NEWSLETTER
Trusts and Estates

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Message from the Chair

Jennifer L. Schooley, Chair

On behalf of the Board of Governors of the Virginia State Bar Trust and Estates Section, I'm pleased to introduce the Fall 2019 edition of our Trusts and Estates Newsletter.

This issue includes three relevant articles. First, Richard Howard-Smith presents Part Two of his series, "Protecting an Estate Plan from Disruption." This article reviews possible solutions for testators who wish to provide more protection against revisions to their estate plans by beneficiaries who intend to disrupt their express intentions. In our second article, "Defending the Elderly and Disabled: The Importance of Advocate Counsel in Guardianship and Conservatorship Proceedings," Allison Zizzo reviews the complicated and distinctive role of advocate counsel for a respondent in guardianship and conservatorship proceedings. In our third article, "Assisted Reproduction and Virginia Trusts and Estates Practice: A Primer," Aejaz A. Dar provides a unique summary of Virginia laws regarding assisted reproduction which impact estate planning and administration and provides practitioners with an analytical tool to utilize when discussing assisted reproduction issues with clients.

I extend my gratitude to Vanessa Stillman, our Newsletter Editor, and Kevin Stemple, our Assistant Newsletter Editor, for their work in sourcing authors, editing, and producing this Fall edition of our section newsletter. We encourage anyone interested in contributing to upcoming newsletters to contact Vanessa or Kevin.

In addition to the newsletter, our Section assisted Virginia CLE in presenting the 38th Annual Trusts and Estates Seminar last month in Roanoke, Fairfax, and Williamsburg. Topics included a survey of federal tax and Virginia law developments, estate planning, drafting, and trust administration practices that limit exposure in the event of divorce, understanding fiduciary income tax from death to trust termination, tips to avoid becoming the subject of fiduciary litigation, and how to navigate the perfect storm involving the elderly client and the dysfunctional family. In addition to working with Virginia CLE, our Board of Governors is building a tool for the public on the Virginia State Bar website that will provide tips to executors and administrators navigating the probate process. Any section members interested in participating in this public service project should contact me to be included.

Our Board of Governors welcomes your suggestions for future Section activities, CLE topics, and newsletter topics. Please feel free to contact me or any other board member with your ideas.

Jennifer L. Schooley
Section Chair ⚜

TABLE OF CONTENTS

Protecting an Estate Plan from Disruption

By Richard Howard-Smith, Esq.

Introduction

Part One of this article focused on some relatively common ways that some disgruntled beneficiaries have used to alter estate plans of their benefactors. The legal means discussed in Part One (and others that are not) that have many beneficial uses to correct errors and make desirable adjustments to estate plans as external factors change over time and obsolete designs also have certain disadvantages for those testators[1] who are more desirous or even insistent that their schemes be honored and followed for posterity. There is an obvious tension here that the law tries hard to address, but as with any tension, there are balances that are not always equitably achievable. This Part Two will review some ideas for those testators who wish to provide more protection against subsequent revisions of their plans by beneficiaries who might not appreciate the designs or restrictions provided for them using the rules and tools discussed in Part One which can be used to disrupt the express intentions of a testator's documents and plans.

Wills and Powers of Attorney

Because a will contest is the most common way to challenge and defeat a testator's wishes, the best way to prevent them is to avoid the legal grounds for them. Proof of fraud, duress, mistake and lack of testamentary capacity, and failure to comply with required legal formalities can defeat a will, so taking steps to eliminate, minimize or prepare a defense to them will go far to protect the will and estate plan. This is normally addressed well by competent and diligent estate planning attorneys, but the recent trends toward commoditization of estate planning and more "do it yourself" planning by testators (such as online and other consumer-based planning) has a significantly higher chance of challenge and failure. Even the lack of the attorney as a potential witness to the facts of the preparation and execution of a will is missing in such cases, one significant factor not likely to be thought of by such consumer testators and not mentioned by non-attorney services.

Competent planning involves a skilled attorney discussing a testator's wishes, drafting them, and taking steps to be able to overcome possible challenges. Documenting these actions and providing appropriate memorialization commensurate with the risks and potential challenges is responsible planning. Some estate plans are not likely to be challenged, such as those where the testator is clearly competent and uninfluenced, all beneficiaries' interests are equal, and all estate property is fungible (or likely to be converted without objection). In such cases there is usually nothing material that a challenge would accomplish. Others at the other end of the spectrum are those plans with a significantly higher chance of challenge, such as those of elderly and infirm testators, those benefitting non-family members or unequally favoring beneficiaries of similar status, and those estates with unusual or coveted assets.

One example of testators failing to build in protections against will contests that is not new (and still possible in Virginia and a few other states) is the holographic will. The quintessential "do it yourself" planning, such handwritten documents are rarely complete, sometimes have glaring omissions, often contain ambiguous dispositions, and of course by definition lack most of the "formalities" safeguards of attorney-drafted and execution supervised wills. Except in the most time-critical of circumstances (usually because of total lack of advance planning), or the most skin flinted testators, it is hard to conceive of why anyone would try to achieve their testamentary wishes in this manner.

Those testators who are serious about their goals and do expect to die (perhaps with some uncertainty as to when) should take the time and spare the expense of proper planning, which of course includes dedication to maintenance and perhaps readjustments. Attorneys can also only do so much; planning on the eve of major surgery is not as uncommon as one might think in the author's experience, and by

procrastinating, the testator has themselves inserted the element of duress into their planning, increased the odds for mistakes, and time-compromised the attorney's ability to properly work to protect against challenges. For these reasons, the author will not undertake such estate planning absent countervailing considerations, such as serving an existing and well-known testator and family with relatively normal dispositive patterns and lack of favoritism. The non-existence of these factors should not lightly be ignored or dismissed by competent estate planners; sometimes it is just too late and the attendant risks to the planner not worth it.

Other steps can be taken to help prevent or deter challenge. While many states do not recognize *in terrorem* clauses, Virginia does. However, in many cases, they may provide more bark than bite, and can even invite challenge. For instance, if a will intentionally omits a person who would otherwise expect to be a beneficiary and such omitted person believes there is a basis for challenge, they have little to lose in mounting a challenge because the only way they receive anything is by making a challenge. For this reason, clever testators (and their advisors) try to create ways to add sufficient interests to dissuade such beneficiaries by giving them reasons to think before challenge. Some of these efforts include providing a significant enough interest that is not worth the risk of forfeiture; providing for gifts over to others to increase the odds of a bad result in the eyes of the potential challenger (such as an unattractive beneficiary or a charity that might be favorably protected by a court or at least the attorney general), and efforts to assign costs of litigation or even alternative forums for contest, such as arbitration.

The recent predominant use of revocable trusts that are often amended have their own unique challenge protection needs. Because amendments to revocable trusts are amended at least as frequently as wills, often they are completely restated. Despite the usual lack of need to retain prior versions for interpretation, saving them to demonstrate the retained ability to amend the trust is advisable, despite the UTC default rule (reversing the common law) that unless a trust states that it is irrevocable, it is deemed revocable. The UTC default rule on capacity to create or amend a trust requires the same capacity as for a making or modifying a will.

One area where the author has some reservations with most commentary on the subject is in the area of advance communication of the estate plan to beneficiaries. Perhaps obviously and mostly unhelpfully, in those cases where the risk of challenge is minimal, there is also little if any downside to disclosure. However, in those cases where challenge risk is greater, the advance disclosure is not likely to help salve the disappointments of those most affected, and may even damage the lifetime relationships of the testator and family. In such cases, one should question the efficacy of advance disclosure, and take additional steps to document the rationale involved in the estate plan, and prepare for explanation at the appropriate time. The more effort and detail a testator provides to explain her intent and wishes, the more likely it is that they will be respected. To the extent such statements are best not written in the actual testamentary documents, having "side" letters and memoranda offering contemporaneous explanations are often advisable. Such written apocrypha can be used to help support intended and desired interpretations of a will, and also to defend against will construction actions or other challenges to the will or particular dispositions.

Just preparing a will is not enough, taking steps to protect the will and other documents from loss or destruction is just as important. A very few states have pre-probate will validation procedures for judicial determination, but it is not widespread. Virginia has for a long time permitted a will to be lodged (stored) with the clerk of court during a testator's lifetime, but there is no evaluation of the will or any requisites of validity.[2] Other protections can be added by consistency of actions, using a competent estate planning attorney and other planning advisors (and using the same advisors over time) to provide a file chain of notes and documents, and also witnesses to the testator's intentions and actions.

Because a considerable amount of lifetime abuse of testators and their assets has occurred by those having powers of attorney, it is reasonable to invest more effort in preventing their misuse. The best protection is to choose a trustworthy agent; obviously most don't intend to choose an untrustworthy one.

The next best and workable protection is to require reporting by the agent to others so that their actions are transparent; reporting can be to other agents, likely beneficiaries, the testator's attorney or accountant, or to the Commissioner of Accounts. Providing for such reporting on demand and with automatic remedies for failure can also reduce the need for costly statutory POA demands and litigation. Arbitration provisions can also be added for quicker and more private review of POA actions.

Disclaimers

Generally, disclaimers provide beneficiaries a tool to divert assets away from themselves when they may not want assets, or wish to share them with other persons - sometimes contingent beneficiaries, but also sometimes others that might not be anticipated by a testator. The latter is particularly true in those cases where there is cooperation among a group of such persons, such as discussed in Part One of this article. As discussed there, in unique and extreme cases, the thoughtful use of multiple disclaimers might be employed to benefit the very person(s) that the testator did not want to transfer assets to.

The right to disclaim or renounce all or part of an inheritance is generally always available under statute or case law; you cannot force someone to accept a gift. Normally, testators (and also often their advisors) do not consider the possibility that an intended beneficiary might not want a portion of their inheritance, or the ways that they might divert it, because it defies common sense and the norm of wealth accretion. In many cases, the possibility that beneficiaries might disclaim is either not likely, or even if it is, the disclaimer results are inconsequential to the testators plans. For instance, if a child does not want a gift and disclaims it so that it passes to their own children, the testators grandchildren, most testators would not care. However, where the testator's plans are more unusual or specific, the possibility that disclaimers might disrupt those detailed plans significantly increases.

Planning to prevent the use of disclaimers is certainly possible, and in those cases where the testators wishes are intended to be discriminatory or restrictive, should be considered. The starting point is to review the intended plan once it is near final (particularly the specific documents involved) to think through the effects that the disclaimer of each specific person would have, separately and then perhaps cooperatively if implicated. If the risk of disclaimer or the possible disclaimer results are acceptable, nothing further need be done.

However, if there is potential beneficiary dissatisfaction with the dispositive scheme and the possible disclaimer results are unacceptable, the testator has more work to do. The plan details could be modified to eliminate or minimize the risk of disclaimer and/or create more acceptable results if done. Another simple but very effective way to address both the risk and unacceptable results of a disclaimer is to provide specifically for an alternative disposition. Here a charity might serve as a good alternate beneficiary, because protection of the charitable disposition might provide an even stronger case for challenge defense on public policy grounds, and could implicate the attorney general to protect the charity in some states. This drafting possibility could be as simple as "if any beneficiary should disclaim an interest under this will/trust, such interest shall pass to XYZ charity, and not as if such beneficiary predeceased the testator."

Trust Modification and Termination

The widespread adoption of the Uniform Trust Code ("UTC")[3] has afforded beneficiaries new statutory tools to modify trusts in ways that perhaps the trust settlor (here "testator" for simplicity) did not anticipate. These tools are both judicial non-judicial in scope, though non-judicial methods can be confirmed and challenged in court. State UTC laws vary in some respects as to the scope of permitted changes and participants required. The two main methods of trust modification under the UTC are judicial modifications and "non-judicial settlement agreements" ("NJSA"). Amplifying the reach of the UTC by easier procedural use is its concept of "adequate representation," which allows for more primary beneficiaries to act in the stead of their descendants or other alternate takers whose interests are substantially similar and no conflict of interest exists.

Other than the intervention of a court and its application of legal and equitable principles to a

trust and the relationships of its trustees and beneficiaries, the most significant limitation on the ability to modify a trust is the UTC's clarification that generally speaking, the "material purposes" of a trust should not be modified absent a compelling need. Some of these needs are codified, such as to achieve the testator's tax objectives, correct mistakes, and address unanticipated circumstances. Here also states differ in their UTC enactments on the powers of the courts and trust participants to modify trusts in manners that are inconsistent with the trust's material purposes. Absent a living settlor's consent (i.e., in an irrevocable *inter vivos* trust) Virginia permits judicial modification of a trust where all of the beneficiaries consent (or the court finds that the interests of non-consenting beneficiaries will be adequately protected[4]) and the proposed modification is not inconsistent with a material purpose of the trust.[5] Similarly, even though the parties to a NJSA can agree to modify any trust provisions that a court could modify, those modifications cannot violate a "material purpose" of the trust.[6]

While a testator cannot remove or deny the court's authority over a trust subject to its jurisdiction, the restrictive testator is not totally without the ability to limit such modifications. The simple way to do this is to specify the material purposes of the trust in as much detail as possible, with a view to potential modifications that could be sought by aggrieved beneficiaries. The more the testator expresses her wishes concerning her goals for the trust, the more likely they are to be respected by courts and seen as non-modifiable limitations by beneficiaries. In extreme or contentious cases, explicit material purposes would be the cornerstone of a challenge to attempted trust modification. There really is no reason this type of custom drafting cannot be done in every instance, the only barriers are really just the time and cost to do so, which modern commoditization of estate planning documents discourages.

The testator could also add language to the trust to restrict the governing law applicable to the trust to a state that has more restrictive laws and courts that the testator felt would be more inclined to follow her wishes. This step could be combined with drafting language to prevent the trust fiduciaries from changing such governing law even if the place of administering the trust changes in the future due to changing trustees and/or moving of new beneficiaries.

Fiduciary Discretion

Though not typically used for major alterations of a testator's estate plan, fiduciary discretion granted by the donative instrument and by statutes can sometimes be used to shift assets among beneficiaries. Here again, the most effective limitations that a restrictive testator can add to her estate planning documents is more guidance on how discretions are to be exercised by the fiduciaries. More clarity not only helps direct actions, it also provides boundaries, which in some cases could strengthen the basis for challenge by aggrieved beneficiaries over what it might otherwise be.

Trust Decanting

Decanting is yet another method of altering a trust. Available in most but not all states, a trustee's authority to decant can arise under a state's common law[7] or its own trust statutes (sometimes included in its version of the UTC enacted in that state). The transfer of assets by decanting from a trust can be made to another existing trust or a new trust, either with somewhat similar dispositive terms (need not be all that alike in some cases), beneficiaries (though sometimes new beneficiaries are permitted via the provision for a power of appointment in the new trust), and often significantly different administrative terms. Because the authority to decant is based upon the trustee's authority and discretion to distribute assets to beneficiaries,[8] trust decanting is also relatively easy to limit or prohibit. Drafting desired limitations on a trustee's authority should work fine. If the state has enacted statutory decanting, such statutes typically expressly allow for the denial of authority to decant.[9]

Added as a subpart to Virginia's UTC, Virginia has adopted the Uniform Trust Decanting Act ("UTDA").[10] It specifically limits decanting to certain specified situations, and permits additional optional restrictions or prohibitions on decanting.[11] However, such limitations or prohibitions must be specific to decanting (many older trusts will not be for obvious reasons):

C. A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.[12]

For obvious reasons, any restrictions or prohibitions on decanting in a trust must be preserved in the decanted trust.[13]

Conclusion

The ability of beneficiaries to alter estate plans of testators has never been greater, and though there are many positive aspects of potential modifications to old, incomplete or defective plans that enhance the creators goals and intentions, testators may not always desire that their plans might be so easily changed. When plans are specific, restrictive or otherwise uniquely important to a testator's goals, there are steps that can be taken to improve the odds of respect and enforcement. Estate planners have always needed be prognosticators to do their job well, and that need has never been greater. Designing the ways an estate plan can work well is hard enough; protecting that design and plan by engaging even greater foresight, anticipation and careful thought expressed in custom planning and drafting is yet another set of skills and expertise the estate planner can provide the concerned and motivated testator. ⚜

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(Endnotes)

1. "Testator" is used in this article in the broad sense of anyone planning and intending to make a transfer of an asset as a part of an estate plan, whether by will, gift or a transfer in trust. Similarly, "Will" means dispositive instruments, including Trusts.

2. Va. Code § 64.2-409.

3. Enacted in Virginia as Article 7 of Title 64.2.

4. Va. Code § 64.2-729.D.2.

5. Va. Code § 64.2-729.B.

6. Va. Code § 64.2-709.

7. At least a handful of states have judicial decisions permitting decanting, including Florida, Massachusetts, New Jersey and Iowa.

8. Virginia (and the Uniform Trust Decanting Act) permits decanting where a trustee has discretion to make income or principal distributions.

9. *e.g.*, 12 Del. C. § 3528(a), which permits decanting unless the trust instrument otherwise provides.

10. Va. Code § 64.2-779.1 *et seq*.

11. Va. Code § 64.2-779.12.A.

12. Va. Code § 64.2-779.12.C.

13. Va. Code § 64.2-779.12.E. ⚜