AN OVERVIEW OF ESTATE AND TRUST LITIGATION

ACTEC MID-ATLANTIC FELLOWS INSTITUTE

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INTRODUCTION

The disposition of a deceased person's estate can lead to litigation because it allocates valuable property among often-competing interests. Various commentators have indicated that this type of litigation has become more common.[1] Mainstream media often focuses on high-profile disputes, such as the litigation involving the $300 million estate of the reclusive, 104 year old Huguette Clark.[2] For every high profile headline case, however, countless other families (whose wealth has often been accumulated in relative anonymity) find themselves in the midst of a dispute.

Meanwhile, as described further below, the law has evolved to recognize claims that historically would not have survived. Traditionally, courts placed the highest emphasis on the sanctity of will execution – under what historically was known as the "statute of Wills." Because a Will provides the only opportunity for a person to speak from the grave, strict formalities were required to make sure that the document was in fact valid. More recently, courts have adopted more liberal approaches by allowing claims regarding "writings intended as wills" or discerning the intention of instruments through second-hand evidence of the testator's "probable"

intention. However, one views these doctrines on the merits, they inevitably permit claims that would not have been considered fifty years ago.

Meanwhile, one need only briefly consider the vast and ever-evolving range of family arrangements and other dynamics that cause conflicts to arise. Consider the following scenarios:

- Children often harbor suspicion, resentment, or outright hostility toward a parent's second (or perhaps third or fourth) spouse.
- A sibling who resides with or near an elderly parent may feel burdened by caretaker obligations and come to resent other siblings—often living far away—whose everyday lives are not consumed by those obligations.
- Siblings who live far away may be concerned that the caretaker sibling is gaining some financial advantage.
- The elderly parent may seek to make dispositions to compensate the caretaker child, but do so late in life when he is weakened and potentially vulnerable.
- The elderly parent, hoping to avoid conflict, may add fuel to the conflict by leaving his assets in disarray or by selecting a fiduciary for his estate who will not be well received by the rest of the family.
- The elderly parent, seeking to preserve harmony, may appoint all of his children as fiduciaries of the estate, only to have them disagree over virtually everything.
- The fiduciary of an estate may improperly administer the estate, fail to collect assets, or have conflicts of interest that affect his decision, thus leading to suspicion.
- The decedent may have neglected to update his estate plan or waited until his deathbed to do so, leaving doubts and uncertainty

as to the disposition of the estate or claims that certain heirs or family members were not addressed. This late in life planning can produce questionable dispositions to caretakers or others surrounding him in his last years.

- The decedent may have questionable financial affairs that will greatly complicate the administration of his estate.

In each of the foregoing scenarios, and countless permutations of them, an estate can become embroiled in litigation and controversy. Some of these disputes might have been predicted or anticipated before the decedent's death, but, in many instances, the dispute surfaces after death when the true facts (or actions of the family members or fiduciary) lead to hostility that breeds conflict. The death of a patriarch or matriarch might strip away a façade of civility, revealing the existence of sibling rivalry, resentment or hostility that the parent historically mediated, discouraged or perhaps even concealed.

Litigation can arise when a person dies with an apparently valid will or has provided for the disposition of his assets through a trust. Interested persons who are dissatisfied with the final disposition may seek to challenge the instrument. Where a person dies without a will, disposition of his estate is governed by the law of intestacy. The intestacy statute will direct the disposition of the decedent's estate. Most intestacy statutes favor those closest to the decedent (spouse, children, parents, and the like).[3] Intestate

dispositions can also create disputes, including issues as to a potential taker's relationship to the decedent, the choice of administrator, or whether the estate is in fact governed by a will or some other disposition.

Litigation also arises after the disposition of the estate has been determined – or at least seems to have been determined -- by the admission of the will to probate or determination of intestacy. Once the fiduciary of an estate begins to act, the beneficiaries can dispute his actions, claiming that the fiduciary breached his fiduciary duties to them. The fiduciary must balance many competing interests, including the claims of creditors and taxing authorities, whose rights usually come ahead of those of the beneficiaries. The fiduciary himself might discover that the will fails to provide adequate guidance as to the disposition of the estate due to ambiguities, unforeseen contingencies, or changes in the law. The fiduciary (often a family member) may have interests in the family business or other arrangements, thus finding himself with conflicting interests (that may have been created by the decedent).

This presentation summarizes some of the types of disputes that may arise in estate matters. Relying on various "Uniform" law provisions, as well as examples under the law of New Jersey and New York, it reviews some of the substantive and procedural issues that arise in such litigation, focusing by way

of example on challenges to the validity of a will or a trust. It concludes with a discussion of the settlement of those disputes as that is the outcome in the vast majority of probate disputes.

Those who have not been involved in estate and trust litigation should bear in mind that while knowledge of trust and estate law remains important, these disputes also involve knowledge of rules of procedure, courtroom dynamics, discovery techniques and evidentiary determinations and other litigation issues. Those issues might significantly affect the outcome of any dispute, as it remains possible that the outcome of a particular dispute might be governed by an evidentiary ruling excluding seemingly relevant information from the trial court's ultimate determination.[4] Similarly, strong policies precluding fraud as to the desires of a deceased (or incapacitated) person have resulted in the enactment of "dead man's statutes that either precluded admissions of, or place stringent limits upon, testimony regarding the statements of a decedent; the exclusion of such evidence, or the resulting imposition of a heightened burden of proof, can sway the outcome.[5] Any examination of the myriad issues that arise in discovery, trial, or appeals—sometimes governed by generally applicable rules of civil procedure—goes well beyond the scope of this article.

TYPES OF CHALLENGES

A person who is not satisfied with an instrument that allegedly governs the disposition of an estate (whether it is in the form of a will or a trust) can challenge that instrument. In order to pursue such a challenge, the dissatisfied person must be able to demonstrate that he has "standing" to pursue a claim, usually by showing that he has an economic interest in the outcome because he would have received a greater share of the decedent's assets under some earlier instrument or by intestacy. In these types of disputes, the interested parties typically assert some claim to a share of the estate, i.e., they want some part or all of the money. These disputes can be compounded by other factors, such as greed, suspicion of irregularities, misunderstanding, sentiment, long-standing family hostility, or any number of other factors.

This type of dispute involves the determination of the validity of an instrument or transaction through which a person transfers property to others (relatives, friends, charities, or other recipients). In most instances, these matters are complicated because the most important witness, the testator or grantor, is dead.[6] These disputes may involve "testamentary" transactions (those that take effect upon death) as well as all types of "inter vivos" transactions (those made during lifetime).

As discussed further below, these disputes might include allegations that a person lacked the required mental capacity to execute an instrument, was fraudulently induced to sign it, or was unduly influenced by others when he signed it.

EXECUTION ISSUES

On relatively rare occasions, the execution of the instrument is defective. A number of statutes govern the execution of wills.[7] Some jurisdictions presume proper execution if the execution is supervised by an attorney.[8] In addition to those specific requirements, some states have expanded the categories of documents that might be accepted as wills, e.g., permitting probate of a "writing intended as a will," even if the document does not satisfy the formal requirements for will execution.[9] That statute has been interpreted to permit probate of a will that was never even signed by the decedent.[10] Other jurisdictions have recognized that the formalities of execution of a will can be waived if the court is satisfied there was "substantial compliance" with the statutory requirements.[11]

WILL CONSTRUCTION

Even where no one disputes the validity of a will or trust, a dispute may arise over its interpretation. The disposition of millions of dollars can turn on the meaning of a single word. Many jurisdictions have adopted statutes

guiding the construction of wills (these provisions might be viewed as "gap-filling" provisions).[12] One theory of construction, followed in New Jersey and to an increasing extent in the Uniform Trust Code (UTC), seeks to ascertain the "probable intent" of the testator or grantor through far-reaching inquiries, i.e., considering evidence extrinsic to the will, to determine the true objectives of the instrument.[13] Other states ordinarily limit will construction disputes to ambiguities arising within the "four corners" of the will unless ambiguities appear on the face of the instrument.[14]

Many states have “default” rules of construction that seek to address the interpretation of an instrument.[15] For example, these rules might determine what happens if one the residuary devisee predeceases the testator.[16] The Uniform Probate Code (“UPC”) contains default rules of construction.[17] The Uniform Probate Code and Uniform Trust Code contains a number of sections addressing the modification and reformation of wills and Trusts. [18] These construction or interpretation issues can arise in the context of a fiduciary’s action seeking “instructions” from a probate court (discussed below) or in connection with an accounting proceeding seeking approval of a proposed distribution of an estate or trust.

GUARDIANSHIP AND MANAGEMENT OF AFFAIRS

As our population lives longer, disputes arise from proceedings involving determinations as to whether a person's authority over her person or property should be transferred to another, such as guardianship and conservatorship proceedings.[19] These may be driven by evidence of elder financial abuse or, perhaps more cynically, by a reluctance to wait for the long-delayed inheritance. Similar issues may arise in disputes involving the use of a power of attorney or other contractual rights.[20] Related proceedings often involve competing claims as to "control" over the incapacitated person. In those cases, the court may have some duty to protect, and perhaps advocate for, the interests of the incompetent person through a "substituted judgment" inquiry.

CONTRACTS RELATING TO DISPOSITION OF ESTATE ASSETS

Disputes can arise over contracts or agreements. These may be contracts relating to inter vivos or testamentary dispositions.[21] Or they may involve life insurance, employee benefits, marital settlements, and other so-called non-probate transfers.[22]

ACCOUNTING PROCEEDINGS

Parties sometimes raise concerns as to the implementation of the terms contained in a will or trust or seek information as to the assets governed by

those instruments. The conduct of fiduciaries (executors, trustees, guardians, or otherwise) may be challenged in various proceedings, including those involving "contested" accounts. State statutes and court rules govern the process by which an account is settled in a formal court proceeding. In many instances, however, the beneficiaries approve the fiduciary's actions by agreement based upon some informal disclosure of the estate's assets, liabilities, and expenses, as well as its proposed distribution (this latter process is called an "informal" account).[23]

When administering an estate, a fiduciary is held to a high standard of conduct. One leading judicial decision described the fiduciary relationship as follows:

> Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions.[24]

Claims of breach of fiduciary duty can arise under various provisions of the Uniform Probate Code (UPC), the UTC or common law. Where a breach of fiduciary duty is proved, the beneficiaries may seek to hold the fiduciary responsible for damages (known as a "surcharge") associated with his actions

or inaction.[25] In such disputes, the parties may seek removal of the fiduciary from his office, but those proceedings are usually vigorously contested.[26]

ACTIONS FOR DECLARATORY RELIEF OR INSTRUCTIONS

In most jurisdictions, a fiduciary may seek to avoid future disputes as to his actions by asking the court to provide "advice," "directions," or other declaratory relief as to how he should handle a proposed transaction or distribution.[27] These proceedings, often commenced in seemingly benign form captioned with terms like *request* for instructions, can lead to hotly contested disputes among those interested in the fund, issue, or transaction.[28] As noted above, such proceedings may involve “interpretation” of the will or trust.

CLAIMS BY SPOUSES AND OMITTED BENEFICIARIES

Under the law of most jurisdictions, a surviving spouse has a right to assert a claim to share in the estate if she is omitted from the will. This right, called either a "right of election" or "elective share" claim, permits a surviving spouse who is dissatisfied with the provisions for her in the will to "elect" to take a statutory share of the estate (such as one-third of the estate).[29] In order to pursue such a claim, a surviving spouse must demonstrate compliance with the requirements of the state elective share statute. These disputes often involve issues as to which assets are included in the estate

because many states "augment" the estate with assets transferred by the decedent before his death.[30]

In most jurisdictions, a person is free to dispose of his estate in any manner he deems appropriate (subject only to provisions such as the spousal elective share). Other than as provided by statute, no person (spouse, children, or otherwise) is entitled to a forced share of the estate. Some jurisdictions, however, provide certain rights to parties whose relationship with the decedent began after a will was executed. A spouse who married the decedent or a child who was born to the decedent after the decedent executed his will may have a claim to a statutory share of the estate (often what that person would have taken if the decedent died intestate) if it can be demonstrated that the decedent omitted that person and did not otherwise provide for that person.[31] In those factual circumstances, the statutory "omitted" or "pretermitted" spouse or child rules should be consulted as there may be other statutory prerequisites to a claim.

OTHER TYPES OF CLAIMS

In the administration of an estate or trust, issues may arise as to the disposition of assets or claims against the estate or trust. For example, creditors have the right under the laws of most states to seek to have their claims determined during the estate administration.[32] To the extent a

beneficiary's interest in a trust is not protected by a spendthrift provision, the law also generally permits the beneficiary's creditors to reach the beneficiary's interest in the trust via attachment of distributions made to the beneficiary or made on his behalf.[33]

Former spouses or children may seek to enforce rights under marital settlement agreements or divorce judgments.[34] Third parties, such as live-in companions, may assert claims to palimony (if permitted by law), and issues may arise as to the paternity of children.

CHOICE OF FORUM FOR ESTATE LITIGATION AND GOVERNING LAW

Estate and trust disputes are typically litigated in the separate court to which all probate matters are allocated (variously called probate courts, surrogate's courts, orphans' courts, or chancery courts). These courts often have their own procedural rules that may vary significantly from a particular state's generally applicable rules of procedure (standard procedures for discovery, trial, and the like may be incorporated in the rules). Some of these courts have very broad jurisdiction to address virtually all matters that will touch upon an estate or a trust.[35] The particular procedural requirements of the relevant state will need to be consulted to verify the court in which a particular issue or proceeding may be addressed.

In addition to the applicable rules of procedure, estate litigation involves substantive probate law, such as that state's version of the UPC, the UTC, and various other statutes (for example, statutes governing powers of attorney, guardianships, paternity, marital agreements, property ownership, and other issues). Most states have a fairly extensive body of common law governing the outcome of probate disputes. Federal law, including the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA), may be relevant to the outcome of a dispute, particularly those involving compelling claims regarding beneficiary designation over retirement assets.

Countless reported cases, spanning centuries of judicial proceedings, address disputes involving inter vivos and testamentary transactions. Although some decisions remain good law for centuries, others may have been abrogated by subsequent statutes. In some instances, a citation check of those cases might not reveal the statutory change, so caution is required.

PROCEDURAL ISSUES INVOLVING CHALLENGES

Most courts have well-defined rules for commencing a challenge to a will. These rules are based on the format of the initial probate process. The following is a summary of some of the many procedural issues that may arise in such a dispute or in a challenge to a trust.

SOLEMN FORM PROBATE

In some states, like New York, a will can be admitted to probate only after notice is given to those affected by the probate decision. This ordinarily includes those whose rights would be adversely affected by the probate of the will, such as those who would take the estate by intestacy (the "distributees").[36] That notice-based probate process is called "solemn" form probate.[37] In that form, any action to dispute the will must be commenced before the will is admitted to probate by filing "objections" to probate. Unique procedures may be available, such as the right to pre-objection discovery under New York Surrogate's Court Procedure Act Law section 1404 as to the circumstances of the will execution.

COMMON FORM PROBATE

Another approach, sometimes called "common" form probate, involves the probate of the will in an ex parte fashion before a designated official (surrogate, registrar of wills, probate clerk, or, in certain states, a limited jurisdiction probate judge whose actions are subject to review in a court of general jurisdiction). These procedures often do not involve notice to those affected until after the initial probate.[38] In that form of probate, the ex parte decision is subject to review by plenary court proceedings. New Jersey follows that approach.[39]

STANDING

State rules (or case law) typically define the class of persons whose financial interests might be prejudiced by the probate of a will so that they should be permitted to challenge it.[40] Generally, the law does not permit a challenge by those who would not be affected adversely by probate. This class of potential challengers might include beneficiaries under prior wills and intestate heirs. Depending on the jurisdiction, some questions may exist as to whether fiduciaries named in prior wills may pursue challenge.[41]

With respect to disputes involving trusts, any person interested in the trust's administration may invoke the court's jurisdiction over the trust's administration.[42] The "Uniform" Trust Code provisions now describe the mechanisms for challenging a trust.[43]

TIMING OF CHALLENGE

The time permitted to challenge a will is often very short. In solemn form jurisdictions, the potential challenger may be required to raise his desire to challenge in response to the initial process served in the matter. In a common form jurisdiction, the challenge may need to be filed within a short time of the initial probate (in New Jersey, for example, the verified complaint must be filed within four months of the surrogate's ex parte probate judgment; if the challenger resides outside New Jersey, he has six months to do so).[44] In New York, objections to probate must be filed ten days after the completion of any examinations under New York Surrogate's Court Procedure Act Law section 1404.[45] The UTC establishes time periods for challenging a trust (addressed below).

PARTIES

It is important to identify and join any required parties who might be affected by the outcome of a probate judgment. To the extent that minors or incapacitated parties have an interest, it will be important to join them through virtual representation or through appointment of a guardian ad litem.[46]

MANAGEMENT OF THE ESTATE OR TRUST PENDING LITIGATION

It is important to plan for the administration of a dispute while the matter is pending. Probate courts may have the authority to appoint, with full or restricted authority, the executor named in the will pending the outcome of a dispute.[47] The court also may have the ability to grant temporary administration or trusteeship so that there is a neutral stakeholder responsible for the estate or trust administration.[48]

OBTAINING INFORMATION REGARDING A WILL

Before a person commences a will contest, he should ascertain the potential outcome of the dispute by comparing the proffered will with the outcome that would be obtained if the challenge is successful. Thus, for example, if the challenger would take the entire estate by intestacy but the last will leaves the entire estate to a housekeeper, the challenger will know what would happen if a challenge is successful. He may obtain a copy of the will from the court (if a proceeding is pending). But it may be more difficult to obtain information as to earlier (or intervening) wills that might be probated if the last will is invalidated.

CHALLENGES TO A TRUST

A person interested in a trust (or in the decedent's estate) might not be aware of the terms of a trust agreement (for example, a trust with dispositive provisions that take effect after the death of the grantor). Therefore, he might not know that he has a basis for a challenge. Unlike the probate procedures (which effectively require a prompt filing of a will for probate), sometime could pass before a person learns of the existence of a trust. Some states now require the trustees to give notice of the existence of a trust when it becomes irrevocable. California and other states have adopted statutes, modeled on the UTC, that require certain disclosures with respect to trusts after the death of the grantor; these requirements include notice to heirs at law and trust beneficiaries.[49] It is important to ascertain the manner in which a trust may be challenged and if there are time periods in which a challenge must be filed. If the challenger becomes aware of the existence of a trust agreement that she desires to invalidate or if she wishes to compel an accounting or seeks interpretation of trust provisions, she may commence a court action. Once the action is commenced, it may proceed in a manner similar to a will contest or other action involving a will.

PRE-DEATH CHALLENGES

Historically, wills could not be challenged before death, except possibly in the case of the testator's incompetency or incapacity.[50] The law in this area is evolving as some jurisdictions have now permitted predeath probate disputes.[51]

AFTER-DISCOVERED WILLS

Where one will has been offered for, or even granted, probate but then a later will is discovered, the local law will have to be evaluated to ascertain if there are express time limits in which an after-discovered will must be offered for probate.[52] Assuming that no such time limits exist, it would then become necessary to prove that the later will was properly executed (subject to any challenges that might be raised for lack of capacity, undue influence, or the like).

PROBATE OF LOST WILLS

Where a will has been lost, it may be possible to probate a copy of it.[53] It may even be possible to establish by testimony what the lost will provided, but it is essential to establish the circumstances under which the will was lost or destroyed. In many jurisdictions, there is a presumption of revocation where an executed original or executed copy cannot be found and the original will was in the testator's possession.[54] For this reason, it is

not advisable to execute wills in duplicate and then give an executed original to the testator: he may not understand (or may forget) the need to retain his original, believing that the attorney's retention of a copy is sufficient.

EVIDENCE OF LOST WILLS

If it can be shown that the original will was left with the attorney but was subsequently lost by the attorney (for example, while moving to a new office), there would be no presumption that the testator intended to revoke his will, and a copy may be admitted to probate if its genuineness is established. For example, a photocopy could be established by having the witnesses acknowledge that they signed it. On the other hand, if the original will was taken away by the testator but cannot be found after a thorough search of his papers, it will be presumed that he destroyed it with the intention of revoking it. It may still be possible to overcome this presumption of revocation. For example, the proponent might offer testimony that the testator acknowledged the existence of his will shortly before he died, and the reason it cannot be found is because his papers were stolen after death or because his house burned down; but the court may impose a very high burden of proof on anyone seeking to probate a lost will where the original was in the testator's possession.

NO-CONTEST CLAUSES

Some jurisdictions, like New York, vigorously enforce clauses in a will that deprive a person of all benefits under an estate if he contests the will (with certain exceptions).[55] Other states decline to enforce such clauses if "probable cause" exists for commencing a challenge.[56] Resolution of this question is often an important prelitigation consideration for a potential challenger.

SUBSTANTIVE LAW GOVERNING CHALLENGES

FREEDOM OF DISPOSITION

A person is free to dispose of his property as he deems appropriate, whether by will, deed, gift, or trust.[57] Most American jurisdictions permit the disinheritance of one or all family members. "[A] will cannot be set aside merely because it is 'unequal or unjust.' If capacity, formal execution, and volition appear, the will of the most impious man must stand, unless there is something, not in the motives which led to the disposition, but in the actual disposition, against good morals or against public policy.'"[58]

A person may dispose of his property as he desires, subject to certain limited exceptions, such as spousal right of election statutes."[59] Under those statutes, a person may not be able to entirely exclude his surviving spouse from his will, except to the extent permitted by the elective share law or

statutes relating to omitted spouses or children.[60] Similarly, a will, trust or other disposition must not violate public policy, such as creating an incentive to divorce.[61]

UNDUE INFLUENCE

Any disposition (will, trust, or gift) may be invalidated if it is the product of, or tainted by, "undue influence."[62] In broadest terms, "'[u]ndue influence' has been defined as 'mental, moral or physical' exertion which has destroyed the 'free agency of the testator' by preventing the testator 'from following the dictates of his own mind and will and accepting instead the domination and influence of another.'"[63]

> "[T]o constitute undue influence, there must be a disruption of the freedom of will and of judgment of the testator."[64]

Nonetheless, a competent adult may choose to consult with many persons—or may choose to consult with no one—before deciding how to dispose of his property. In *Gellert* v. *Livingston,* the New Jersey Supreme Court said thus:

> Not all influence is "undue" influence. Persuasion or suggestions or the possession of influence and the opportunity to exert it, will not suffice. It must be such as to destroy the testator's free agency and to constrain him to what he would not otherwise have done in the disposition of his worldly assets. The coercion or domination exercised to influence the testator may be moral, physical, or mental, or all three, but the coercion exerted upon the testator's mind must be of a degree sufficient to turn the testator from disposing of his property according to his own desires

> by the substitution of the will of another which he is unable to resist or overcome. Each case of this nature must be governed by the particular facts and circumstances attending the execution of the will and the conduct of the parties who participated in order to determine if the coercion exerted was "undue."[65]

PROOF OF UNDUE INFLUENCE

As a general rule, unless a presumption or inference of undue influence arises, the person asserting an undue influence claim bears the burden of proving undue influence. The UPC places the burden of proof on the challenger in most instances.[66] In practice, however, it is difficult to obtain actual proof of undue influence because the person exerting undue influence does so in a subtle, secretive, or "insidious" manner, often over an extended time period.[67]

Some cases thus focus on presumptions or inferences of undue influence that arise as a result of the relationship between a putative beneficiary and the testator. *Haynes v.* First *National State* Bank described the presumption of undue influence in a will contest:

> [T]he burden of proving undue influence lies upon the contestant unless the will benefits one who stood in a confidential relationship to the testatrix and there are additional circumstances of a suspicious character present which require explanation. In such case the law raises a presumption of undue influence and the burden of proof is shifted to the proponent. . . .
>
> The first element necessary to raise a presumption of undue influence, a "confidential relationship" between testator and a beneficiary, arises "where trust is reposed by reason of the testator's weakness or

> dependence or where the parties occupied relations in which reliance is naturally inspired or in fact exists."
>
> The second element necessary to create the presumption of undue influence is the presence of suspicious circumstances which, in combination with such a confidential relationship, will shift the burden of proof to the proponent. Such circumstances need be no more than "slight." . . .
>
> In this jurisdiction, once a presumption of undue influence has been established the burden of proof shifts to the proponent of the will, who must, under normal circumstances, overcome that presumption by a preponderance of the evidence.[68]

In a slightly different approach focused on similar policy concerns, "where there is a confidential relationship between the decedent and the beneficiary/drafter of the will, the mere fact of the bequest, standing alone, permits an inference of undue influence, and the drafter then has the burden of offering an explanation, alternative to his influence, for the contested will."[69]

Similar issues arise with respect to challenging an inter vivos transaction, as one court stated:

> [W]henever it appears that the relations between the parties to an inter vivos gift are of such character that in reasonable probability they do not deal with each other on terms of equality because one has given friendship and justifiably reposes confidence in the other, that on the donee's side superior knowledge exists as to the nature of the transaction proposed by him, as well as the detriment to be suffered by the donor if he engages in it, and the donee fails to see to it that the donor thoroughly understands its nature and consequences, equity should regard it as voidable at the instance of the donor or his representatives.[70]

Questions may arise as to whether a challenge to an inter vivos trust is governed by the probate rules because it is arguably a "testamentary substitute" or whether it is governed by potentially different standards for challenges to inter vivos transfers. For example, some common estate plans involve a will through which the entire estate "pours over" to an existing inter vivos trust; that trust would contain dispositive provisions taking effect on the grantor's death.

Some states have concluded that an undue influence claim involving such a testamentary substitute should be evaluated under the same standards that apply in the will context.[71]

Other courts evaluating trust undue influence claims have merely recited undue influence standards without addressing whether the same standards would apply in the will context.[72]

FRAUD AND MISTAKE

Fraud and mistake are sometimes included among the grounds for challenging a will or a trust[73] but these are special situations. For example, a mistake that may invalidate a will is a mistake as to the effect of the instrument. A testator may have signed a prior draft of the will rather than the final version that was intended. Similarly, fraud may involve having the testator sign a will under representations that it was a different instrument.

A mistake may also authorize relief through construction[74] without requiring that the will be set aside.

In cases involving mistake or fraud, relief may be sought by applying the constructive trust doctrine or similar equitable theories. Difficult issues may arise as to the basis for a claim. For example, assume that the testator was operating under certain factual assumptions (e.g., that her child had predeceased her) when she revoked a will. If those factual assumptions were not correct, can a court employ equitable doctrines to revive the old will?

TESTAMENTARY CAPACITY

Some probate disputes focus on whether the testator possessed the required testamentary capacity.[75] Although courts vary in their approach as to who bears the burden of proof,[76] the test for capacity is often similar to that described by New York's highest court:

> "The proponent has the burden of proving that the testator possessed testamentary capacity and the court must look to the following factors: (1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them.[77]'

The standard for testamentary capacity may be lower than that required for other transactions, such as a trust or power of attorney.[78] On the other hand, the standard required to establish a revocable trust may be the

same standard required to execute a will.[79] In a dispute involving an instrument other than a will, this potential distinction should be examined.

SETTLEMENT OF ESTATE AND TRUST LITIGATION

Will contest, like most family litigation, can be acrimonious. Jealousy, pride, and greed may be involved. Not only money is at stake. The heirs may fight just as bitterly over tangible personal property that may have little monetary value but symbolize their parents' love or affection.

FACTORS AFFECTING SETTLEMENT

Most probate courts encourage settlement. When and how they do so varies by jurisdiction. Some judges will become involved in settlement discussions; others do not get directly involved but have court attorneys or referees handle those matters. Some refer cases to mediation.[80] Some jurisdictions refer the disputes to other judges for settlement discussions, while others employ early settlement programs in which lawyers who regularly practice in the probate field are designated to mediate particular cases.

Depending on the substantive law, it is possible that disputing beneficiaries could effectively rewrite the will or substantially modify its provisions to achieve a compromise.[81] Likewise, in some jurisdictions, interested persons may enter nonjudicial settlement agreements to construe

the terms of a trust or to resolve other disputes involving trusts.[82] In some states, court approval of a compromise may be required. In addition, it is important to consider whether an agreement among the beneficiaries will have the desired tax effect.

The timing of settlement discussions varies. Some believe that there must be some initial court proceedings before the parties become inclined to pursue a settlement. Adverse rulings, probing depositions, family turmoil, and the like often convince the parties that the dispute should be resolved. Often, the mounting attorney fees provide incentive for the parties to settle.

In many cases, early settlement is difficult to achieve. In some cases, however, it may be advantageous for the parties to settle early. For example, where one of several intestate takers challenges a will or where one of a class of beneficiaries under an earlier will brings the challenge, the proponent may consider settling with that party before others get involved in the action. Similarly, tax issues may be resolved more sensibly by settlement; in deciding a disputed case, a court may not be obliged to consider the tax effect of a particular ruling. The parties should consider the effect of litigation on the nature and structure of family businesses, tax planning, and other issues that might be addressed more effectively in an agreement.

TAX AND FINANCIAL CONSIDERATIONS IN SETTLEMENT

Other circumstances may weigh heavily in favor of settlement. For example, where a contesting party is a spouse or charity and the estate is large enough to face a substantial tax burden, a settlement disposition in favor of the charity or spouse may involve actually paying about fifty cents on the dollar because the settlement with the spouse or charity might qualify for the unlimited spousal or charitable deduction, thus substantially reducing estate taxes.

Bear in mind that for estate and gift tax purposes, the Internal Revenue Service (IRS) ordinarily will accept a settlement based upon a reasonable compromise of bona fide claims under applicable regulations. These regulations should be examined before settlement to ascertain whether a proposed settlement qualifies for the marital or charitable deduction or constitutes a gift between the parties.

For example, with respect to the marital deduction, Treasury Regulations section 20.2056(c)-2(d) (2), captioned "Will contests," provides that "if as a result of a controversy involving the decedent's will, or involving any bequest or devise thereunder," a property interest is assigned or surrendered to the surviving spouse, the interest so acquired will be regarded as having "passed from the decedent to the surviving spouse" (as must occur

to qualify for the marital deduction) only if the assignment or surrender was a "bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate." The first part of that regulation focuses on tax treatment of final judicial determinations. The last sentence notes that if the determination is made by consent or agreement, "it will not necessarily be accepted as bona fide evaluation of the rights of the spouse."[83]

A substantial body of case law must be considered in determining, under the applicable regulations, whether a proposed settlement will be accepted by the IRS as a compromise of bona fide claims under the applicable state law. In considering this issue, one must bear in mind that the IRS is only required to give effect to a ruling of a state's highest court on questions of state law.[84] Thus, the parties must determine that the compromise meets the bona fide outcome under state law test.[85] In addition to federal tax issues, the settlement should take into account the state death tax considerations.

Settlement discussions might also take into account nonprobate transfers. These may become part of a settlement package, depending on the structure of the deal. They may impact, however, on the value of the estate and the tax liability.

A settlement may have income tax consequences. For example, receiving a $10,000 IRA (with its income tax consequences) would not be the

same as receiving $10,000 in stock in the decedent's name alone that received a stepped-up basis. Certain estate assets may contain built-in capital gains (i.e., the value of the entity may "step up" to the date-of-death value, but the assets inside the entity may not). If a dispute is settled on terms that shift the potential income tax liability so that the recipient will ultimately bear a substantial capital gains tax when an asset is sold or will be saddled with income in respect of a decedent (e.g., deferred compensation), the after-tax consequences should be considered.

Thus, in order to resolve probate disputes, parties will need to focus on the net value of any settlement. Indeed, that should be considered in determining whether to pursue an estate dispute as attorney fees and taxes may consume a substantial portion of the estate. It is important to focus on the potential outcomes at each stage of any dispute.

CONCLUSION

Parties involved in estate and trust litigation can anticipate a demanding, often emotionally draining, exercise that can consume several years. Meanwhile, significant demands are placed on their attorneys as they must truly act as "counselors at law," devoting significant time to counseling their clients through a family crisis to achieve the clients' true objectives. Some client objectives, such as the desire to vindicate themselves or affirm

the value of their relationship with the deceased, may never be achieved in litigation or may be delayed for years. Nonetheless, in difficult situations, litigation may provide the only mechanism to determine the proper disposition of an estate or trust. The parties should bear in mind, however, that other mechanisms, such as mediation, may provide the client a better opportunity to vent his anger, frustration, or concerns. These mechanisms may thus lead to a sensible resolution without the cost and long delay often associated with full-blown litigation.

In this type of litigation, it thus becomes important to focus on potential outcomes. If a last will is set aside, what will happen next? Does the estate devolve by intestacy? Are there other wills that must be challenged in order to secure a favorable outcome for the client? Is the likely recovery sufficient to warrant the expense? Mounting a successful challenge to a will could be a meaningless exercise that will ring hollow if the counsel fees incurred consume a large part of the assets inherited.

In estate accounting disputes, financial performance is not the sole indicator of a favorable outcome. For example, when a beneficiary complains of the investment performance of a trust, such assertions must take into account statutes, such as the Uniform Prudent Investor Act, that were enacted to change the focus of investment disputes from market

outcomes to evaluation of the fiduciary's conduct in formulating investment objectives. In the same vein, one sibling may desire to remove another as fiduciary,[86] but the stringent standards for removal may be difficult to overcome.

Finally, the commencement of litigation, like a declaration of war, usually leads to a long period of hostility among family members, forever changing their relationships (and often other relationships within the family). Statements made in pleading—and the inevitable statements in replies—are not easily forgotten.

Although these concerns require caution in commencing litigation, the reality is that serious wrongdoing can and does occur. In each of the scenarios recited at the beginning of this article, the outcome could depend on whether a court finds that the party was motivated by greed or control or whether that party had innocent motives that were incorrectly perceived by others. In many instances, it becomes difficult to predict those outcomes as the perceived facts may be blurred by evidentiary considerations that preclude the court from hearing the whole story.[87]

A party confronting litigation faces a host of legal and factual issues. All relevant considerations should be considered before embarking on a course of action. Even with that careful analysis, the unpredictability of

estate disputes may be one reason why so many courts choose to defer them to mediation or other alternative dispute resolution mechanisms (where the vast majority are resolved). Unlike so many issues involving the disposition of estates that are governed by federal law, the legal issues confronted in estate litigation vary substantially from state to state (and from other types of civil litigation). Accordingly, experienced counsel should be consulted to identify the proper course of action and to conduct the required proceedings.

Endnotes

[1] *See* Seidenberg, Plotting Against Probate, ABA Journal (May 2008).

[2] *See* Sullivan, How to Avoid an Estate Battle After You Die, N.Y. Times, June 14, 2013.

[3] *See* UNIF. PROBATE CODE § 2-101 to -103; N.J. STAT. ANN. § 3B:5-1 et seq.; N.Y. EST. POWERS & TRUSTS LAW § 4-1.1. This article will cite to uniform acts, such as the Uniform Probate Code (UPC) and the Uniform Trust Code (UTC), which were both developed by the National Conference of Commissioner on Uniform State Laws (NCCUSL). The UPC has two versions: a pre-1990 version and post-1990 version. The former provides the basis for many state probate codes, even though it has been modified by many adopting states. Estate and trust litigation is almost always dependent on state law, so this article also cites, by way of example, New Jersey and New York common law and statutes (as the author practices there).

[4] *See* Matter of 1961 Trust, 194 N.J. 276 (2008) (excluding proposed testimony of drafting lawyer in dispute regarding interpretation of trust instrument).

[5] Compare N.J.S.A. 2A:81-2 (imposing "clear and convincing" evidence standards regarding the introduction of testimony of a deceased or incapacitated person) and N.Y. C.P.L.R 4519 (testimony by interested person regarding statement of a deceased or incapacitated person might be "excludable").

[6] *See* Haynes v. First Nat'l State Bank, 87 N.J. 163, 176 (1981); Rollwagen v. Rollwagen, 63 N.Y. 504 (1876).

[7] UNIF. PROBATE CODE § 2-502.

[8] *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 Supplementary Practice Commentaries (McKinneys); Matter of Kindberg, 207 N.Y. 220, 228 (1912) (a presumption of due execution applies " . . . where the execution had been under the supervision of a lawyer or any person fully conversant with the statute requirements . . .")

[9] UNIF. PROBATE CODE § 2-503.

[10] *In re* Estate of Ehrlich, 427 N.J. Super. 64 (App. Div. 2012), certification denied, 213 N.J. 46, 59 A.3d 602 (2013); In re Probate of Will and Codicil of Macool, 416 N.J. Super. 298, 3 A.3d 1258 (App. Div. 2010).

[11] *See* Will of Ranney, 124 N.J. 1 (1991).

[12] UNIF. PROBATE CODE § 2-601 et seq.; UNIF. PROBATE CODE § 2-701 et seq.

[13] *See* Fid. Union Trust Co. v. Robert, 36 N.J. 561 (1962); UNIF. TRUST CODE § 416 (to achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention."); Matter of Trust of Violet Nelson, 454 N.J. Super. 151 (App. Div. 2018) (authorizing litigation to proceed that would determine whether decedent's disposition to her "grandchildren" could be interpreted to exclude grandchildren who were born outside of her faith).

[14] *In re* Cord, 58 N.Y.2d 539 (1983); *In re* Accounting by Fleet Bank, 10 N.Y.3d 163 (2008) ("A court must first look within the four corners of a trust instrument to determine the grantor's intent; only if the terms are ambiguous may a court consider extrinsic evidence."); Trust of Duke, 61 Cal. 4th 871 (2015) (accepting what were then viewed as novel will reformation theories in California).

[15] See e.g., N.J.S.A. 3B:3-34 to -48; N.Y. EST. POWERS & TRUST LAW 3-3.1 et seq.

[16] See, e.g., NY EPTL 3-3.3.

[17] PROBATE CODE 2-601 to 2-609; 2-701 to 2-711.

[18] UNIF. PROBATE CODE 2-805 and 2-806; UNIF. TRUST CODE 414 to 417.

[19] *See* UNIF. PROBATE CODE § 5-101 et seq.

[20] D'Amato v. D'Amato, 305 N.J. Super. 109 (App. Div. 1997) (dispute as to accounting of attorney-in-fact).

[21] UNIF. PROBATE CODE § 2-701.

[22] UNIF. PROBATE CODE §§ 2-801 et seq., 6-101.

[23] Guidance in the preparation of fiduciary accounts can be found in ENGLISH & WHITMAN, FIDUCIARY ACCOUNTING AND TRUST ADMINISTRATION GUIDE (ALI-ABA 3d 2004).

[24] Meinhard v. Salmon, 249 N.Y. 458, 464 (1928).

[25] UNIF. PROBATE CODE § 3-712; UNIF. TRUST CODE § 1002; In re Carter's Estate, 6 N.J. 426 (1951).

[26] UNIF. PROBATE CODE § 3-611; UNIF. TRUST CODE § 706; In re Duke, 87 N.Y.2d 465 (1996).

[27] *See* N.Y. SURR. CT. PROC. ACT LAW § 2107; N.J. STAT. ANN. § 2A:16-55; UNIF. TRUST CODE §201.

[28] *In re Duke*, 305 N.J. Super. 408 (Ch. Div. 1995), affd, 305 N.J. Super. 407 (App. Div. 1997) (disposition of $170 million trust involves construction of words *lineal descendant* as applied to adult adoptee).

[29] UNIF. PROBATE CODE § 2-201 et seq.

[30] UNIF. PROBATE CODE § 2-203

[31] UNIF. PROBATE CODE § 2-301 et seq.

[32] UNIF. PROBATE CODE § 3-801 et seq.

[33] UNIF. TRIST CODE § 501

[34] *See, e.g.*, Tannen v. Tannen, 416 N.J. Super. 248 (App. Div. 2010)

[35] UNIF. PROBATE CODE §§ 3-105 to -106, 3-201 et seq.; UNIF. TRUST CODE § 202 TO 204.

[36] *See* N.Y. SURR. CT. PROC. ACT LAW § 1401 et seq.

[37] *See* UNIF. PROBATE CODE § 3-401 et seq.

[38] UNIF. PROBATE CODE § 3-301 et seq.

[39] Rules Governing the Courts of the State of New Jersey, §§ 4:80-4:85 [hereinafter N.J. Rule].

[40] UNIF. PROBATE CODE § 3-404.

[41] *See, e.g.*, N.Y. SURR. CT. PROC. ACT LAW § 1410 (permitting nominated fiduciary in a prior will to pursue a challenge after demonstrating cause for doing so).

[42] UNIF. TRUST CODE §201.

[43] *See* N.J.S.A. 3B:31-23 and 45.

[44] N.J. Rule 4:85-1.

[45] N.Y. SURR. CT. PROC. ACT LAW § 1410.

[46] UNIF. PROBATE CODE §1-403; UNIF. TRUST CODE § 301 to 305; N.Y. SURR. CT. PROC. ACT LAW § 315; N.J. Rule § 4:26.

[47] N.Y. SURR. CT. PROC. ACT LAW § 1412 (providing for appointment of a "preliminary executor" pending outcome of probate).

[48] UNIF. PROBATE CODE §3-614 (providing for appoint of a “special administrator” prior to the appointment of a general administrator or where the general administrator cannot or should not act); UNIF. TRUST CODE §1001(b)(5) (providing for the appointment of a “special fiduciary” to take possession of the trust property and to administer it).

[49] *See, e.g.*, CAL. PROBATE CODE § 16060.5-16061.8; UNIF. TRUST CODE §813.

[50] Casternovia v. Casternovia, 82 N.J. Super. 251 (App. Div. 1964) (dictum).

[51] *See* D. Fitzsimons, *The Gathering Storm-Guardianship Litigation and Pre-Death Will Contests,* EST. PLAN. MAG. (2009); *see also, e.c.*, Alaska Stat. § 13.12.530 (allowing a testator, a nominated personal representative or an interested party who has the consent of the testator to petition the court during the testator’s lifetime for a determination that the will is valid); Ark. Code Ann. § 28-40-202. (allowing a testator to seek a declaratory judgment as to the validity of his will to the extent it disposes all or a part of an estate in Arkansas); N.D. Cent. Code § 30.1-08.1-01 (North Dakota statute allowing a testator to bring a proceeding for declaratory judgment that his will is valid); Ohio Rev. Code Ann. § 2107.081(A). (allowing a testator who executes a will allegedly in conformity with Ohio law to file a declaratory judgment action as to the validity of the will).

[52] *See, e.g.*, UNIF. PROBATE CODE § 3-412(3)

[53] *Id*. § 3-402(a)(3)

[54] *In* re Estate of Sapery, 28 N.J. 599 (1959).

[55] *See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-3.5.*

[56] UNIF. PROBATE CODE § 2-517.

[57] *Id*. § 2-603 (providing that the intention of the testator as expressed in the will controls the disposition of the estate); *see* Alper v. Alper, 2 N.J. 105, 114-15 (1949).

[58] *In re* Blake's Will, 21 N.J. 50, 57 (1956).

[59] UNIF. PROBATE CODE § 2-201 et seq.

[60] *Id*. § 2-201 et seq. and 2-301 et seq.

[61] *In re* Estate of Donner, 263 N.J. Super. 539 (App. Div. 1993); UNIF. TRUST CODE § 404 (“(a) trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve”);

[62] UNIF. PROBATE CODE § 3-407; UNIF. TRUST CODE § 406 (“(a) trust is void to the extent its creation was induced by fraud, duress, or undue influence”); Gellert v. Livingston, 5 N.J. 65, 71 (1950); Haynes v. First Nat'l State Bank, 87 N.J. 163, 176 (1981).

[63] *Haynes*, 87 N.J. at 176 (citation omitted).

[64] Pascale v. Pascale, 113 N.J. 20, 30 (1988); Will of Walther, 6 N.Y.2d 49, 53 (1959).

[65] 5 N.J. at 73 (citations omitted).

[66] UNIF. PROBATE CODE § 3-407.

[67] *In re Collins*, 510 N.Y.S.2d 940 (App. Div. 1987).

[68] 87 N.J. at 176-78.

[69] *In re Collins,* 510 N.Y.S.2d at 944; *In re* Putnam, 257 N.Y. 140 (1931) (infer¬ence of undue influence arises where drafting attorney benefits from will).

[70] *In re* Dodge, 50 N.J. 193, 228 (1967).

[71] *See, e.g.*, Hagen v. Hickenbottom, 41 Cal. App. 4th 168, 182, 48 Cal. Rptr. 197, 205 (Ct. App. 1995) (noting that undue influence principles relating to a will "are manifestly as applicable to an estate plan formalized by simultaneously executed inter vivos trust and pour-over will as to a will alone"); Crump v. Moss, 517 So. 2d 609, 612 (Ala. 1987) ("Proving undue influence in the procurement and execution of a trust requires essentially the same evidence as is required to invalidate a will."); Sun Bank/Miami N.A. v. Hogarth, 536 So. 2d 263, 268 (Fla. Dist. Ct. App. 1988) (in determining whether probate court had jurisdiction over an inter vivos trust, court held that the probate court did have jurisdiction where the will and trust agreement "must be read together to give effect to [the] testamentary plan").

[72] *See In re* McKittrick Trust, 865 P.2d 1099 (Mont. 1993); Creek v. Union Nat'l Bank, 266 S.W.2d 737 (Mo. 1954); Scott on Trust § 333 (rescission of trusts); BOGERT, Trusts and Trustees § 44 (rev. 2d ed. 1984).

[73] UNIF. PROBATE CODE § 3-407.; UNIF. TRUST CODE § 406

[74] UNIF. PROBATE CODE § 2-601 et seq.; UNIF. TRUST CODE § 112

[75] Gellert v. Livingston, 5 N.J. 65, 71 (1950).

[76] UNIF. PROBATE CODE § 3-407.

[77] *In re* Kumstar, 66 N.Y.2d 691, 692 (1985) (internal citations omitted).

[78] *In re* Landsman, 319 N.J. Super. 252 (App. Div. 1999).

[79] UNIF. TRUST CODE § 601

[80] For a thorough discussion of mediation in estate matters, See Susan N.Gary, Mediation for Estate Planners: Managing Family Conflict (ABA RPTE 2017).

[81] UNIF. PROBATE CODE § 3-1101; *see* N.J. STAT. ANN. § 3B:23-9.

[82] UNIF. TRUST CODE § 111

[83] Treas. Reg. § 20.2055-2(d) (regarding charitable compromises).

[84] Comm'r v. Bosch, 387 U.S. 456 (1967).

[85] *See* Ahmanson Found. v. United States, 674 F.2d 761 (9th Cir. 1981); Beveridge v. Comm'r, 10 T.C. 915 (1948); Farrell v. Comm'r, 13 T.C.M. 239 (1954); Estate of Friedman v. Comm'r, 40 T.C. 714 (1963).

[86] UNIF. PROBATE CODE § 3-611.; UNIF. TRUST CODE § 706

[87] For example, state dead man's statutes limit or entirely preclude a person from testifying as to transactions with a decedent. *See, e.g.,* N.J. STAT. ANN. § 2A:812; N.Y. C.P.L.R. § 4519.