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Creative Estate Planning: Solving Common Estate Planning Problems With Innovative Solutions

BY KENNETH ADAM PIERCEY, JD

Is There a Better Way?

As attorneys, we often rely on our analytical and critical thinking skills to best serve our clients. While these skills are crucial to providing sound legal counsel, it can sometimes lead us to undervalue the power creativity can bring to the practice of law. Our firm has found that when we combine our expertise in estate and tax planning with a desire to provide client-centered service, we can harness the power of creativity to find unique solutions to complex problems. The following are a few examples of innovative estate planning strategies that can be used to achieve better

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Estate Planning for Frequent Flier Miles

BY ROBERT L. SCHUR

Frequent flier miles are big business. American Airlines alone generated $2.1 billion in revenue in 2016 from its AAdvantage frequent flier program. Many airline miles accrue not from flying, but rather airline branded credit cards and other rewards credit cards.[1] Consumers held a total of $5.8 billion of unredeemed credit card rewards as of the end of the third quarter of 2018.[2] Nonetheless, 15 percent of all miles go unused.[3] A quick calculation based on these figures shows that the amount of accrued, yet unredeemed airline miles are worth hundreds of millions, if not billions of dollars.

Planning for disposition of airline miles at death represents a new, largely

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1. https://www.apa.org/topics/divorce.
2. See 750 ILCS 5/503(c)(1) and *In re Marriage of Mouschovias*, 359 Ill. App. 3d 348, 831 N.E.2d 1222 (4th Dist. 2005).
3. See *Clark et ux. v. Rameker et al.*, 134 S. Ct. 2242, 189 L. Ed. 2d 157 (2014).
4. See *Rush Univ. Med. Ctr. v. Sessions*, 2012 IL 112906, 980 N.E.2d 45, 55 (Ill. 2012) (*citing In re Brown*, 303 F.3d 1261, 1268-69 (11th Cir. 2002) and Restatement (Third) of Trusts § 58 cmt. e (2003) (trust principal is not subject to settlor's creditors when trust assets have been irrevocably conveyed to trust by settlor for the benefit of other beneficiaries).
5. See *In re Marriage of Matt*, 123 Ill.App.3d 47, 462 N.E.2d 535 (1st Dist. 1984) (holding that Section 2-1403 of the Code of Civil Procedure prohibits the garnishment of the trust income from a spendthrift trust to satisfy debts). *But see also In re Marriage of Sharp*, 369 Ill. App. 3d 271, 860 N.E.2d 539 (2d Dist. 2006) (trust income, once distributed to a trust beneficiary, can be used to satisfy debts, even if the trust corpus is protected by a spendthrift trust).
6. See 760 ILCS 3/816(23).
7. 26 U.S. Code Section 6075(a).

Estate Planning for Frequent Flier Miles

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untapped opportunity for estate planning attorneys to be relevant to clients without estate tax issues. In the age of a higher estate tax exemption, slated to be $11.58 million per person in 2020, estate planners should address issues and assets that matter to clients of more modest means, even if such issues and assets are outside of the traditional estate-planning realm.[4]

Airline miles are particularly tricky because while clients may view them as property, they are at best a set of contract rights.[5] More likely, miles are freely revocable intangibles created by the airlines that issued them.[6] United Airlines,[7]American Airlines,[8] Delta Air Lines,[9] and Southwest Airlines[10] explicitly state in their mileage program contracts that miles are not property. This statement seems antithetical since airlines accept miles as a cash substitute for tickets. Indeed, clients place a "high pecuniary and psychological value" on their miles and likely consider them descendible and devisable.[11] Airlines have nonetheless made sure that miles are not just non-descendible and non-devisable, but not property at all.[12]

This article provides practical suggestions to help estate planners manage clients' frequent flier miles in light of a string of cases from the Supreme Court of the United States and federal appellate courts that strongly favor the airlines, allowing for unilateral changes in the contracts governing the programs, restrictions on transfer, and preempting many claims brought against the airlines under state law. Since any attempt to effectuate transfer after death would likely fall within the jurisdiction of a state probate court, estate planners need to find ways to ensure miles are transferred in accordance with their clients' wishes while avoiding lawsuits against airlines.

Airline Miles and Federal Preemption

Many enterprising fliers have sued airlines alleging various injustices in the administration of frequent flier programs. However, because of the nasty combination of federal regulation and contracts of adhesion that give airlines virtually unfettered control of their frequent flier programs, the airlines have the strong upper hand. Ironically, it is federal *de*regulation under the Airline Deregulation Act of 1978 ("ADA") that gives rise to federal preemption.[13] The Supreme Court has limited relief in frequent flier benefits cases to two channels: breach of contract claims and filing complaints with the United States Department of Transportation. For the reasons outlined below, both of these methods are futile, particularly in the context of a probate case.

The origins of this preemption doctrine come from *Morales v. Trans World Airlines,* in which the Attorney General of Texas threatened to sue Trans World Airlines ("TWA") for allegedly deceptive marketing practices.[14] TWA sought an injunction against the suit, claiming that the ADA preempted a state's enforcement of its consumer protection law against the airline's advertisements.[15] Writing for the majority, Justice Antonin Scalia agreed.[16] The ADA says that "states may not enact or enforce a law, regulation, or other provision having the force and effect of a law related to a price, route, or service of an air carrier…."[17] The court found that advertising was related to fares, and thus pricing.[18] Therefore, the ADA preempted state enforcement action.[19] Justice Scalia also pointed out that the purpose of the ADA was to effectuate airline deregulation by preventing states from "undo[ing] federal deregulation with regulation of their own."[20] From this straightforward ruling came an expanded preemption doctrine surrounding frequent flier programs.

Three years later, the Supreme Court heard the case of Myron Wolens, an aggrieved traveler who sued American Airlines over the terms of the AAdvantage frequent flier program. He alleged in *American Airlines v. Wolens* that under the Illinois Consumer Fraud and Deceptive Business Practices Act,[21] blackout dates and other restrictions on and devaluations of the frequent flier program constituted an unfair and deceptive practice.[22] The Supreme Court deemed this claim preempted because the challenged "mileage credits for free tickets and upgrades" constituted prices and the challenged "capacity controls and blackout dates" amounted to services.[23] Presumably, therefore, an airline's refusal to transfer miles after a decedent's death cannot be challenged under the Illinois Consumer Fraud and Deceptive Business Practices Act or another state statute since miles are related to prices and services. Attorneys seeking to compel an airline to transfer miles will have to turn to other legal avenues.

In *Wolens*, the court left open the door

for plaintiffs to bring a suit under a breach of contract theory, citing a statement from American Airlines' brief that contracts are "privately ordered obligations and thus do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law,' within the meaning of [the ADA preemption provision]."[24] The court continued, "A remedy confined to a contract's terms simply holds parties to their agreements," which are outside the operation of a state statute.[25] In other words, if an airline were violating its frequent flier program's terms and conditions, the ADA would not preempt such a claim because contracts are, in effect, self-governing.

In 2014, such a contract claim came before the Supreme Court, but its plaintiff failed to appeal the trial court's interpretation of the contract. Rabbi S. Binyomin Ginsberg sued Northwest Airlines for breach of contract after the carrier revoked his membership in Northwest's WorldPerks frequent flier program, thereby depriving him of his miles.[26] Ginsberg brought three more claims in addition to breach of contact: negligent misrepresentation, intentional misrepresentation, and the breach of the covenant of good faith and fair dealing.[27] The United States District Court for the Southern District of California dismissed all of his claims but for breach of contract, citing preemption by the ADA, but found that the contract itself was not breached.[28] The United States Court of Appeals for the Ninth Circuit affirmed, except that it reversed the District Court on the breach of the covenant of good faith and fair dealing, finding such claim was not preempted.[29] Ultimately, the Supreme Court ruled that the covenant of good faith and fair dealing was a "state imposed obligation" and thus preempted by the ADA.[30]

While Ginsberg only ever could have won on a breach of contract theory, he lost on this claim at the District Court level because under the terms of the WorldPerks contract, Northwest could revoke miles if a customer abused the program.[31] Northwest concluded that Ginsberg complained far too often and too frequently received compensation for service failures, including nine complaints about baggage being too slow to arrive on the luggage carousel.[32] The Supreme Court, however, pointed out that Ginsberg could have, even should have, appealed the District Court decision constructing the contract, which may have allowed him to recover his lost miles.[33]

While we may never know if Ginsberg would have won on appeal of his breach of contract claim, two United fliers that same year unsuccessfully brought class action lawsuits for breach of the contract governing United's Mileage Plus program. Frequent flier George Lagen had earned lifetime status as a "Million-Mile Flyer" with United.[34] When United merged with Continental, United eliminated the Million-Mile Flyer status and awarded Lagen the lesser Premier Gold status.[35] Lagen ultimately lost because United had the right to modify the terms of the Mileage Plus Program at any time and in its sole discretion.[36] The court did point out that Lagen could bring a fraud-based claim by filing a complaint with the Department of Transportation, which the ADA would not preempt.[37]

Another United flier, Hongbo Han, claimed that United breached the Mileage Plus contract by calculating the miles awarded based on the distance between a flight's origin and destination rather than actual miles flown.[38] While the terms of the contract were ambiguous, the United States Court of Appeals for the Seventh Circuit nonetheless found that, as in the *Lagen* case, United had the "sole right to interpret and apply the Program rules."[39] Further, the Seventh Circuit pointed out that the court had previously recognized that under Illinois law, "a contract can vary from the norm by including language which indicates that one of the parties is to have discretion to interpret and apply the contract."[40] The court will give effect to the airline's interpretation as long as such interpretation is not unreasonable.[41] As such, fliers suing airlines over miles are terribly disadvantaged because miles are not property, claims against airlines under state law are preempted, and airlines are free to interpret their ironclad contracts as they please.

Planning for Transfer of Miles at Death: Airline Policies and Recommended Techniques

Airline Transfer Policies

No client or attorney should ever have to resort to a lawsuit or administrative complaint to effectuate transfer of frequent flier miles after death. Thus, the first step in effective estate planning for airline miles is to know how airlines' frequent flier program contracts govern transfer of miles at death. For simplicity, this article excludes foreign carriers and ultra-low-cost carriers like Spirit and Frontier since the bulk of clients in an Illinois lawyer's office will have miles on one of the four major carriers below. There are indications in the popular press that airlines will waive the fees detailed below upon a showing that the account holder is dead.[42] Nonetheless, neither lawyers nor clients should rely on the largesse of a customer service agent to preserve a potentially valuable asset. The transfer policies of United, American, Delta, and Southwest follow.

American Airlines

American may grant the transfer at the airline's sole discretion upon presentment with "court approved" wills.[43] This language is ambiguous, but suggests the will would have to be admitted to probate for American to accept it. The fee to transfer miles during life or at death is $12.50 per 1,000 miles plus a $15 transaction fee.[44] Slightly different fees apply for transfers of 8,000 miles or less.[45]

United Airlines

Transfer on death is at airline's sole discretion. The fee is $7.50 per 500 miles plus a $30 processing fee.[46] Nonetheless, United has indicated that it may soon eliminate this fee.[47]

Delta Air Lines

Transfer on death is not allowed.[48]

Southwest Airlines

Transfer on death is not allowed, but Southwest's Rapid Rewards program explicitly allows using up a decedent's accrued points within 24 of the "last earning date" without a fee.[49]

Estate Planning Techniques and Suggestions

Below are suggestions for helping clients to preserve their miles. Certain techniques will be more effective for some airlines than others, but none are mutually exclusive.

These strategies will need to evolve over time as airlines modify the terms of their frequent flier contracts, as illustrated by the *Lagen* case.[50]

Bequests in Will and Trust: Limited Effectiveness

First and perhaps most obvious, make a provision for the miles in both the client's will and trust. Three of the major airlines reviewed here do not officially recognize bequests in a will, but it certainly cannot hurt to include such a provision. The worst an airline can do is deny the request, pointing to the frequent flyer program contract provisions that state that miles are not property and cannot be transferred at death. The same is true with trusts; nothing ventured nothing gained. However, since airlines explicitly state that miles are not property, a bequest via will or trust still may fail since only a decedent's real and personal estate can be transferred by will.[51] Likewise, a "pourover" provision of a will transferring the miles to trust at death would fail for the same reason, since common estate planning forms reference property owned at death.[52] Further, any state law claim brought to enforce the transfer of miles under a will or trust would fail on either preemption grounds or the terms of the United,[53] American,[54] Delta,[55] and Southwest[56] contracts that state that miles are not property.

Sharing Account Information: An Ethical Pitfall

One common sense non-legal solution would be for the miles holder to give his or her spouse or another trusted person the holder's mileage account online login information. Doing so would be especially useful at death because, effectively, the person holding this information can act as the account holder online and not notify the airline of death. However, advising a client to use this technique may run afoul of the Illinois Rules of Professional Conduct. Illinois Supreme Court Rule 1.2(d) states that a lawyer may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent…." Given that the airlines either prohibit transfer at death or prescribe a procedure for transferring or using miles at death, advising a client to act as someone else online likely amounts to a fraudulent attempt to circumvent these rules.[57] From a lawyer's perspective, it is far better to let the client discover this technique themselves and then advise as to the legal consequences of the conduct, which is permitted under Rule 1.2(d).[58]

Inter Vivos Transfers and Use of Miles During Life

The simplest and most ethical solution is to use the miles during life. The holder can use the miles for himself, his family, or anyone else for whom he or she wants to purchase a ticket on any of United,[59] Delta,[60] and Southwest.[61] While American's AAdvantage terms and conditions do not explicitly allow booking tickets for others,[62] the author has routinely used his AAdvantage miles to book tickets for his wife. This technique is particularly useful if a client will not live long and cannot use the miles himself.

Digital Assets Clauses

Adding digital assets clauses to wills and trusts empowers an executor or trustee to access the decedent's digital information while also avoiding the ethical issues of handing over usernames and passwords. Digital assets include all of our online information, which can include frequent flier accounts.[63] While it is not clear that an airline will honor such a clause and grant account access, it certainly is much more ethical than telling clients to give others their passwords. Whether access to digital information relates to an airline's prices, routes, or services under the ADA is an open question.

Conclusion

Given the rise in popularity of airline credit cards and the sheer amount of unredeemed points and miles, clients will inevitably ask their estate planning lawyers about what to do with their frequent flier miles at death. Given the difficulty, expense, and perhaps even the impossibility of transferring them at death, clients are best served to use them during their lives. If clients perceive that their miles are a valuable asset, it is our job as lawyers to provide competent counsel to help them preserve these miles, even given the constraints outlined in this article.■

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12. *Id.* at 1049.
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14. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 379-80 (1992).
15. *Id.* at 380.
16. *Id.* at 385.
17. Airline Deregulation Act 49 U.S.C. § 41713(b)(1) (1997).
18. *Morales*, 504 U.S. at 383-4.
19. *Id.*
20. *Id.* at 378.
21. 815 ILCS 505/1 *et seq*. (West 2018).
22. *American Airlines v. Wolens*, 513 U.S. 219, 227 (1995).
23. *Id.* at 219.
24. *Id.* at 228-9.
25. *Id.*
26. *Northwest Airlines v. Ginsberg*, 572 U.S. 273, 282 (2014).
27. *Id.* at 279.
28. *Id.* at 277, 279.
29. *Id.* at 289.
30. *Id.* at 286-7.
31. *Id.* at 277.
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