

## Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2862

**Date:** 11-Feb-21  
**From:** Steve Leimberg's Estate Planning Newsletter  
**Subject:** [Mary Vandenack on In re Estate of Michael R. Brinkman](#)

*“This case is an excellent illustration of the need to draft very specifically in defining children and issue as well. In the event a testator does desire to exclude a beneficiary (and I agree that is not clear in this case), specific language disinheriting a beneficiary should be included. Additionally, whenever unique provisions are included or whenever dealing with beneficiaries from different relationships, careful attention should be given to all provisions in the document to ensure that a template ultimate heirs clause does result in inclusion of an otherwise excluded beneficiary.”*

**Mary E. Vandenack** provides members with commentary on [In re Estate of Brinkman](#), a case that demonstrates the need to draft very specifically in defining children and issue.

**Mary E. Vandenack** is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly regarded practitioner in the areas of tax, benefits, trusts and estates, business exit planning, asset protection planning, executive compensation, equity fund development, business and business succession planning, tax dispute resolution, and tax-exempt entities. Mary’s practice serves high net worth individuals, businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax-exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as a member of Council and the Planning Committee. Mary is a member of the American Bar Association Law Practice Division where she currently serves as Vice Chair of Law Practice Magazine and Division Secretary. Mary was named to ABA LTRC 2018 Distinguished Women of Legal Tech, received the James Keane Award for e-lawyering in 2015, and serves on ABA Standing Committee on Information and Technology Systems. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics

including improving the delivery of legal services, technology in the practice of law and process automation.

Here is her commentary:

## EXECUTIVE SUMMARY:

In the case of [\*In re Estate of Michael R. Brinkman\*](#),<sup>1</sup> the Nebraska Supreme Court concluded that an intention to disinherit must be clear in the terms of a will.

## FACTS:

Michael Brinkman died December 23, 2016. He was survived by two children, Nicole and Seth. The personal representative of the estate was, Kimberly Milius, the mother of Michael Brinkman. Milius was not the mother of Nicole.

Milius admitted Michael Brinkman's will for probate. Relevant provisions include:

### ARTICLE I.

The references in this Will to my "son" refer to my son, SETH MICHAEL BRINKMAN. The references in this Will to my "children" and/or my "issue" shall include my son, SETH MICHAEL BRINKMAN, and all children of mine born or adopted after the execution hereof."

### ARTICLE V.

*I give the residue of my estate to my issue, per stirpes. . . .*

(Emphasis added.)

### ARTICLE VII.

If at any time before final distribution there shall not be in existence anyone who is, or might become, entitled to receive benefits under the foregoing provisions of this Will, any portion remaining shall be distributed to the persons to whom and in the proportions in which the same would have been distributed had I died intestate, domiciled in the State of Nebraska, owning such assets immediately following the death of the last survivor of the class composed of my issue and myself.

Nicole is not mentioned in the will.

Nicole objected to probate of the will and claimed she was entitled to one half of the estate. The personal representative and Seth claimed that Nicole had been disinherited.

The county court agreed with Nicole and ruled that the will was ambiguous with respect to Nicole's status, that she was not clearly disinherited, and thus an heir of the decedent under the will. The Nebraska Supreme Court affirmed.

## **COMMENT:**

Nicole's argument was that the term "issue" in the will was ambiguous. The will provided that the residue of the estate was to be distributed to issue per stirpes.

Upon review, the Court examined the use of the word "include" where it was used to refer to children. The Court noted that the word could be used to include a child born out of wedlock to avoid an argument that such a child should be excluded. The Court also noted that "to include" does not result in exclusion. In this case, The Court noted that the language simply included Seth and children born after the execution of the will in the definition of issue. The language did not exclude issue of a person pursuant to state statute. Nicole is a linear descendant of Michael Brinkman and thus included by Nebraska statute in the definition of issue.

The Court then noted that in searching for the intention of the testator, consideration must be given to the entire will. The will included no express statement that disinherited Nicole from the estate. In fact, the will included language that provided for ultimate distribution to Michael's heirs at law. The Nebraska Supreme Court agreed with the county court's ruling that Nicole was entitled to half of the residuary estate.

This case is an excellent illustration of the need to draft very specifically in defining children and issue as well. In the event a testator does desire to exclude a beneficiary (and I agree that is not clear in this case), specific language disinheriting a beneficiary should be included. Additionally, whenever unique provisions are included or whenever dealing with beneficiaries from different relationships, careful attention should be given to all provisions in the document to ensure that a template ultimate heirs clause does result in inclusion of an otherwise excluded beneficiary. Also consider documentation in your file summarizing the testator's intentions in the will.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE*  
DIFFERENCE!

Mary Vandenack

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## CITATIONS:

<sup>[1]</sup> [\*In re Estate of Brinkman\*, 308 Neb. 117 \(January 8, 2021\)](#)

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