PLANNING IN A FOREST OF RED FLAGS:

WHAT TO DO WHEN YOU EXPECT LITIGATION OVER YOUR CLIENT'S ESTATE PLANNING DOCUMENTS?

ACTEC 2018 ANNUAL MEETING SAN ANTONIO, TEXAS

The First Line of Defense: Scrivener as Potential Witness

Chilling Dissent: In Terrorem Clauses

Keeping Beneficiaries at Bay: Settlor Designated Surrogate Beneficiary Representatives

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Beating Them to the Punch: Antemortem Probate

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1.0 FIRST LINE OF DEFENSE: SCRIVENER AS POTENTIAL WITNESS

> These steps were taken to assist in preserving the will: All discussions with the testatrix were had in the absence of the favored beneficiary, the son. After the initial conference with the testatrix, she was requested to write me a letter in her own handwriting, setting forth in detail the disposition she wished to make of her estate and the reasons that motivated her desire to provide more favorably for her son than for her daughters. Upon receipt of this letter, a draft of the will was prepared and forwarded to her under a covering letter in which she was required to give close and careful consideration to the inequality of the disposition as between her children and the reasons supporting such action. She was requested again to transmit her final decision in her own handwriting. This was done, and thereupon the will was placed in final form. Four persons were then selected in whose presence this will was to be reviewed, explained, discussed and executed. Two of those were to be used as attesting witnesses in keeping with the legal requirements of the laws of our state. The other two were not to sign as attesting witnesses and would be used only in the event of a contest. These four persons were carefully selected as to age and other qualifications as witnesses. Upon completion of the execution, each witness recorded the discussions that took place, and particularly the statements of the testatrix, for future reference in the event of a contest. When the testatrix died, the daughters were disappointed - one was embittered, and there was talk of a contest. She employed a reliable attorney, and in the course of his investigation, there was revealed to him a part of the somewhat elaborate steps that had been taken to discourage the filing of a contest. The daughter's attorney advised against a contest, and the will was probated. – Leon Jaworski[1]

1.1 Evidentiary Issues as to the Scrivener's Notes/Testimony

1.1.1 The Attorney-Client Privilege – Background.

As a general rule, the attorney client privilege survives the client's death.[2] The U.S. Supreme Court upheld the posthumous application of the common law attorney-client privilege against the argument that the privilege should not prevent disclosure of confidential communications where the client has died and the information is relevant to a criminal proceeding:

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[1] Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 92 (1958).

[2] *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998) (deciding that an interview of Deputy White House Counsel Vincent W. Foster, Jr. with his lawyer shortly before Mr. Foster's death was privileged).

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanished altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.[3]

A well-recognized exception to the general rule is the "testamentary exception" which permits disclosures from the drafting attorney in disputes among the client's heirs.[4] The attorney-client privilege, of course, belongs to the client, not the attorney. As such, the client may waive the privilege. The testamentary exception is seen as an implicit waiver by the client of the privilege in contests among heirs or other takers under a testamentary instrument:

> [W]e are of opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin.
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> * * *
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> The client may waive the protection of the rule. The waiver may be expressed or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its objects, and in direct conflict with the reason upon which it is founded.[5]

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[3] *Id.* at 407.

[4] *Id. See also Zook v. Pesce*, 91 A.3d 1114 (Md. 2014).

[5] *Glover v. Patten*, 165 U.S. 394, 406-8 (1897) (quoting, in part, from *Blackburn v. Crawfords*, 70 U.S. 175 (1865)).

The attorney-client privilege, which normally protects the client's interests, is "impliedly waived in order to fulfill the client's testamentary intent."[6]

1.1.2 The Dead Man's Statute

About one-third of U.S. jurisdictions continue to retain, in some form, the dead man's statute. It is an early common law rule that precludes an individual who survived a decedent from testifying about a transaction with that decedent.[7] It disqualifies an interested party – one with a stake in the outcome – from testifying because the decedent would not be able to rebut or contradict the testimony from that interested party.[8]

The drafting attorney would be unlikely to be disqualified from testifying due to the dead man's statute because he/she would not have a direct interest in the outcome of the litigation involving heirs or other takers under a testamentary instrument.[9]

1.1.3 Hearsay[10]

1.1.3.1 The History of the State of Mind/Intent Exception to the Hearsay Rule

Most jurisdictions have adopted Federal Rule of Evidence 803(3), or a version of it, which sets out an exception to the hearsay rule to permit declarations of intention. In its current form, Federal Rule of Evidence 803(3) excepts from the general prohibition against hearsay

> statement[s] of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition

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[6] *Swidler & Berlin v. U.S.*, 524 U.S. at 405. (disclosure "helps the court carry out the decedent's estate plan"). *See also* Edward J. Imwinkelfied, *The New Wigmore, a Treatise on Evidence: Evidentiary Privileges* § 6.13.2(b) (Richard D. Friedman ed., 2d ed. 2010).

[7] *See* Fred Franke and Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1, 21-23 (2014).

[8] *Id. See also* Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Creditability: The Next Step in an Historic Trend*, 47 ALA. L. REV. 145, 145 (1995) (following the repeal of the dead man's statute, the trier of fact then would be permitted to weigh the credibility of the witness).

[9] This is even the case when such testimony touches on a malpractice claim. *See, e.g., Michalski v. Chicago Title & Trust Co.,* 365 N.E.2d 654, 657 (Ill. App. Ct. 1977); *Estate of Hurst v. Hurst*, 769 N.E.2d 55, 63 (Ill. App. Ct. 2002) (permitting the attorney to testify where a related malpractice case was pending, noting that to be disqualified from testifying, "[t]he interest of the witness must be direct and be such that a pecuniary gain or loss will inure to the witness directly as the immediate result of the judgment"); *Ball v. Kotter*, No. 08-CV-1613, 2012 WL 987223 (N.D. Ill. March 22, 2012) *aff'd*, 723 F.3d 813 (7th Cir. 2013).

[10] The following is lifted largely from the author's article: Fred Franke and Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1, 25-28 (2014).

> (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.[11]

This is a true exception: it permits a third party to testify as to what the declarant said about his or her plan or intention, including in the case of testamentary documents, a memory or belief about what the declarant intended by a then-existing document.

Federal Rule of Evidence 803(3) is informed by two early United States Supreme Court cases, neither relating to wills or trusts.[12] Those cases, however, explain why Rule 803(3) has its tortured syntax ("but not including . . . unless it relates to"). The first case, *Mutual Life Insurance Co. of New York v. Hillmon*, established a broad exception to permit hearsay as to statements made by a decedent as to something that person planned to do in the future to prove, or tend to prove, that the person did exactly what he or she said that he or she would do.[13] *Hillmon* was an insurance fraud case where a woman claimed her husband died in a certain remote location thereby entitling her to the death benefits from several policies. The insurance company acknowledged that someone had, in fact, died in that remote location, but that it was not Mr. Hillmon but a Mr. Walter. As evidence, the insurance company wanted to introduce letters from Mr. Walter saying he planned to go to that remote location.[14] The evidence was held admissible to demonstrate that Mr. Walter probably went to the remote location[15] – a very broad exception to the hearsay rule.[16] The second case, *Shepard v. United States*, involved a murder trial where the defendant, Dr. Shepard, was charged with poisoning his wife.[17] The evidence sought to be used was the testimony of the deceased wife who said that she had some liquor from a bottle immediately before she became ill

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[11] FED. R. EVID. 803(3). Rule 803(3) was rewritten in 2011 from the original 1975 version for stylistic, not substantive, reasons. *See* Symposium, *The Restyled Rules of Federal Evidence*, 53 WM. & MARY L. REV. 1435, 1440, 1462 (2012). In its original form the exception covered "statement[s] of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." *See* An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926, 1939 (1975).

[12] While text of FED. RULE OF EVID. 803(3) states that it only applies to wills, it would be a logical extension to apply it to trusts. *See Upman v. Clark*, 753 A. 2d. 4, 10-11 (Md. 2000)(holding that a revocable trust was akin to a testamentary transfer under a will).

[13] *See Mutual Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 296, 299–300 (1892).

[14] *See id.* at 285–87.

[15] *See id.* at 299–300.

[16] In some instances, the proponent wants to introduce forward-looking hearsay to prove someone other than the declarant did something. This raises thorny due process issues. *See* Lynn McLain, *"I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker – and the Role of the Due Process Clause*, 32 CARDOZO L. REV. 373, 379, 383 (2010).

[17] *Shepard v. United States*, 290 U.S. 96, 97 (1933).

that tasted odd, and further, that "Dr. Shepard has poisoned me."[18] The court held the statement to be inadmissible: "Declarations, of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if this distinction were ignored."[19]

The *Hillmon* situation involved a forward-looking statement of intent: Mr. Walter said he was going somewhere, so he probably went there after making the statement. Rule 803(3) carves out these forward-looking statements of intent as a general hearsay rule exception, not just an exception because the statements relate to a testamentary instrument. This exception, of course, applies equally to showing testator or settlor intent.[20]

Rule 803(3) appears to permit, however, backward-looking declarations of intent if these declarations relate to the terms of the declarant's will. This is at variance to the Shepard-type prohibition which may well disallow the hearsay exception as to a testator's statements. Backward-looking statements related to the declarant's will were carved out based on expediency:

> The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of the declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic.[21]

1.1.3.2 Modern Application of the Hearsay Rule

A Maryland case illustrates the backward-looking element of 803(3) and how statements by a testatrix after execution of a will may be admissible to show how she meant the will to be interpreted. *National Society of Daughters of American Revolution v. Goodman* involved whether a restricted gift to the Daughters of the American Revolution (D.A.R.) for the purpose of funding its nursing home facility lapsed because the D.A.R., in fact, did not maintain a nursing home.[22] The decedent had prepared a will leaving part of her estate to Gallaudet University and part of her estate to the D.A.R. for the nursing home. After execution, the attorney contacted the D.A.R. to discuss the gift and learned that the D.A.R. did not maintain a nursing home. He thereupon contacted his client who said that she did not intend any gift to go to the D.A.R. in that situation but all to Gallaudet University. The attorney prepared a new will, but his client died before she

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[18] *Id.* at 98.

[19] *Id.* at 105-06. (Nor did the statements qualify as a dying declaration under the facts of the case. *Id.* at 99-102.)

[20] *See In re Sayewich's Estate*, 413 A.2d 581 (N.H. 1980); *Engle v. Siegel,* 377 A.2d 892 (N.J. 1977). Both cases permitted the scriveners to testify as to what the testators wished to accomplish in their wills as long as the testimony did not contradict the terms of the wills.

[21] FED. R. EVID. 803(3) cmt. (2014).

[22] *See Nat'l Soc'y of Daughters of Am. Revolution v. Goodman*, 736 A.2d 1205, 1209–10 (Md. App. 1999).

was able to execute the new will.[23] Nevertheless, the testimony was permitted as a backward-looking declaration of what she intended by her original will.[24]

Another Maryland case followed suit. In *YIVO Institute for Jewish Research v. Zalenski*, the decedent left a bequest in his will to a charity and then he later made a gift to the same institution.[25] The issue was whether the subsequent gift adeemed the bequest in the will. The testimony sought to be excluded was that of a friend who said that the decedent declared years after making the subsequent charitable gift, that he did not need to change his will because the charitable institution would understand that the gift that he had made was adeeming the bequest in the will. Such testimony was admitted.[26]

South Carolina, on the other hand, takes the opposite view, holding that a later statement related to funding a bequest was not admissible because it did not show the testatrix's intent when she executed her will. In *In Estate of Gill v. Clemson University Foundation*, the testatrix left a $100,000 bequest to the Clemson University Foundation to fund a scholarship for "academically deserving football players."[27] Later, she designated the scholarship fund as the payee of a $100,000 IRA. Clemson saw this as two $100,000 gifts, whereas the estate contended the IRA designation was how the testatrix funded her one bequest to the school.[28] The court excluded testimony of what the testatrix told her advisors when setting up the IRA designation because it was "not made at the time of the Will to show her belief at that time" and therefore violated Rule 803(3).[29]

1.2 The Lawyer as Probable Witness

The drafting lawyer is often a key, perhaps the key, witness in most post-mortem will or trust litigation:

> Lawyers figure prominently in claims of undue influence. They sometimes serve to rebut claims of undue influence by providing the testator with independent advice. For example, in rejecting a claim of undue influence one court observed that the lawyer "took careful steps to ensure that the drafted document reflected only [the testator's] desires." Sometimes, however, lawyers play a negative role. In setting aside a deed, another court noted that the donee took the donor to the donee's own attorney "and sat in with [the donor]

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[23] *Id.* at 1207–08.
[24] *Id.* at 1209–10.
[25] *See YIVO Inst. for Jewish Research v. Zalenski*, 874 A.2d 411, 414–15 (Md. 2005).
[26] *Id.* at 422–23.
[27] *See In Estate of Gill v. Clemson Univ. Foundation*, 725 S.E.2d 516, 519 (S.C. Ct. App. 2012).
[28] *See id.*
[29] *Id.* at 521.

> while he spoke with the attorney. This afforded [the donee] a unique opportunity to influence the disposition.[30]

Lawyers should not, of course, prepare estate planning documents for clients who lack testamentary capacity:

> If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client whom the lawyer reasonably believes to lack the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist client's whose testamentary capacity appears to be borderline. In such a case, the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.[31]

Although cognitive impairment may increase the susceptibility to undue influence, it is not the same as a lack of competency: "[R]emember that it is a *competent* testator or donor who is subject to undue influence; it is not a form of *lack of capacity*, but rather the substitution or imposition of one person's desires for those of the testator's or donor's."[32] It has been suggested that the lawyer has an ethical duty to determine whether a client is free from undue influence before proceeding to draft a document:

> What obligation, if any, does the lawyer have to ascertain her client's capacity before agreeing to draft a will or trust? What is the lawyer's duty to ascertain whether the client is acting of her own volition and free from any undue influence? Consider the following statement from the ethics opinion of the San Diego Bar Association: "A lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence."[33]

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[30] William M. McGovern, Jr., *Undue Influence and Professional Responsibility*, 28 REAL PROP. PROB. & TR. J. 643, 644–5 (1994).

[31] ACTEC Commentaries MRPC 1.14: Client with Diminished Capacity at Page 162 (5th ed. 2016).

[32] Deborah J. Tedford, *The Client with Marginal Capacity*, ACTEC Summer Meeting, Atlanta Georgia (June 2011) at (V)(F).

[33] Adam F. Streisand, 3 EST. PLAN. & COMMUNITY PROP. L.J. 241, 294 (Spring 2011) (citing an Diego Bar Ass'n, Ethics Op. 1990-3 (1990). The caselaw does not necessarily follow. In *Moore v. Anderson Zeigler Disharoon Gallagher & Gray*, 109 Cal. App. 4th 1287 (2003) (holding that the testator's lawyer had no duty to the client's children to ascertain and document the testamentary capacity of a client.) In jurisdictions following a strict privity rule instead of a third-party beneficiary standard, that would not ever be an issue. *See Noble v. Bruce*, 709 A.2d 1264 (Md. 1998).

Given that the drafting attorney will most probably be a witness in any challenge to an estate plan document and that the examination of that attorney will focus on the issue of capacity and the issue of undue influence, the attorney should (1) be able to reasonably determine capacity and (2) be alert to possible undue influence. In situations where capacity or susceptibility to undue influence is an issue, the drafting attorney ought to consider having the client examined by a geriatric psychiatrist or, at least, the client's regular physician to memorialize the client's cognitive abilities at the time of the planning. Obviously, if there is no capacity or there is undue influence, the attorney should not proceed with the planning.[34]

1.3 Warning Flags and Best Practices

1.3.1 Conditions Giving Rise to Concern

Obviously, there are conditions that ought to heighten the drafting attorney's awareness of potential post mortem contest. Some of these warnings are as follows:[35]

- Skipping over close family members for non-family beneficiaries or distant family beneficiaries.
- Skewing the amount of, or putting restrictions on, gifts to similarly situated beneficiaries.
- Significant changes late–in–life to long-established estate plans.
- Unusual, or at least not generally accepted, beliefs motivating the bequest.
- Unusual, peculiar, or out-of-character behavior by the testator.
- Disabled and/or dependent testators.
- Testators reclusive or generally withdrawn from other people.

1.3.2 Best Practices as Heightened Awareness, not Special Procedures

There are two problems the drafting attorney will encounter if he or she adopts a methodology entirely tailored to a perceived potential threat: (i) not all litigation can be foreseen, and (ii) it leads to a potentially damaging cross examination focused on the fact that the drafting

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[34] MRPC 1.14 does not exactly say *what* the attorney should do if he or she suspects undue influence. The rule, however, does suggest that the privilege does not preclude the attorney from taking reasonable steps to protect the client which would necessarily involve a breach of confidentiality.

[35] This list is derived, in part, from two articles by Gerry W. Beyer, *Drafting in Contemplation of Will Contest,* 38 No. 1 PRAC. LAW. 61 (1992) and *Will Contests – Prediction and Prevention*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 1 (2011).

attorney knew that the alleged problem existed and was concerned with it. ("How many wills have you ever drafted?"; "In how many did you use these protection steps?").

The better approach is to use the same basic approach on all engagements but perhaps use more care, and detailed documentation, in situations where there are warning flags.

A war story example: Our practice is to dictate notes at the initial client meeting in front of the client. This serves several purposes: (i) It demonstrates to the client that you were actually listening, (ii) it permits the client to chime in with additions or corrections, and (iii) it lends itself to more complete and detailed notes of client meetings. Some years ago a new client came in quite ill and wished changes to how she was leaving the bulk of her property – skipping over her sister to make the residuary bequest to a beloved cousin. The initial meeting was on a Monday, her will was prepared and signed by Friday of the same week before a scheduled exploratory surgery. She died on Saturday in surgery. These notes, as with all client file notes, were transcribed in a standard format. A year or so later at deposition the contesting attorney apparently did not believe that the notes were prepared as part of a standard practice and he followed my deposition with that of my secretary to verify that this was indeed not a special note taking technique employed for just one client.

1.4 Testamentary Capacity

The drafting attorney should establish in his or her initial meeting with the prospective client that the client has the requisite testamentary capacity, as defined by state law. A few jurisdictions set out a statutory definition. California, for example, generally states that any individual 18 years of age or older "who is of sound mind may make a will," then further carves out those who are not deemed competent to do so:

> (a) an individual who is not mentally competent to make a will if at the time of the making of the will either of the following is true:
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> (1) the individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individuals relations to living descendants, spouse, and parents, and those whose interests are affected by the will.
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> (2) the individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individuals devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.[36]

Similarly, the Restatement (Third) of Property states:

[36] CALIFORNIA PROBATE CODE § 6100.5.

> [T]he testator … must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of the property and must also be capable of relating these elements to one another and forming an orderly desire regarding disposition of the property.[37]

These definitions are similar to the common law articulations:

> Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of his or her bounty, the general composition of the estate, and what he or she wants done with it, even if memory is impaired by age or disease, and the testator need not have the ability to conduct business affairs.[38]

Although these definitions are similar, they are not exactly the same. California by statute specifically defines the natural objects of one's bounty as certain family members or, perhaps, any other person named in the testamentary instrument. The natural objects of a testator's bounty include, but are not the same as, heirs at law. Nevertheless, the immediate family circle enjoys an inherent societal bias in favor of inheriting. Thus, if bequests are going to those not in the immediate family or not equally to members of the immediate family in each class, the drafting lawyer needs to document why the bequest is "natural." The drafting attorney must describe why the gift is being made and how it relates to the testator's comprehension of his relations.

1.5 Information Regarding Capacity

The requirement that a testator must know generally the nature of his or her assets is also critical. The standard practice seems to be to send prospective clients questionnaires and other forms in order to have documents for the initial meeting describing the nature and circumstances of his or her various assets. It is important that the drafting attorney not simply use these filled in forms to establish that the prospective client understands the nature of his or her assets. Someone else may have filled in the form. Best practice would be not to consult a form but to generally discuss assets with the client while making notes based on those discussions rather than focusing on the form. The form should be used to more finally describe the assets but it is not effective evidence as to the client's understanding of the extent of his or her assets.

The other prong of capacity is that the prospective client knows what he or she wants the testamentary document to accomplish. Again, the drafting attorney needs to memorialize what dispositional plan the client has in mind (and why). This is quite different than memorializing the tax mechanisms being employed which usually originates with the lawyer not the client.

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[37] RESTATEMENT (THIRD) OF PROPERTY: Wills and Other Donative Transfers § 8.1(b) (2003).
[38] *Estate of Reichel*, 400 A.2d 1268, 1270 (Pa. 1979).

At a minimum, the drafting lawyer should document these elements of testamentary capacity of his or her client, regardless of whether a will or trust contest is apparently in the offing.

Testamentary capacity generally means that "the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property."[39] By statute, many jurisdictions do not attempt to define capacity but simply rely on the common law.[40] Other jurisdictions by statute flesh out the common law definition.[41]

Undue influence, of course, is generally pled in will or trust contest along with capacity issues. Of course, diminished capacity can create an opportunity for undue influence. Ideally, therefore, the drafting attorney should meet with the client separate from others to ask questions, and record the client's answers to those questions, related to the essential elements of client testamentary capacity.

While the elements of undue influence are factually specific case by case, most jurisdictions look for certain common elements: "1) a confidential relationship existed between the testator and the person allegedly exercising the influence; 2) the confidant played some role, however indirect, in the formulation, preparation or execution of the will; 3) the testator was susceptible to undue influence; and 4) the testator made a testamentary gift to the confidant which was unnatural." [42]

Of the various factors, the existence of a confidential relationship is seen as "the linchpin of the undue influence inquiry."[43] The Restatement (Third) of Property states that the term "'confidential relationship' embraces three sometimes distinct relationships – fiduciary, reliant or dominant-subservient."[44] A fiduciary confidential relationship arises when the donor and the donee

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[39] RESTATEMENT (THIRD) OF PROPERTY § 8.1. Many jurisdictions rely on the common law definition.

[40] In Maryland, for example, "any person may make a will if he is 18 years of age or older, and legally competent to make a will." MD. CODE ANN., ESTS. & TRUSTS § 4.101. Obviously, the Maryland definition throws you back into the common law to make a determination of whether such person is "legally competent" to make the will.

[41] *See* CAL. PROB. CODE § 6100.5.

[42] Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 583–84 (1997). The Maryland court provides a similar list: "(1) The benefactor and beneficiary are involved in a relationship of confidence and trust; (2) The will contains substantial benefit to the beneficiary; (3) The beneficiary caused or assisted in effecting execution of will; (4) There was an opportunity to exert influence; (5) The will contains an unnatural disposition; (6) The bequests constitute a change from a former will; and (7) The testator was highly susceptible to the undue influence." *Moore v. Smith*, 528 A.2d 1237, 1239 (Md. 1990).

[43] Madoff at 583.

[44] RESTATEMENT (THIRD) OF PROPERTY §8.3, cmt. g.

find themselves in a settled category of fiduciary obligation.[45] For example, a fiduciary confidential relationship includes an attorney-client, trustee-beneficiary or guardian-ward relationship.[46]

Whether the confidential relationship can be defined as a reliant relationship is determined by fact. In order to establish a reliant relationship, Plaintiffs must present evidence that shows the relationship based on special trust and confidence. For example, the donor was accustomed to being guided by the judgment or advice of the alleged wrongdoer.[47]

The existence of a dominant-subservient relationship is also a question of fact. As such, the person wishing to establish it must present evidence to establish that the donor was subservient to the alleged wrongdoer's dominant influence.[48]

State law defines the evidentiary impact of a finding of a confidential relationship. In Maryland, for example, the existence of a confidential relationship will shift the burden of proof to the donee of an inter vivos gift, requiring the donee to show that gift was not the product of undue influence. For testamentary dispositions, however, a confidential relationship only operates as one factor to show undue influence and does not shift the burden of proof.[49]

One commentator set out a useful checklist of things to do to ensure that the client is competent.

1. Get to know the client. . .
2. Determine the client's mental state. . .
3. Take extensive notes. . .
4. Interview the client more than once.
5. Interview the client when no one else is present.
6. Probe for fears, anxieties and unnatural reactions.
7. Discuss generally the testator's assets and take accurate notes. . .
8. Ask the client about previous physical or mental problems and the names of treating physicians or other professionals. . .
9. Determine if an earlier will exists and why changes are being made. . .[50]

Many estate planning clients come in as a couple. Each of these suggestions applies to those clients as a unit in most situations. If, however, there are step children and/or a second marriage involved, it may be advisable to interview each client individually or, if warranted, have each seek separate counsel.

2.0 CHILLING DISSENT: IN TERROREM CLAUSES

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[45] *Id*.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *See Upman v. Clarke*, 753 A.2d 4, 5 (Md. 2000).
[50] Dennis W. Collins, *Avoiding a Will Contest—The Impossible Dream?* 34 CREIGHTON L. REV. 7, 19–20 (2000).

2.1 In Terrorem Clauses or No Contest Clauses.

In terrorem or no contest clauses were traditionally favored as a method of discouraging litigation. Generally, such a clause provides that any legatee challenging a will would forfeit his or her interests under that instrument. "Such a provision is intended to frighten or terrorize any distribute from objecting …"[51] The naming of these clauses, but not necessarily the impact such clauses have, has softened over time:

> [T]he names of these clauses have changed over the years as the view of society and the laws have changed. Historically, these clauses were called "in terrorem" clauses, implying the terror that was supposed to be struck in the hearts of anyone who might want to challenge the testamentary instrument. This title implies that discouraging litigation will give effect to the testator's purposes. Later, these clauses were titled "no contest" clauses, a less formidable title, but still focused on discouraging litigation and giving effect to the testator's purposes. Currently, some have been naming these clauses "forfeiture" clauses, focusing on the fact that the beneficiaries will forfeit their bequest if they contest the will.[52]

Regardless of the name given to the clause, the purpose is to discourage potential litigation. In order for this goal to be effective, the potential litigant must be given a substantial enough bequest that he or she would be concerned about forfeiting it.

2.2 In Terrorem Clauses at Common Law.

At common law, no contest clauses were enforced regardless of whether there was probable cause to bring a challenge and/or whether such challenge was made in good faith. Thus, the U.S. Supreme Court upheld an in terrorem clause stating:

> It is only carrying out a plain intent of the testator, and giving to the residuary devisee that which the testator intended, and forbidding the heir from taking property not designed for him … And, when a testator declares in his will that his several bequests are made upon a condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall, without compliance with that condition, receive his bounty, or be put in a position to use it in an effort to thwart his express purposes.[53]

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[51] Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 36 ACTEC L.J. 547, 554 (2011).
[52] Donna R. Bashaw, *Are In Terrorem Clauses No Longer Terrifying? If So, Can You Avoid Post-Death Litigation with Pre-Death Procedures?*, 2 NAELA J. 349, 351 (2006).
[53] *Smithsonian Institution v. Meech*, 169 U.S. 398, 414–5, (1898).

In the *Smithsonian Institution* case, there was little question but that the will challenge was in good faith. The testator's wife had legal title to certain real estate and consequently when she died intestate, "[p]rima facie, therefore, the title passed to her heirs."[54] The testator left his wife's heirs who would, by title, receive the real property, a cash bequest subject to a no contest clause. He then specifically devised the real estate subject to the cloud on title to the Smithsonian Institution claiming that the property was subject to an oral trust between his deceased wife and himself. He claimed that this oral trust passed title to him at her death thereby permitting him to make the charitable devise.[55]

This unblinking enforcement of no contest clauses in Washington, D.C. apparently continues to this day: no contest clauses still are enforced "notwithstanding good faith and probable cause and making the contest."[56]

2.3 The Softening of the In Terrorem Clause if Probable Cause Exists for the Contest.

The Uniform Probate Code and the Restatement (Third) of Property argued for the modification of common law to provide that in terrorem clauses would be enforceable unless probable cause exists for instituting the proceedings.[57]

Most states follow the Uniform Probate Code and Restatement (Third) of Property approach.[58]

2.3.1 Probable Cause for In Terrorem Clause Purposes.

The Restatement (Third) of Property defines probable cause as follows:

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[54] *Smithsonian Institution*, 169 U.S. at 402.

[55] There was no specific discussion of the Statute of Frauds so presumably the jurisdiction (Washington, D.C.) had not extended the Statute of Frauds to oral trusts of real property.

[56] *Ackerman v. Geneviene Ackerman Family Trust*, 908 A.2d 1200 (D.C. Ct. App. 2006).

[57] *See* UPC § 2-517; RESTATEMENT (THIRD) OF PROPERTY § 8.5.

[58] *See* T. Jack Challis & Howard M. Zaritsky, *ACTEC State Survey; No-Contest Clauses* (3/24/12). The survey lists 22 states that follow the Uniform Probate Code and at least 5 others that generally adopt that approach. Although somewhat dated, the state survey remains the most comprehensive list of how the various states treat the subject. California by statute will only enforce an in terrorem clause if a "direct contest" is brought without probable cause. *See* CAL. PROB. CODE § 29-1-6-2. Direct contests involve an attempt to invalidate a will based on undue influence, duress, lack of capacity and the other traditional caveat grounds. The New York statute tilts toward enforceability of in terrorem clauses, however, by statute the prospective caveator is entitled to examination of the will proponent's witnesses, the person who prepared the will, the nominated fiduciaries and others as a preliminary to a decision whether to file an objection to the will. *See* McKinley's EPTL § 3-3.5(b)(3)(D). Also in Florida in terrorem clauses are unenforceable. FLA. STAT. § 732.517. Likewise, in Indiana in terrorem clauses are unenforceable. IND. CODE § 29-1-6-2.

> Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer normally involves representation by legal counsel.[59]

Because the right to contest a will is statutory, that right may be lost by failure to contest the will within the period of the statute of limitations. Generally, the statute of limitations is triggered by the notice of the will being admitted to probate but the limitation period may be quite short—often much less than one year and sometimes as short as three months after notice.[60] In Maryland, for example, the time for filing a caveat is six months from notice.[61] As noted in the definition of probable cause under the Restatement (Third) of Property, the probable cause must exist at the time of instituting the procedure which, given the short statutes of limitation that often apply, can be somewhat tricky.

The Restatement (Third) of Property definition of probable cause differs somewhat from the use of probable cause in criminal cases for issuing warrants. In an Arizona case, for example, the appellate court distinguished probable cause in a criminal context which is "based on substantial evidence" and held, using the Restatement, that it is the evidence "possessed by the plaintiff when she instituted a lawsuit."[62] In that case, the Supreme Court of Arizona reversed the intermediate court because it was based on determinations eventually made at trial. Thus, the standard adopted by the Supreme Court of Arizona for determining whether a plaintiff has probable cause to bring a will contest, and therefore allows the plaintiff to escape the punishment of a no contest clause, requires the trial court to "refer to the evidence known at the time the contest was initiated" to determine whether a "reasonable person, properly informed and advised" would conclude that there is a "substantial likelihood of success in the contest period."[63]

When a contestant fails to provide evidence, is unhappy with his or her legacy under the will, or only suspects or supposes the will was a product of fraud or undue influence, the plaintiff lacks probable cause for a will contest and the in terrorem clause is enforceable.[64]

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[59] RESTATEMENT (THIRD) OF PROPERTY § 8.5 *cmt c*.
[60] EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 12:1 at n. 25 (Thomson Reuters 2d ed. updated 2017).
[61] MD. CODE ANN. EST. & TRUSTS § 5-207.
[62] *In Re Estate of Shumway*, 3 P.3d 977, 1066 (Ariz. Ct. App. 1999) rev'd in part; aff'd in part 9 P.3d 1063 (Ariz. 2006).
[63] *In Re Estate of Shumway*, 3 P.3d at 1067.
[64] *Russell v. Wachovia Bank*, NA, 633 S.E.2d 722, 727 (S.C. 2006) (enforcing in terrorem clause because family discord, strife and a less-than-favorable inheritance does not constitute facts that

The determination of whether a contestant has sufficient probable cause to file a will contest would appear to be quite a subjective determination (regardless of whether it is cast in the terms of being a "reasonable" person standard). Courts have found that a plaintiff bringing a will contest has a substantial likelihood of success proving his or her claims, and therefore probable cause, when (i) a decedent was in a confidential relationship at the time the will was written, (ii) the individual in the confidential relationship with the decedent receives a greater portion of the estate, and (iii) the decedent is shown to be a person easily susceptible to direction.[65]

2.4 In Terrorem Clauses Applying to Revocable Trusts.

The trend has been to treat in terrorem clauses in trusts the same as they are treated in wills. Currently most jurisdictions have addressed in terrorem clauses in trusts either by statute or in case law.[66] Some states address both wills and trusts in the same statute,[67] others have parallel statues addressing wills and trusts,[68] and others argue that, because trusts are used as will substitutes, the same rules regarding in terrorem clauses should apply.[69] Most jurisdictions have addressed the enforceability of in terrorem clauses in trusts, and the result is to apply substantially the same rules as exist in that jurisdiction's probate code whether by statute or case law.

2.5 Use of In Terrorem Clauses in Estate Planning.

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produce a substantial likelihood of succeeding on claims); *Hammer v. Powers*, 819 S.W.2d 669 (Tx. Ct. App. 1991) (enforcing in terrorem clause because plaintiff's case was dismissed with summary judgment for failure to plead or present evidence); *In Re Estate of Simpson*, 595 A.2d 94, 99–100 (Pa. 1991) (finding that even though decedent was in a confidential relationship, plaintiff did not have probable cause for a lawsuit because it was based on his inability to fathom any reason why the decedent would change her will, he had no evidence to substantiate his suspicions and brought the contest because he did not get what he wanted under the will).

[65] *In Re Estate of Shumway*, 9 P.3d at 1067–69 (Ariz. 2000) (holding plaintiff had substantial likelihood of succeeding on her will contest claims because decedent was in a confidential relationship with the bookkeeper receiving a portion of the estate, was legally blind, may have been asleep when the will was read to him and did not participate in the revision of his will); *In Re Friends Estate*, 58 A. 853, 857 (Pa. 1904) (holding plaintiff had a substantial likelihood of succeeding on her will contest claims because the decedent was weak and dependent, the decedent's son had influence over her, the influential son had contempt for other members of the family and received a larger portion of the estate).

[66] *See Generally* T. Jack Challis et al., *State Laws: No-Contest Clauses* (Mar. 24, 2012).

[67] *See* 12 DEL. STAT. § 3329; HAW. REV. STAT. § 560:3-905; 20 PA. CON. STAT. § 2521.

[68] *See* N.H. REV. STAT §§ 551:22(II) & 564-B:10-1014.

[69] In an unpublished memorandum opinion the Superior Court of Connecticut applied the rules dealing with wills to trusts by putting "(trust)" after each mention of a will. 2015 Conn. Super. LEXIS 413. Other courts address the issue more directly and explain that, when trusts are used as will substitutes, in terrorem clauses in trusts should be governed by the same rules as wills. *See Keener v. Keener*, 682 S.E.2d 545, 548 (Va. 2009).

The in terrorem clause is a tool but by no means a provision that should be mindlessly put in every estate plan. Often clients wish to disinherit a child or someone else who may be a natural object of the client's bounty. In those cases, the client may not wish to leave that person a sizeable bequest simply to construct a penalty if that person challenges the estate planning. In those cases, the client should simply disinherit the individual by naming the individual as not being left anything under the will. This is preferred over leaving the individual a nominal amount because such a bequest may be viewed as an insult and trigger the unwanted challenge.

If the client wishes to use an in terrorem clause, it is best to tailor it to the situation. It may be more helpful to apply the in terrorem clause to only one specific bequest under the will and not the entire document. Narrowing the scope of the in terrorem clause is helpful because neither the testator nor the drafting attorney can foresee the future and whether the favored beneficiaries may wish to institute a court proceeding for some reason. Additionally, the in terrorem clause should be tailored to address specific types of challenges. While the testator or settlor may wish to deter challenges to the validity of the will or trust, he or she may not wish to deter challenges to a trustee or executor's actions.

2.6 Scope of In Terrorem Clause.

One motivation for tailoring the scope of an in terrorem clause is that overly-broad in terrorem clauses risk being unenforceable on public policy grounds. One argument against in terrorem clauses is that they block access to the judicial system and are thus viewed by many jurisdictions with disfavor.[70]

Here is an example of an overly-broad in terrorem clause encountered in practice. We would recommend <u>not</u> using it. It demonstrates how broad these clauses are drafted and how problematic they can be:

> Notwithstanding the "Resolution of Disputes" provisions under Section __ of Article __ of my Trust, if any devisee, legatee, or beneficiary under my Trust or any amendment thereto no matter how remote or contingent such beneficiary's interest appears, or any of my legal heirs, or any person claiming under any of them, directly or indirectly, does any of the following, then in that event I specifically disinherit such person or persons, and all such legacies, bequests, devises, and interest given to such person or persons under my Trust, or any amendment thereto, or any other Trust document created by me at any time, shall be forfeited and shall be distributed as provided elsewhere herein as though such person or persons had predeceased me without issue:

[70] *See Rodriguez v. Gavette (In re Estate of Shumway)*, 3 P.3d 977, 984–85 (Ct. App. Div. 1 1999), review granted in part, (Mar. 14, 2000) and opinion vacated on other grounds in part, 9 P.3d 1062 (Az. 2000).

a) Unsuccessfully challenges the appointment of any person named as a trustee in my Trust Agreement, or any amendment thereto, or unsuccessfully seeks the removal of any person acting as a trustee;

b) Objects in any manner to any action taken or proposed to be taken in good faith by my Trustee under my Trust Agreement, or any amendment thereto, whether my Trustee is acting under court order, notice of the proposed action, or otherwise, and said action or proposed action is later adjudicated by a court of competent jurisdiction to have been taken in good faith;

c) Objects to any construction or interpretation of my Trust Agreement, or any amendments thereto, or to the provisions of either, that is adopted or proposed in good faith by my Trustee, and set objection later adjudicated by a court of competent jurisdiction to be an invalid objection;

d) Claims entitlement to (or an interest in) any assets alleged by my Trustee to belong to the Probate or Trust Estate, whether such claim is based upon a community or separate property right, Marvin rights, a contract or other right or device, and said claim is later adjudicated by a court of competent jurisdiction to be invalid;

e) File a creditor's claim against the assets of the Probate or Trust Estate and such claim is later adjudicated by a court of competent jurisdiction to be invalid;

f) Anyone, other than me, attacks or seeks to impair or invalidate (whether or not any such attack or attempt is successful) any designation of beneficiaries for any insurance policy on my life or any designation of beneficiaries for any pension plan, Keogh, SEP, or IRA;

g) In any other manner contest my Trust Agreement, or any amendment thereto, executed by me, or in any other manner, attacks or seeks to impair or invalidate any of my Trust's provisions; or

h) Conspires with or voluntarily assist anyone attempting to do any of the above acts.

The drafter of this clause failed to tailor the clause to address a specific bequest, a specific beneficiary, a specific type of action or actions brought without good faith or probable cause.[71]

[71] For examples of good in terrorem clauses see T. Jack Challis et al., *Not so Fast: Drafting, Planning, and Litigating no Contest Clauses*, American Law Institute-American Bar Association Continuing Legal Education, September 13–14, 2010.

Arguably, this provision violates the non-modifiable UTC good faith standard. The provision purports to punish only if the contestant objects "to my action taken or proposed to be taken in good faith by (the) Trustee." This standard is the contract good faith standard not the standard applied under the common law or the UTC.[72] Under the UTC, regardless of the terms of the instrument, a trustee has a duty "to act in good faith and in accordance with the terms and purposes of the trust and in the interests of the beneficiaries." By rooting the good faith obligation to the terms and purposes of the trust and the interests of the beneficiaries, the UTC, in effect, imposed fiduciary standards to good faith. This, in turn, obligates the trustee to act reasonably.[73] Under the contract standard of good faith—which seems to be the standard under the above example language—good faith is the lowest standard under the law: the absence of subjective bad faith. Read literally, the broad language punishing any beneficiary objecting to an action taken in good faith by the trustee violates the UTC immutable standard as well as common law standard governing trustees.[74]

A declaratory judgment action may be used to determine whether an overly broad in terrorem clause is unenforceable. The purpose of the uniform declaratory judgement act was to permit "parties who are uncertain as to their rights and duties, to ask a final ruling from the court as to the legal effect of an act before they have progressed with it to the point where any one has been injured".[75] A declaratory judgment action to determine the validity is not a violation of the clause.[76] Because of the short filing requests required for most caveat proceedings, a declaratory judgment action may not be practical. In the case of potential actions against a personal representative or trustee for actions taken or not taken during administration, however, it may be a viable approach.

Aside from it's possible unenforceability, however, the broad, sweeping in terrorem clause runs the risk of creating unintended consequences. It might chill favored beneficiaries from seeking to monitor and/or control a faithless fiduciary.

Best practice is to tailor an in terrorem clause to fit the exact situation feared by the settlor. More tailored clauses would be as follows:

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[72] Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and the Good Faith in Contract*, 36 ACTEC L.J. 517 (2010).
[73] *Id.* at 530–33. *See also* RESTATEMENT (THIRD) OF TRUSTS § 50 (2003).
[74] *See McNeil v. McNeil*, 798 A.2d 503 (Del. Supr. Ct. 2002) (holding that a settlor who attempts to create a trust without effective accountability is not a trust). Also, "[a] trust necessarily grants rights to the beneficiary that are enforceable in equity." GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 974 (3d. ed. 1967).
[75]Uniform Declaratory Judgement At (Prefatory Note)(1922).
[76] Hicks v. Rushin, 185 S.E. 2d 390, 392 (Ga. 1971) ("The search for the true meaning of a will is not an attack upon it.") See also In re: Est. Burkhalter, 806 S.E. 2nd 875 (Ga. 2017). Also see "What Constitutes Contest or Attempt to Defeat Will Within Provision thereof Forfeiting Share of Contesting Beneficiary". 3 A.L.R 5th 590 at § 15(a) (Originally published 1992) (It has been uniformly held that an action for construction of a will does not trigger an in terrorem clause).

> Settlor understands that, by making gifts or other lifetime transfers to certain family members in the past, she has made other beneficiaries of this trust unhappy. Further, Settlor understands that by providing for distribution of life insurance proceeds and retirement benefits outside of this trust to certain beneficiaries, some other beneficiaries may believe that they have been treated unfairly. Settlor wishes to confirm that she intends to give more assets under this trust and certain non-trust assets to [*names of favored beneficiaries*] than to other beneficiaries and is concerned that the beneficiaries not so favored may wish to contest this trust. In the event that these less favored beneficiaries should choose to challenge the validity of this trust instrument and/or the distributions contained herein or distributions made to beneficiaries outside this trust, then Settlor intends that the provisions for forfeiture under the no contest clause of this trust shall apply immediately and without exception.
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> * * *
>
> Settlor does not have any less love or affection for [*names of less favored beneficiaries*] but has made substantial payments to him during Settlor's lifetime for drug rehabilitation programs and his other needs. According, Settlor includes the following no contest clause to deter such less favored beneficiary from contesting the additional gifts at Settlor's death to [*names of favored beneficiaries*] and their descendants.[77]

An alternative to an in terrorem clause is, of course, straight disinheritance. Best practice is to name the excluded heirs and simply state that they are receiving nothing under the instrument. Often the older practice of leaving such excluded heirs a small bequest ($10) was seen as an insult that could trigger the challenge.[78]

3.0 KEEPING BENEFICIARIES AT BAY: SETTLOR DESIGNATED SURROGATE BENEFICIARY REPRESENTATIVES.

3.1 Background.

[77] T. Jack Challis et al., *Not so Fast: Drafting, Planning, and Litigating no Contest Clauses*, American Law Institute-American Bar Association Continuing Legal Education, September 13-14, 2010.

[78] The drafting lawyer should detail in his or her notes why the heir is being disinherited. Reasons should not be in the instrument so as not to generate a rebuttal and a basis for a contest. Also consider the, albeit rare, possibility of defamation. *See* Paul T. Whitcombe, *Defamation by Will: Theories and Liabilities*, 27 J. MARSHALL L. REV. 749 (1994).

Except as "permissibly modified by the terms of the trust," the trustee has affirmative duties to keep beneficiaries reasonably informed as to the existence of the trust, of a beneficiary's status as a beneficiary and his or her right to obtain information concerning the operation of the trust.[79]

A beneficiary's right to information concerning aspects of the trust and it's administration, of course, is important because it notifies the beneficiary of his or her right to enforce the trust "for only by being informed can the beneficiaries know of and enforce their interests."[80] Thus, the UTC originally provided non-modifiable rights to information to certain beneficiaries.[81] As various states have considered adoption of the information and reporting requirements under the UTC, "a majority of the adopting states have made changes to these provisions [the information and reporting requirements] in a nonuniform way."[82] As modified in 2002, the UTC bracketed the mandatory notice/information rights to signal that it might be changed by an enacting state.

Some states have modified the notice/information obligations of a trustee by removing their mandatory nature altogether. These statutory changes may "have unwisely invited the drafting of trusts that appear to make the trustee accountable to no one, which will likely result in litigation over whether the settlor really intended to create a trust."[83]

3.2 Drafting to Keep "Beneficiaries in the Dark."[84]

In states which have adopted but modified the UTC, there may be an option for the settlor to eliminate or reduce a beneficiary's right to information. One purpose, of course, is to place barriers on a beneficiary enforcing his or her rights to trust benefits.[85]

Each state takes a different approach, so the drafting attorney must consult his or her statute. Some states have eliminated the mandatory requirement altogether.[86] In at least one of

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[79] RESTATEMENT (THIRD) TRUSTS § 82 (2007).

[80] David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 57 MO. L. REV. 143, 199 (2002). *See also McNeil v. McNeil*, 798 A.2d 503 (De. 2002) (highlighting the importance of information to a beneficiary who was under the impression that he only had a remainder interest when, in fact, he was a current discretionary income beneficiary).

[81] *See* UTC § 105(b); UATC § 813(a) and (c).

[82] Kevin D. Mallard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J., 373, 383 (2005).

[83] *Id.* at 395 (noting that Kansas, Tennessee, Utah, and Wyoming have removed the trustee's duty to inform and report).

[84] The title of this section was lifted from Cindy Basham, *Shedding Light on Keeping Beneficiaries in the Dark*, 89 FLA. B. J. 94 (2015) which discusses Florida's trust notification requirement.

[85] There are, of course, more positive reasons to keep beneficiaries in the dark than to eliminate enforcement—knowledge of the trust might "demotivate" a beneficiary from being productive, for example. *See* Mallard, at 393.

[86] For more information on what different states have adopted, see Lauren Z. Curry, *Agents in Secrecy: The Use of Information Surrogates in Trust Administration*, 64 VAND. L. REV. 925, n. 55–85 (2011).

those states, the courts imposed a duty of a trustee to supply information regardless of the terms of the trust.[87] Other states have taken a middle path and substituted the requirement to give information to the beneficiary for a provision that permits the settlor to appoint a surrogate to receive such information on behalf of the beneficiary. The District of Columbia, for example, permits a settlor to designate a person to receive information, notice and reports in lieu of the beneficiary.[88] Such surrogate must "act in good faith to protect the interests of the beneficiaries …"[89] Good faith is a contract standard of care, not fiduciary standard of care.[90]

Eliminating the requirement to provide information to a beneficiary begs the question of how a trustee, who possess the power to make discretionary distributions to an uninformed beneficiary, can exercise his or her discretion in making a distribution without tipping off the beneficiary of his or her rights under the trust.[91]

Maryland permits a surrogate who can only be held liable by the beneficiary if the designated representative is shown "by clear and convincing evidence to have been in bad faith with respect to the beneficiary."[92] Unlike Washington, D.C., Maryland did not modify the mandatory requirement to supply a qualified beneficiary with certain information if the beneficiary requests it.[93]

The surrogate approach is seen as a compromise between the broad requirements to disseminate information imposed by the UTC and the complete waiver of those requirements adopted by many states.[94] The surrogate approach is not without its flaws. By inserting an additional individual who is not a fiduciary between the trustee (the fiduciary) and the beneficiary, the surrogate approach may reduce the fiduciary accountability associated with trusts. As long as the trustee provides appropriate notice, information and reports to the surrogate and the surrogate abides by the—lower, non-fiduciary—standard of care applicable to his or her role, the beneficiary may be without recourse. It seems that the surrogate approach alleviates the trustee of accountability and may even destroy the trustee-beneficiary relationship. Certainly courts will be resolving these issues in the future.

4.0 BEATING THEM TO THE PUNCH: ANTEMORTEM PROBATE.

A few states have enacted statutes permitting pre-death probate of a will. The perceived benefits flow from the fact that the pivotal witness, the testator or testatrix, is available to rebut

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[87] *Wilson v. Wilson*, 690 S.E.2d 710, 711 (N.C. Ct. App. 2010).
[88] D.C. CODE § 19-1301.05 (2001).
[89] *Id.*
[90] Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517 (2010).
[91] *See* Mallard, at 395.
[92] MD. CODE ANN., EST. & TRUSTS § 14.5-306.
[93] MD. CODE ANN., EST. & TRUSTS § 14.5-105(11). This is also the approach taken by the Missouri statute.
[94] Lauren Z. Curry, *Agents in Secrecy: The Use of Information Surrogates in Trust Administration*, 64 VAND. L. REV. 925 (2011).

any charge of lack of capacity and/or undue influence. Antemortem probate also has the benefit of flushing out technical flaws that may exist from improper execution while corrective action can still be taken.[95]

4.1 The Antemortem Jurisdictions.

Eight states have antemortem statutes to validate wills: Alaska,[96] Arkansas,[97] Delaware,[98] Ohio,[99] Nevada,[100] New Hampshire,[101] North Carolina,[102] and North Dakota.[103] The Alaska and Nevada statutes also permit pre-death validation of trusts. New Hampshire[104] and Delaware[105] permit the validation of trusts by separate statute.

4.2 Basic Patterns of State AnteMortem Statutes.

Statutes allowing for antemortem validation of wills typically allow only the testator to bring the action, and require the testator to serve all beneficiaries named in the will and all persons who would inherit if the testator died intestate. Some states also allow the testator's legal representative to commence the action.[106] Delaware has a unique system that allows the testator to give notice to any or all beneficiaries, interested persons, or anyone else and then allows those individuals a specific amount of time in which to contest the will.

The relevant trust statutes mirror those applicable to wills. Alaska and Nevada allow the settlor and/or trustee to commence an action, New Hampshire allows a settlor to commence an action, and Delaware permits a trustee to send notice that will bind any recipient who does not respond within 120 days of the date of the notice.

4.3 Pros and Cons of Using Antemortem Statutes.

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[95] *See* Aloysius A. Leopold and Gerry W. Beyer, *Ante-Morten Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 133–34 (1990) ("From the outset, readers should be aware that the purpose of this article is neither to suggest that post-mortem model of probate be abolished, nor that antemortem probate is a panacea. Rather, it is to demonstrate that antemortem probate is a viable technique which could serve to reduce the problematic side of the current post-mortem system and provide a wide-range of benefits to a significant segment of the population.").
[96] ALASKA STAT. ANN. §§ 13.12.530–590 (West 2015).
[97] ARK. CODE ANN. § 28-40-202, 203 (West 2015).
[98] 12 DEL. C. § 1311.
[99] OHIO REV. CODE ANN. § 2107.081–.085 (West 2015).
[100] NEV. REV. STAT. § 30.040(2).
[101] N.H. REV. STAT. 552:18.
[102] N.C. GEN. STAT. § 28A-2B-1.
[103] N.D. CENT. CODE § 30.1-08.1-01.
[104] N.H. REV. STAT. § 564-B:4-406(d).
[105] 12 DEL. C. § 3546(a).
[106] Alaska and Nevada.

The argument favoring antemortem probate is that it permits the best evidence, the testimony of the testator, to be presented:

> No matter how sane, competent, and lucid a testator may be or how strong his desire that his estate be administered by trusted persons, our current system of post-mortem probate cannot guarantee a testator that his intentions and instructions will be carried out in spite of all the expense and caution exerted. The post-mortem probate system does not offer a true and effective method to probate a will nor does it test the validity of the intentions expressed within it because the best evidence, the testimony of the testator, is unavailable. Post-mortem probate creates a situation in which excluded heirs are invited to challenge the will and use the testator's expressed intentions to destroy the instrument, question the giver's sanity, and line their own pockets with property that was never intended to be theirs. Post-mortem probate law is encumbered with antiquated presumptions, procedures, and traditions, which by resisting statutory alteration, are sure to frustrate testamentary intent and reveal with shining clarity the need for an alternative.[107]

Even though antemortem statues appear to be helpful, they do have their pitfalls. Antemortem probate only creates a valid, unchallengeable document if notice and an opportunity to challenge is given the testators heirs. Many elderly or ill clients who disinherit a child or other descendant may not want to bring the contest to a head or confront the disinherited individual. Given that most vulnerable documents contain "unnatural" plans for disposition, many clients may never want to go public with the plan.

> Lack of confidentiality is more of a problem for the testators attracted to antemortem probate. "Obviously," wrote Fellows, "the more atypical the distribution, the more vulnerable the will to claims of mental incapacity, fraud, or undue influence." Scholars that criticize the present system say that those with "unnatural" dispositions—people whose estate plan does not conform to majoritarian values—will benefit the most from antemortem probate. A testator would not want to display certain unnatural dispositions for everyone to see. A testator could have an illegitimate child whose existence is not known to the family. It is also relatively common for a testator to leave a gift to someone whom they feel has been wronged in the past. Every gift in a will has a story and many testators would prefer to keep those stories private. This is especially true where the very reason that the testator

[107] Leopold & Beyer at 137.

chooses antemortem probate because she fears an unnatural gift might otherwise be invalidated.[108]

4.3 "Backdoor" Antemortem Probate via Guardianship Litigation.

The common law provided that the validity of a will could not be adjudicated pre-mortem because prior to a testator's death, there are no heirs and consequently no will.[109] Although this principle may have been black letter law at one time, increasingly, estate planning documents have been subject to antemortem challenges in guardianship proceedings, where heirs and even the potential ward may address the validity or invalidity of a will or other document. Of course, a contested guardianship does not permit attorneys or clients to employ the proactive measures that conventional estate planning provides.

A California case, for example, effectively determined the validity of a will and trust under the surrogate judgement provisions for conservator that later estopped a post-death challenge to those instruments.[110] Likewise, a Pennsylvania case held that the validity of a will and trust could be determined in a declaratory judgment action that had been filed prior to the testator's/grantor's death (although the testator/grantor died during the pendency of the declaratory judgment action).[111]

[108] Jacob Arthur Bradley, *Antemortem Probate is a Bad Idea: Why Antemortem Probate Will Not Work and Should Not Work,* 85 MISS. L.J. 1431, 1462 (2017) (quoting Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1070 (1980)).
[109] *See generally Cowan v. Cowan*, 254 S.W.2d 862 (Tex. Civ. Ct. App. 1952).
[110] *Murphy v. Murphy*, 164 Cal. App. 4th 376 (Cal. Ct. App. 2008), as modified on denial of reh'g (1/22/08), review denied, 2008 Cal. LEXIS 10879 (Cal., Sept. 10, 2008).
[111] *In Re Mampe*, 932 A.2d 954 (Pa. 2007). (using the Declaratory Judgment Act to invalidate a will and revised revocable trust). *See also In Re Guardianship of E.N., 877 N.E.2d 795 (Ind. 2007)* (finding that the Indiana guardianship estate planning statute did not permit crafting a disposition plan to take effect after the death of the ward); *Peyton v. Longo (In Re Davis)*, 954 So. 2d 521 (Miss. App. 2007).