Planning for Probate Contests Pre and Post Death
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1. Use of trusts and gifts as will substitutes

   A. Advantages

      1. May be more difficult to undo an inter-vivos transfer after grantor's death than to delay or invalidate provisions in a will

      2. Can help beneficiary finance litigation should the gift be contested later (and as a result may result in more favorable settlement terms to beneficiary, especially if beneficiary is in a position to incur legal fees and estate is not)

      3. The rights of potential contestants may be different in setting aside an inter-vivos transfer as opposed to a Will.

         a. For example, there may not be a right to a jury trial in setting aside a revocable trust, but there would be one in contesting a Will.

         b. Need to be careful about the converse. For example, is an in terrorem clause valid in an inter-vivos trust under state law?

4. Depending on the facts and circumstances, it may add an additional level of litigation that will deter potential objectants.

5. Depending on the type of asset transferred and the terms of the transfer, there may be some advantages to the grantor, including tax savings, creditor protection and Medicaid eligibility

6. Potential for enjoyment to beneficiary sooner, especially if litigation were to take place after death

B. Disadvantages

1. Capacity to make a gift is higher than the capacity needed to make a Will (i.e. testamentary capacity)

   a. If item is “re-gifted” in a Will (i.e., a belt and suspenders approach), it may strengthen contentions of undue influence and lack of capacity

   b. If item is not “re-gifted”, there is the danger that the property will not ultimately pass to intended donee if the transfer is later set aside on any grounds

2. Cannot really give it all away during lifetime

3. Irrevocability

a. Items transferred by donor will be unavailable to donor if they should need asset later

b. Donor cannot undo gift if there is a falling out with the donee, or simply does not like what donee has done with property

2. Preparation of effective in terrorem clauses

A. Use when looking to disinherit someone who would have right to file objections to probate of last will:

1. Distributees

a. Current distributees

a. Potential distributees (i.e., issue of current distributees if current distributee should predecease and state law would have their issue become distributees in their place)

2. Persons named in prior instruments

B. How far can a contest go without triggering clause

1. Look to state law, not instrument

2. Depositions of attorney-draftsman, attesting witnesses and proponent of Will

3. Filing of objections – Can objections be made on certain grounds that will not trigger the clause?

C. Use of a bequest to strengthen clause

1. The point of the clause is to limit, if not eliminate, the interest of a person in the estate.

2. However, if person affected will forfeit nothing (or very little such as $100), the clause will likely not prevent a contest

3. Make more than a nominal bequest to potential objectant

a. How much to bequeath?

b. Bequest into trust for benefit of potential objectant

c. Bequest to issue of beneficiary – Should this be allowable under public policy concerns

Example – I leave $25,000 to A's children per stirpes. However, if A, or any of his children, object to the probate of this instrument, this bequest shall be null and void.

3. Destruction of previous testamentary documents and preparation of codicils versus completely new wills

A. Reasons to keep prior documents:

1. The existence of previous documents may discourage a contest where it can be shown that the estate plan was similar for many years with only minor changes made from document to document (i.e., that the objectant would need to successfully contest a several wills executed over an extended period of time to be ultimately successful)

2. If the last will cannot be located, but a prior one can, it will avoid intestacy (although the resulting dispositions under the prior Will may not be what the decedent would have wanted)

B. Reasons to destroy prior documents:

1. If a prior will is located that has significant differences, and the original is filed with the Court, it may give persons who would otherwise have no standing to object the right to do so

2. If there is a dramatic change in the estate plan, and it is believed that prior instruments would undermine the ability to probate the last Will, it may be advisable to destroy the prior documents

C. Preparation of codicils versus completely new wills - With word processors, it is extremely easy to make changes to prior wills and simply re-execute the entire will. However, there may be reasons why a codicil is preferable.

1. Does the proposed change alter the distribution of the estate or the potential parties to the probate proceeding (i.e. a person who would be a necessary party under the prior instrument would not be a necessary party under the revised estate plan)?
2. If it is desirable to keep the prior wills available, the attorney should keep in mind that there is a greater likelihood that the prior Will will be destroyed if a later Will is executed, as opposed to when a codicil is done, since the original underlying Will is still a necessary document
3. If there is a problem simply with the last change, it may be possible to admit the underlying Will and previous codicils to probate and only contest a very minor change made by the last codicil

4. Videotaping document execution - A properly done videotape of the execution ceremony can show the condition of the testator, as well

as allow the testator to state their reasons for taking the steps they have (such as explaining why a certain party was disinherited)

A. Testators, particularly the elderly or disabled, come off worse on video than in person

B. Many testators are nervous at the typical will execution ceremony; adding a videotaping component to the ceremony may increase this level of anxiety, lending potential credibility to a claim that the person had some level of diminished capacity

C. Given that the capacity to execute a Will is the lowest level of capacity in the law, and that there is a rebuttable presumption that a testator has this level of capacity, it is unwise to give any ammunition to a potential objectant on this point

D. What should the attorney supervising the execution do if the ceremony does not go as planned (for example, if the testator is asked why he is disinheriting his son and he says that he prefers not to go into it)?

    1. Should the videotaping continue?

    2. Under what circumstances can the videotape be destroyed?

5. Use of medical professionals

   A. If living client has questionable capacity:

      1. Ethical issues involved in referring to medical professionals

         a. Duty to zealously represent client

         b. If client has question of capacity, what steps should be taken to "protect" client?

      2. When to bring in a medical professional

         a. If attorney questions capacity and wants answer for self

         b. If attorney does not question capacity, but anticipates a potential contest and wants to "close the door" on issue

      3. How to select or recommend a medical professional

         a. Appropriate licensing

            i. Should be licensed by state

            ii. Psychologist, psychiatrist and other titles

         b. Appropriate specialty

            i. Elderly

            ii. Therapy versus testing

iii. Specificity (such as an expert in Alzheimer's) versus generality (an expert in dementia)

c. If possible, review whom local Court uses as its experts (this may help your professional's credibility in the eyes of the Court if they will need to later testify as an expert witness)

4. How to bring in a medical professional

a. Discussion with client

b. Discussion with client's family

B. Strategies and factors for contesting and defending capacity

C. The view from the psychologist's perspective

1. Pre-death versus post-death

2. Testing

6. Suggestions in Handling the Probate Contest

A. For objectant

1. Thoroughly review original Will

a. Terms of Will

1. Who are the beneficiaries of the Will and what was their relationship to the testator?

2. Who are the nominated fiduciaries under the Will and what was their relationship to the testator?
3. What does your potential client get (and what might they give up if they object)?
4. How old is Will?

b. Physical evidence
   1. Staples
      i. Was original Will stapled or ribboned?
      ii. If stapled, are there multiple staple holes in the Will?
   2. Are all pages same type of paper?
   3. Did testator and witnesses sign in same color ink?

c. Miscellaneous
   1. Is there a contemporaneous affidavit of attesting witnesses?
   2. Does the potential objectant know who the witnesses are, and if so, what their

relationship to the testator may have been?

3. Is it possible to determine whether the will was actually drafted by an attorney?

4. Is it possible to determine whether the will was executed under the supervision of an attorney?

2. Beginning discovery

a. Speak with attorney for petitioner

b. Speak with attorney-draftsman

1. Is there a relationship between the attorney-draftsman and:

i. the attorney for the petitioner?

ii. any persons named in Will (including the nominated fiduciary)?

2. How were instructions for drafting received (including who gave instructions)?

3. Where did meetings take place, and if at attorney's office, how did client get there?
4. Was anyone else was present when meeting with client?

c. Discovery regarding the decedent

1. Capacity

a. Medical records

i. General medical condition
ii. Any mental condition (i.e., psychiatric or psychological issues)
iii. Pharmacy (i.e., prescriptions)

b. Testimony of persons who knew decedent and may be able to speak as to their capacity

2. Undue influence

a. Items between decedent and beneficiaries (or nominated fiduciaries if appropriate)

i. Gifts and transfers

ii. Powers of attorney

iii. Actions taken on behalf of decedent either under power of attorney or some other method

iv. Any assets passing to beneficiary or fiduciary by operation of law (e.g., beneficiary designation or joint account)

d. Discovery regarding the drafting of the Will

1. Deposition of attorney-draftsman on topics discussed above

e. Discovery regarding the execution ceremony

1. Deposition of attorney who supervised the ceremony

2. Deposition of the attesting witnesses

3. Look to state law, but some topics to review are:

i. Did testator declare instrument to be Last Will and Testament?

ii. Did testator appear to understand nature of document?

iii. Did testator sign in front of the witnesses, or declare that it was their signature on the page?

iv. Did testator ask witnesses to sign as witnesses?

v. Did witnesses review the document, and if so, do they recall whether document is identical to one witnesses (especially if there are any interlineations, additions, etc.

vi. Did testator appear to have capacity, and if so, on what basis is witness making that determination?

B. For proponent

1. First, consider the advice given to the potential attorney for the objectant above
2. If you did not draft the Will, speak with the attorney who did
3. If you did not supervise the execution of the Will, speak with the attorney who did
4. Speak with the witnesses to the Will to determine what, if anything, they remember about the decedent and the execution ceremony