without a few trite weed jokes. Okay, back to the article.

First, testamentary capacity. The authors note that a major study has "found that long-term marijuana use has a negative effect on intellectual function." There is a scene in Animal House when Flounder, observing four people around a table holding cards, inquires, "You guys playing cards?" This quote that marijuana can affect intellect has that same feel. Weed, narcotics, alcohol, prescription drugs, and even herbal supplements, as well as lack of sleep, stress, ADD, and other variables, all affect intellectual function and performance. And often they can impact

testamentary capacity. The authors cite cases, e.g., *In re Coles Estate*, 205 So. 2d 554 (1968) where a testator was held not to have capacity when under the effect of narcotics. And though no case yet exists where weed has been ruled to negate testamentary capacity, the authors imply that planners should be on the look out for this. "Because courts often look at when the will was executed in relation to when the testator was impaired, it is important that the attorney ascertain the last time the client used marijuana." With this conclusion I have to quibble. In fact, if I wasn't a nice guy, I would add my own comment to the authors' quoted language: "You can't be serious; what are you authors smoking?"

No planner is going to focus on a client's weed use when it comes to testamentary capacity, as nice intellectually as it is to think we should. I envision the following conversation, which will not happen: me to client, "So, Bill, thanks for coming in today to sign your Will. You look a bit too stoned though, why don't you take a few 'weed-free' days and come back with a clear mind and a weed-free body."

Second, the article talks about the impact of weed on provisions in plans that penalize beneficiaries for use of "illegal" drugs. The authors raise many valid points here as to whether weed, legal in quite a few states and soon to be many more, would fall within this provision. A few pages of the article are spent on all the ambiguities that could arise with weed, and in fact those ambiguities are real.

But a digression is needed, to deal again with whether this is a true concern to planner. Though planners talk quite a bit about "behavioral" provisions in trusts, and trust provisions should be drafted more creatively these days, I see very few "illegal drug" provisions. Frankly, they are sort of nonsensical. For every one illegal user, there are about nine abusers of legal (meaning "prescribed") drugs, and therefore not really sure what a testator's intent would be with this kind of provision. Not to go on a real tangent, but "5 hour energy drinks" seem just this side of acceptable; and not long ago, Coca Cola was called that because of its cocaine ingredient (well, that was in fact a few years back). Societal acceptance of drugs/supplements (as in steroids, some of which are not liked, and some of which seem to be okay, like human growth hormone) ebbs and flows. And provisions penalizing beneficiaries for using "illegal" drugs are in my view passé and not realistic. And those provisions are not in widespread use, despite their appearance in many estate planning discussions.

Therefore, not sure the planner has to think too much on how weed will impact those provisions (which they don't use anyways).

Third, the authors discuss the impact of weed on life insurance and the life insurance application process. For insurance professionals, who have had to deal with the impact of drugs, including alcohol, on insurance applications, this area is one they are already familiar with. They are advising their clients on the effects already. To estate planning attorneys, they try to stay far away from the insurance application process. Again, one can only imagine the conversation (that

will never occur) in this regard: “Bill, tomorrow is your insurance application. As your friendly estate planner, I want to remind you, hee hee, don’t drink, toke, or do narcotics tonight. Wait until after the application.”

Fourth, the authors lastly focus on the dire consequences that happen when your weed-client dies. Such things as, the feds may confiscate the weed, while at the same time including it as an asset in the decedent’s gross estate (but at least the estate can discount the weed value because of a limited market, as in lack of marketability); the estate loses an income stream if the decedent was a weed producer, the executors may be arrested when they come into possession of the weed, and the attorney has ethical concerns as to how to advise. I can unequivocally state that despite these dire consequences, the client is much more bummed and focused on the “being deceased” part of the analysis, versus the weed concerns.

And in fact, dealing with a client’s drug dispensary is not an oft-discussed item during the planning discussion.

For the estate planning professional, the article is quite the good read, and highly recommended. But I theorize that no part of our practices will be changed, or our senses alerted, to the prevalence of weed in the estate planning equation. But just for fun, at future meetings, I may leave a frozen Milky Way bar on the conference room table and watch my clients’ eye to see if there is love and desire toward that bar during the meeting. If so, one never knows, maybe I will light up the weed discussion and exhale a few of the points raised by the authors. Certainly sounds like a lot more fun than discussing the generation skipping tax.