Will Contest, Probate, And Fiduciary Litigation Trends: A Bird's Eye View

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A. Introduction

1. Today's very litigious society seems to become more litigious every year. It is helpful to understand what the trends are, where the fiduciary litigation field is heading, and what can be done in practice to cut down on disputes, the potential for conflict, and the risks that conflict will undermine plans created by attorneys for their clients.

2. Ask nearly anyone who has ever drafted a will, executed a will, taken under a will, or not taken under a will, and he or she will agree that few areas generate conflict like estate planning and distribution. As a result, fiduciary attorneys and the clients they counsel have a long-standing familiarity with will contests, trust disputes, and estate-related disputes.

3. In the past a fiduciary lawyer's readiness for potential conflict could perhaps stop at knowledge of will-related disputes. Currently an ever-expanding tax code has spawned increasingly complex vehicles for tax minimization, even middle-class folks have brokerage accounts, and members of an aging population are looking for ways in which familial and nonfamilial caregivers can use their assets during life for their convenience and well-being. Thus, these days assets are increasingly being transferred outside of probate estates.

4. This outline is a front-seat look at the course of fiduciary litigation and where it has been trending. Noticeable

over the past five to 10 years is an alarming growth in three general categories of cases: (1) inter vivos transfers, (2) disputes created because of an abuse of authority, and (3) guardianship/conservatorship disputes.

5. There continue to be plenty of plain old will contests, but this has never been where the majority of litigation has taken place. Rather, most of the litigation has generally centered around various incarnations of the improper taking of assets or fiduciary mismanagement, particularly in the area of administration of estates and trusts. There is still no shortage of work on those fronts. Recession or not, in good times and bad, people die and their families fight. It has been true since the beginning of recorded history, and this likely will not change anytime soon.

6. Because of this truth, lawyers, advisers, and counselors need to be mindful of all kinds of situations that could destroy or obviate a client's lifetime of asset accumulation, his or her carefully drawn up estate plan, or family relationships.

7. This outline discusses the litigation landscape today, where litigation is trending, and what practitioners can do or advise clients of to reduce the potential for a lawsuit (or at least limit the success of one). Also discussed is the potential liability an estate planner may have when a disgruntled beneficiary does not get what he or she was expecting.

B. Demographic Trends Are Shaping Litigation Trends

1. Three different demographic trends are important in determining the possible future of fiduciary dispute liability.

2. First is the increasing number of people entering retirement age. Specifically, in the Baby Boomer generation people with more wealth than any other generation has ever had are entering retirement. As this generation ages, medical advances allow them and their own parents to live longer, though often with diminished physical and mental capacities (e.g., dementia and Alzheimer's disease). This lends itself to an increase in the need for someone to assist the aging with their assets while they are incapacitated, using instruments such as revocable trusts, powers of attorney, and guardian and conservatorship proceedings.

3. Second is the increasing mobility and transience of American society, in which fewer people now live as adults in the same cities or even the same states in which they were raised.

4. Together, these trends signal that in the coming years more people than ever will be elderly with declining physical and mental capacity and without some or all of their family members nearby to care for them. As a result, expect to see more nonfamily caregivers or families in which the burden of care falls to just one family member. Consequently, more testamentary and nontestamentary property transfers are likely to go to nonrelatives or to just the one caregiver relative. Such a situation provides

great potential for litigation initiated by far-off relatives who receive proportionately smaller inheritances or who learn, often too late, that an elderly relative's estate has been completely dissipated.

5. From the courts' perspective, this will result in a sharp increase in the number of lawsuits between heirs-at-law, the natural and traditional objects of the decedent's bounty, and professional caregivers or the sole caregiver relative who had unfettered access to the decedent.

6. The third important demographic trend is the increasing number of people in second and third marriages, frequently with children from each marriage. When people leave different sets of heirs, particularly (as increasingly happens) when those sets of heirs are separated by an age gap and also geographically, tremendous potential exists for the favoring, or apparent favoring, of one set over the other in asset distribution. Consequently, conflicts arise over testamentary and inter vivos transfers. Courts may look askance at defendants who, although they have a traditional claim to the decedent's bounty, are lacking in the full familial bond with their co-heirs, especially when the defendants had greater access to the decedent at the time of the transfers in question.

7. The swell of cases involving defendants who either are traditionally less favored or else less bound by ties of kinship and common experience to their fellow legal heirs may well lead to greater liability for defendants in cases involving the most suspicious type of transfers: newly executed wills, beneficiary designation changes, and inter vivos transfers from the elderly or infirm.

8. These changing demographics have led to an increase in litigation over inter vivos transfers, disputes caused by an abuse of authority (as trustee, executor, attorney-in-fact, or through a confidential relationship), and guardianship disputes. The number of these types of disputes will continue to rise as natural heirs are unpleasantly surprised with the state of a loved one's estate.

9. People who expect to receive an inheritance only to find it has not been adequately protected or properly transferred during the decedent's life are typically very disappointed. Often those disinherited beneficiaries place blame on the trusted estate planning attorney whose action or inaction is seen as at least one of the reasons for their loss. Unfortunately for estate planning attorneys case law is now expanding to allow disinherited and disgruntled beneficiaries to pursue malpractice claims against them.

C. Inter Vivos Transfers

1. Families, particularly those who are inclined toward "misbehavior," often have one ne'er-do-well among their ranks who never fully left the nest. Some may leave home, get married, and have children but still never seem to be able to survive on their own and rely on parents for their survival. Because these children are accustomed to being taken care of by their parents (and their parents are used to taking care of them), they expect they will always be taken care of. In these cases, generally to the surprise of other children upon a parent's death, the family finds there is no estate left to be distrib-

uted in accordance with the decedent's brilliantly drafted will or trust. Often mom or dad has given everything away to the one "needy" child, sometimes intentionally and sometimes not.

2. Sometimes clients disinherit others simply because of the survivorship rights and beneficiary designations that make assets nonprobate assets. By adding a second spouse or child as a joint tenant with right of survivorship to brokerage accounts, bank accounts, deeds, and so forth, a majority of a decedent's estate can be transferred to another by operation of law immediately upon the decedent's death, whether the decedent intended for this to occur or not. The same effect can occur with life insurance policies, retirement accounts, mutual funds, and certificate of deposit beneficiaries or payable-on-death (POD) designations.

3. Many times clients have no idea how their accounts are titled or who they named as a beneficiary 20 years ago when they set up the account (if they ever named anybody in the first place). They may not understand the import of these designations. Unless persistently pushed, most clients will not inquire nor verify the title on the accounts. This often leads to disastrously inequitable results (think beneficiary designations of ex-spouses or soon to be ex-spouses). An estate planning attorney should make every attempt to impress upon the client the importance of these designations and take the time to ascertain exactly how accounts, property, and beneficiary designations are titled.

4. It is also common that a client will name a child (or caretaker) as a joint owner on accounts for convenience, believing the child will later divide the account among the beneficiaries of the client's estate pursuant to the client's wishes. Not surprisingly, the surviving account owner does not always divide the property as the client hoped once the account holder knows the entirety of the property now belongs to him or her under the law.

5. It is not uncommon for greedy and needy children to bleed their parents dry simply by receiving gifts, seeking investments in companies that go nowhere (but provide guaranteed payments to the child), obtaining "loans" from parents (sometimes evidenced by promissory notes) that the child swears the parents forgave or always intended as a gift, deeding additional real property to the child, or simply by paying all of the child's credit card, country club, and mortgage bills.

6. In these cases, the client's seemingly carefully crafted estate plan goes out the window, all of the assets are inherited by stepmom or junior, and the other family members are left wondering how their loved one's estate got so messed up. They begin looking for a lawyer to help them correct what they feel is a tragic injustice.

7. When they do speak to an attorney, the attorney considers the potential claims by examining the circumstances of the inter vivos transfers. Was the decedent competent at the time he or she made those transfers? Did the beneficiary use his or her position to unduly influence the decedent into making these transfers? Was the decedent actually the person making the transfers or was the beneficiary taking action on his or her own? Did anyone (hopefully with deep pockets such as an attorney or financial institution) assist in the transfers?

8. The attorney will then try to build a case based on the facts for claims, such as conversion, breach of fiduciary duty, undue influence, and maybe fraud. The attorney will then seek a constructive trust or ask that the transfers be set aside for lack of capacity. These cases are generally fact-intensive and unpleasant for family members.

9. Be wary when a client makes significant (or even multiple insignificant) "gifts" to some but not all heirs. Not only does this open the door for the transfers to be mischaracterized by the heirs, but the transfers may not be wholly aboveboard. Question your client to see if he or she is feeling pressured to make these gifts at the expense of the other children. It is possible that the client may be feeling pressured by one child to continue supporting this child and his or her family, at the expense of your client's other children. It is possible that without intervention, there will be nothing left in the estate by the time of the client's death.

D. Abuse Of Authority

1. Often assets are transferred in various manners to others in common estate planning vehicles because of the convenience, flexibility, and tax-saving advantages of those vehicles. These commonly used vehicles include revocable trusts, family limited partnerships (FLPs), and intentionally defective grantor trusts. Powers of attorney are also used for their flexibility and convenience.

2. The flexibility, convenience, and dazzling potential tax savings that make these vehicles so attractive to the transferor and the estate planning attorney tend to require one family member to serve in a position of authority over the parent/client/principal/grantor and, sometimes, the other family members. This position of authority is often abused, generally because the planner was not anticipating the potential for abuse, did not explain the potential to the client, and did not take proper precautions to limit the potential for abuse or mismanagement. A huge increase in these types of cases has been observed.

   a. Family Limited Partnerships

      i. Sometimes the very things that attorneys set up for tax purposes are the cause of a dispute. Tying a family together without an exit strategy just to allow for discounting or other tax benefits may cause the family to spend more money in litigation than it saved in taxes. Often, whether the children of the principal business owner are litigating over the FLP or not, the children have no business running a company and generally run it into the ground. How does one decide which of the children will run the company? How does one decide how much information the other children should receive about its operations? What should be done if the children disagree about how the business should be run? These are all questions that need to be discussed at length with the client as he or she considers whether an FLP will, in practical rather than tax terms, work for the family.

ii. Explain to the client that by giving the heirs a portion of the business during the client's life, this may create potential control issues over a company's operations, especially should the client become ill, feeble, or suffer from dementia. Business operations may suffer due to the new owner/manager's lack of knowledge, expertise, or goodwill with customers. Or, the heirs could strip the business of its cash or sell it to the highest bidder despite the wishes of the parent/principal or the other remaining family members.

iii. By placing one child in control of the family business, a natural tension is created with the other children, who feel like they should share in the profits but do not share in the decision making or have any management responsibility. Resentment and mistrust tend to build on both sides of this equation. Be sure to think through this aspect of the planning and plan accordingly.

b. Trustees and Executors

i. Trustees and executors wield a substantial amount of power over the assets they control. Both owe strict fiduciary duties to their beneficiaries, but both are in the position of easily breaching those duties.

ii. One of the most common cases encountered is a dispute created because the fiduciary refuses to provide an accounting to beneficiaries. Secrecy regarding the entity's investments, income, and disbursements always leads to suspicion and distrust. This can, and likely should (absent compelling reason to the contrary), be remedied by providing in the governing document that an accounting must be required on a regular (annual) basis to a certain level of beneficiary. The Uniform Trust Code uses the term "qualified beneficiaries," which seems like a useful way to differentiate among beneficiaries. Not only does this alleviate concerns regarding secrecy, but an accounting may start the statute of limitations running on a breach of trust or breach of fiduciary duty claim. Perhaps a required annual accounting would also serve as a deterrent to the wrongdoing that seems to be increasingly prevalent.

iii. Some planners recommend that clients name co-fiduciaries as a check and balance for the benefit of the beneficiaries (and maybe the fiduciaries as well). Each fiduciary needs to keep in mind, however, that individual fiduciary liability could exist, even if it is the other fiduciary committing the wrongdoing. It is common for testators or grantors to name a child or spouse as a co-fiduciary, along with a trusted family adviser (since the child or spouse is terrible with money and the testator/grantor trusts the adviser). In this situation, it is recommended to make sure the adviser will be involved in the administration, not just serve as a figurehead rubber-stamping the mounds of checks running through the trust or estate (to benefit the other co-fiduciary, of course). A second recommendation is to make sure the adviser that is picked will be willing to say no when the co-fiduciary child/spouse is tempted to misuse or mismanage assets. A provision in the instrument regarding resolution of an impasse should the fiduciaries disagree is an excellent idea. If used more regularly, this would quickly limit estate litigation caseload. When co-fiduciaries cannot cooperate,

disputes ensue, which quickly eat up trust and estate funds. A provision that sets forth how disputes between fiduciaries will be resolved would significantly decrease litigation.

iv. A better solution all around is to pick a corporate fiduciary to serve as executor or trustee. Many people refrain from naming a corporate fiduciary out of concern surrounding a corporate fiduciary's fees. The fees, however, usually are not prohibitive, and the benefits of using a fiduciary with the infrastructure, policies, and expertise to properly handle an estate or trust far outweigh the extra fees paid. Many people are also afraid that a corporate fiduciary will not understand the family dynamics or the testator/grantor's desires. This may actually serve the beneficiaries well as the corporate fiduciary is more likely to remain impartial to beneficiaries than individuals with familial or personal relationships with the beneficiaries.

v. Fiduciaries and beneficiaries also struggle over diversification issues. Failing to diversify a trust (or an estate that remains open for awhile) can be devastating to beneficiaries and to the fiduciary who is sued for breach of fiduciary duty. A concentration of assets is generally a bad idea, especially in the recent past if the concentration of assets in an estate was real estate. Family businesses or farms run the same risk. Talk to clients about how they want the assets of their estate or trust to be concentrated. Then clearly state those desires in the governing document. Do not simply rely on the boilerplate concentration provision that is inserted in all documents; be specific.

vi. Finally, a number of estates never seem to get distributed or closed. Heirs and beneficiaries become very unhappy when they have to wait for years (and in some cases a decade or more) to get their inheritance, for no particular reason. Draft provisions in your document to address this issue, giving thought to each particular client's situation.

c. Accounting In Guardianship, Trust, Power Of Attorney, And Will Matters

i. The accounting issues discussed above for trusts and estates also occur in guardianship disputes and disputes regarding powers of attorney. Most courts require an annual inventory for the guardian/conservator. Some allow for an interested party to obtain an accounting from the guardian/conservator upon petitioning the court. Perhaps it would be good practice to include in the guardian nomination form a requirement that the guardian account to the heirs-at-law on a regular basis. At the very least, consider suggesting that clients who are serving as the guardian, trustee, attorney-in-fact, or executor provide regular, transparent accountings.

d. Powers Of Attorney

i. Powers of attorney can be extremely useful documents that most practitioners spend very little time drafting (usually there is a statutory form) or modifying to suit the needs of particular clients. This is a mistake as powers of attorney can also be very destructive documents. Many people who are given the power of attorney of another will not hesitate to clean out the principal's bank accounts, change the survivorship characterizations on brokerage accounts, change the beneficiary

designations on life insurance policies, IRAs, and 401(k) accounts, and even transfer or sell the principal's real estate. It is not unusual for attorneys-in-fact to make substantial gifts to themselves or their relatives. Often no one else is aware this abuse is occurring until it is too late.

ii. To remedy the lack of disclosure that often allows attorneys-in-fact to abuse their fiduciary duty, it is recommended that planners review their forms carefully. Insert provisions requiring notice to be given to all other heirs-at-law when the power of attorney is first used. Require that any gift made to the attorney-in-fact or his or her family must be replicated to all heirs-at-law or must be approved by a third party. Fully explain to clients in gory detail the consequences of giving a financial power of attorney to someone else, and then probe as to whether the person being appointed is, in fact, the best person for the job. This may be slightly uncomfortable, but so is hearing that the attorney-in-fact has wiped out the client's bank account, transferred the client's home to himself or herself, and now the client is unsure of how he or she will survive.

iii. The last scenario I laid out for you is, unfortunately, becoming the typical scenario for financial exploitation of the elderly, a subcategory of elder abuse.

e. Elder Abuse

i. Elder abuse is a broad term encompassing physical, sexual, and emotional abuse, as well as neglect, abandonment, self-neglect, and financial exploitation. The incidents of elder abuse are increasing at an alarming rate. A 2004 survey prepared for the National Center on Elder Abuse reported cases of abuse increased nearly 20 percent since the year 2000 (available at www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/021406_60PLUS_REPORT.pdf. Elder abuse likely is continuing to increase for the following reasons: the population of Baby Boomers is aging but living longer, dementia is becoming more prevalent, and the great recession of 2008 is putting and has put a significant economic strain on families and caregivers.

ii. Elder abuse cuts across economic and class lines (think Brooke Astor and Andy Rooney), and usually occurs in domestic settings. Shockingly, the most common relationship of victim to abuser is parent/child, or some other family relationship. Children, siblings, nieces, and nephews are most likely to cheat the elderly because the elderly are most likely to choose a trusted family member with managing their finances, and many of the crimes require emotional manipulation, which is most successful when coming from one close to the elderly victim.

iii. Financial exploitation is the third-most common category of elder abuse (behind self-neglect and neglect), and is the fastest growing. Financial exploitation is the illegal use or improper use of an older person's funds, property or assets. This is the type of elder abuse that we encounter in our practice.

iv. Examples of financial exploitation include: using a power of attorney to change the ownership of a bank/brokerage account, giving another person rights of survivorship or payable-on-death

benefits; coercing an elder to change the beneficiary on life insurance policies; and using a power of attorney to make “gifts” to the agent. It is not unheard of that the caregiver/relative using the elderly person’s funds will pay for substandard care to preserve a future inheritance.

v. Many abusers are able to financially exploit their victims through common estate planning tools, documents, and techniques. As mentioned above, these include: transfer of assets to partnerships/ living trusts controlled by the abuser; changing beneficiaries on life insurance, IRA, 401(k), and other nonprobate accounts (including bank accounts); transfer of deeds of property; modification of wills; and execution of powers of attorney. Often this means another professional (attorney, financial planner, or life insurance agent) has assisted, perhaps inadvertently, the abuser to commit elder abuse.

f. Elder Abuse Legislation

i. As elder abuse becomes more prevalent, legislatures are working to create laws aimed at protecting the elderly and other vulnerable populations. The federal government enacted the Elder Justice Act on March 23, 2010, Pub. L. No. 111-148, 124 Stat. 119,782, §6701, as part of the Patient Protection and Affordable Care Act. This act authorizes an Elder Justice Coordinating Council to make recommendations to the Secretary of Health and Human Services on the coordination of activities of federal, state, and local agencies relating to elder abuse and exploitation, allocates $400 million over four years to fund adult protective services, allocates $100 million for state grants to test methods to detect and prevent elder abuse, and allocates $26 million to establish elder abuse, neglect, and exploitation forensic centers, among other things.

ii. State legislatures are also taking notice of this problem. Though state laws vary in their treatment of elder abuse, many states have provided for criminal and civil remedies that specifically target those who abuse the elderly.

iii. Some states like Florida, Minnesota, and Missouri have statutes specifically criminalizing financial abuse of the elderly. *See* Fla. Stat. ch. 825.103; Minn. Stat. §609.2335; Mo. Rev. Stat. §570.145. Other states have enhanced penalties for certain crimes committed against elderly persons. For example, in Nevada crimes against those 60 years or older may carry prison terms that are twice as long, and damages are doubled for losses incurred by an older person as a result of financial exploitation.

iv. Some states have laws specifically addressing the misuse of power of attorney. For example, in Arizona taking advantage of a power of attorney is theft. In California the misuse of a power of attorney is embezzlement. California is very progressive in its elder abuse laws. The California Elder Abuse and Dependent Adult Civil Protection Act creates a specific cause of action for victims of abuse, entitling the victim to enhanced remedies such as attorneys’ fees and costs.

v. Though states now have and continue to create laws to protect the elderly, it is important to know that only certain groups of people may be protected under these laws. States have varying definitions for those whom they protect. Some states have:

(1) Laws to protect all elders against physical and financial abuse;
(2) Laws to protect elders with physical and mental disabilities or inability to protect themselves against physical and financial abuse;
(3) Laws to protect all elders against physical abuse only;
(4) Laws to protect all elders against financial abuse only;
(5) Laws to protect elders with physical and mental disabilities against physical abuse only; and others have
(6) Laws to protect elders only as against caregivers with an affirmative duty.

vi. California, Illinois, Maryland, and Oregon have adopted statutes similar to slayer statutes to penalize those who abuse the elderly. These laws generally treat persons who commit elder abuse like slayers such that they are deemed to have predeceased the abused person for purposes of receiving assets from the victim's estate. Whether the assets pass to the abuser's descendents or others varies from state to state. *See, e.g.,* Cal. Prob. Code §259755 and Ill. Comp. Stat. 5/2-6.2.

vii. In an attempt to stop the prevalent misuse of powers of attorneys, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has drafted the Uniform Power of Attorney Act (2006) ("Act"). This Act has been adopted by 10 states (Alabama, Arkansas, Colorado, Idaho, Maine, Montana, Nevada, New Mexico, Virginia, Wisconsin), the U.S. Virgin Islands, and was introduced in 2011 to Ohio and Texas.

viii. The Act may or may not actually assist in preventing financial exploitation by use of powers of attorney. It appears to be largely designed to provide safe harbor for those who act on them, such as banks. Nonetheless, this Act makes attempts to prevent financial exploitation by doing the following: it defines mandatory and default fiduciary duties that the agent owes the principal, it requires express language from the principal to grant the agent authority to dissipate the principal's property or alter the estate plan, and it provides for judicial review of the conduct of agents and imposes liability for agent misconduct.

ix. Whether the adoption of this Act will assist in the prevention of financial exploitation of the elderly remains to be seen. The placement of well thought-out restrictions in a power of attorney as well as a thorough discussion with clients about the potential pitfalls of the document should be helpful.

E. Guardianship Disputes

1. An alarming escalation in adult guardianship and conservatorship disputes has been observed in our profession. An informal poll of countless probate court judges bears witness to the same trend in their courtrooms. With the increase in life expectancy and advancements in medicine comes the ability for a person to live longer in an incapacitated state. The increase in dementia and Alzheimer's disease, as well as the increase in cases of early onset Alzheimer's disease, adds to the need for a person to have a guardian or conservator. Many heirs see these positions as a way to gain easy access to an early inheritance (while purporting to only be interested in making sure mom or dad is taken care of or protected).

2. Children seeking an early inheritance often engage in fear mongering or scaring the mentally weakened person by saying things like "the government will get it all" or "the money won't be there for your old age." Children also use fear of the "death tax" to coerce parents into transferring assets through tax-planning strategies such as gifts and the creation of FLPs. It is also not uncommon to see unscrupulous caregivers attempt to abscond with the elderly client's assets by obtaining full control of the client's life and finances.

3. Anecdotally, one observes such instances in the news, the most notorious of which might be the sad cases of Brooke Astor or Anna Nicole Smith.

4. Often the designation of a guardian in a health care power of attorney or health care directive is not given the appropriate amount of thought or weight given the power a guardian can have over the ward. Because courts generally give great deference to the ward's nomination, it is imperative that the consequences of naming a particular person (and this person's successor) are fully discussed and explored between the client and the attorney. It may even be wise to use a separate document that functions solely to name the guardian, so that this nomination is not lost among the other difficult decisions usually contained in a health care directive.

5. Because it is likely that an heir or caregiver may object to the nomination of a particular person by claiming that the proposed ward was incompetent at the time of nomination, it is recommended that an attorney draft a contemporaneous memo to the file describing the level of competency of the person at the time of the document's execution, as well as the reasons stated by the person as to why they have chosen the nominee. It is also recommended that the client provide a copy of the document to the nominated guardian.

    a. Pre-Death Will Contests

        i. Pre-death will contests are not permitted in most states, as it is generally held that no one is injured by probate until the testator dies, and only then would an aggrieved party have standing in court. This may, however, be changing.

ii. In *Matter of Glasser,* 2007 WL 867783 (N.J. Super. Ct. Ch. Div. Mar. 8, 2007), the New Jersey court ruled that Ms. Glasser lacked capacity and set aside the estate plan she signed, with her daughter's help, that significantly benefited her daughter to the exclusion of her son. This action resulted in an earlier version of Ms. Glasser's estate plan being adopted, in which the son and daughter essentially benefited equally. Ms. Glasser was alive throughout the entire case regarding the validity of her estate plan.

iii. In *Murphy v. Murphy,* 78 Cal. Rptr.3d 784 (Cal. App. 2008), it was held that a substituted judgment order, in which a superior court authorized father's conservator to re-execute, nunc pro tunc, a living trust and pour-over will that had been executed by father before the conservatorship (and that had effectively disinherited son), collaterally estopped son from arguing, in an action against daughter after father's death seeking rescission of trust and will, that the trust and will resulted from daughter's fraud or undue influence. Essentially the ward's estate plan was carved in stone during his life because the conservator was permitted to and did re-execute the documents.

iv. The argument, however, that potential beneficiaries should be allowed to challenge an estate plan during the ward's life did not work in *In re Estate of Henry,* 919 N.E.2d 33 (Ill. App. 2009). In this case, J.P. Morgan was appointed guardian of the property of Richard Henry in 2006 and sought to set aside a will written by Mr. Henry in 2004, distributing almost $5 million of assets (the majority of his estate) to his caretaker "Mick" and Mr. Henry's nephew-in-law Wemple. Mr. Henry's previous will, written in 1999, distributed various bequests to his predeceased wife's family and left the residue to multiple charities.

v. In 2006 Mr. Henry was adjudicated as a disabled adult in need of a guardian. The court also determined that Mr. Henry had lacked capacity to manage his personal, legal, and financial affairs since 2003. It was further found that Mick, Mr. Henry's caretaker and one of the primary beneficiaries of the 2004 will, had misappropriated approximately $1.3 million of Mr. Henry's funds. Judgment was entered against Mick to return the fraudulent transfers.

vi. J.P. Morgan, the guardian of Mr. Henry's property, then petitioned the court for the authority to execute a codicil, a will, and a trust on behalf of Mr. Henry. J.P. Morgan proposed creating an estate plan essentially identical to Mr. Henry's 1999 will. The court granted J.P. Morgan's petition.

vii. Mick and Wemple appealed. The court held that Mick and Wemple did not have standing to appeal as they were not the ward's guardian, nor were they yet injured by the granting of the petition. The court found that the proper remedy would be for them to institute a will contest upon the death of the testator, when their rights, if any, under Henry's 2004 will would have vested.

viii. The court further found that they would not be collaterally estopped from raising another challenge subsequent to Henry's death (as was the case in *Murphy v. Murphy*), reaffirming that because the appellants have no standing there is no danger of collateral estoppel.

b. Pre-Death Probate

i. Pre-death probate is allowed to some extent in just a few states.

(1) Alaska, Arkansas, North Dakota, and Ohio allow lawsuits to contest the validity of a will before the testator's death. Ark. Code Ann. §§28-40-201 to 203; N.D. Cent. Code §§30.1-08.1-01 to 04; Ohio Rev. Code Ann. §§2107.081 to 085.

(2) Since 2000 Delaware allows people to validate trusts before they die. The grantor notifies friends and relatives of the contents of the document. Those people have 120 days to challenge the trust or their challenge is blocked forever.

(3) Florida recently passed a law allowing pre-death caveats to be filed with the court. Fla. Stat. §731.110. This statute states that any interested person who is apprehensive that an estate, either testate or intestate, will be administered or that a will may be admitted to probate without that person's knowledge may file a caveat with the court. The caveat of the interested person, other than a creditor, may be filed before or after the death of the person for whom the estate will be, or is being, administered. If a caveat has been filed by an interested person other than a creditor, the court may not admit a will of the decedent to probate or appoint a personal representative until formal notice of the petition for administration has been served on the caveator or the caveator's designated agent and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules. A caveat filed before the death of the person for whom the estate will be administered expires two years after filing.

ii. Some states allow a conservator to make changes to an incapacitated person's estate plan (to create or modify wills or trusts, to make gifts, to execute disclaimers, and so forth). California Probate Code §2580 allows a conservator to make a will, revoke or modify a preexisting trust, make gifts, or create revocable or irrevocable trusts. In Georgia, Ga. Code Ann. §29-5-36 allows the conservator to make transfers, outright or in trust, under the court's and a guardian ad litem's supervision.

iii. These pre-death proceedings are said to have the purpose of avoiding spurious will contests, of avoiding evidentiary problems present when a will is offered for probate after the testator's death, and to prevent frustration of the testator's intent. They are, however, rarely allowed under state law.

c. Guardianship And Divorce

i. Some states allow a guardian to file for divorce on behalf of a ward, while others maintain that divorce is an action only the ward can bring. Statutes generally govern this rule, while case law fills in what statutes leave out. In Georgia, the probate court may grant a guardian the power to file for divorce on behalf of the ward for any of the grounds for divorce allowed under law (adultery, abandonment, etc.) other than on the grounds that the marriage is irretrievably broken.

ii. If the guardian of the ward is not the ward's spouse but a beneficiary of the ward's will or an heir-at-law (for example, a child of the ward), there is potential that the guardian may seek to file for divorce on behalf of the ward, thereby increasing the ward's estate vis-à-vis the divorce proceeds, which would subsequently be passed down to the beneficiary/heir-at-law as an inheritance. This is particularly likely to happen if the guardian is a child of the ward but not a child of the ward's spouse. This has occurred a number of times in Georgia. Most recently, the probate court granted a guardian's petition, giving her the power to file for divorce.

iii. In a similar case in New Jersey, *In The Matter Of Jennings,* 453 A.2d 572 (N.J. Super. Ct. Ch. Div. 1981), the mother of a ward attempted to gain power to file for divorce on the ward's behalf. The ward had been comatose for almost four years after a mishap during a routine surgery, and his young wife later began a relationship with another man. The court found the divorce would have no effect on the ward but that it was basically a premature estate dispute — in that the mother was attempting to prevent the ward's property from going to his wife and trying to get it to go to her through intestacy statutes instead. The court did not grant the mother power to file for divorce in this case.

iv. Cases like these are expected to become more common as guardianship disputes increase and states become more accepting of allowing a guardian to file for divorce on behalf of a ward.

F. Malpractice Issues

1. What happens when all of an attorney's meticulous planning does not end up as intended (at least in the eyes of disgruntled beneficiaries)?

2. A legal malpractice claim arises, in most cases, when a beneficiary claims that, through an attorney's negligent estate planning, advice or drafting of transfer documents, he or she has been harmed by receiving less than he or she would otherwise be entitled (and less than the decedent intended the beneficiary receive), often because of greater than expected tax liability. *See, e.g., Lutz v. Balch,* 2006 WL 2575811 (Ohio Ct. App. Aug. 31, 2006) (beneficiary of parents' wills and trusts brought malpractice action against attorney who drafted them, alleging attorney negligently failed to minimize estate taxes); *Stept v. Paoli,* 701 So. 2d 1228 (Fla. Dist. Ct. App. 1997) (beneficiaries of revocable living trust created by parents brought malpractice suit against attorney who drafted trusts, alleging negligence in including a general power of appointment in the surviving spouse over trust assets, resulting in higher estate taxes); *Bucquet v. Livingston,* 129 Cal. Rptr. 514 (Cal. App. 1976) (beneficiaries of inter vivos trust brought malpractice action against attorney who drafted trust agreement, alleging negligence in failing to advise of adverse tax consequences of retention of a power of appointment). Significantly, in these cases, the plaintiffs were not the attorneys' clients but the beneficiaries of the transfers.

3. Traditionally, injured beneficiaries had no cause of action against an attorney, even if the attorney was clearly negligent, as no privity of contract existed between the beneficiary and the attorney. There are

now three general groups among the states with regard to whether a beneficiary has a cause of action against an estate planning attorney:

a. States that allow a broad cause of action (Hawaii, Montana, and New Hampshire): a lawyer owes a duty of care to the beneficiary, as the main purpose of the agreement between the attorney and the client is to benefit the beneficiaries;

b. States following the Florida-Iowa rule: a beneficiary may maintain a cause of action against the estate planning attorney only if the client's intent, as expressed in the will (or other document) is frustrated. Under this rule, the malpractice must be apparent on the face of the document. For the most part, this generally only includes execution errors as actionable; and,

c. "Strict privity" states (Alabama, Nebraska, Ohio, and Texas): the lack of privity between the estate planning attorney and the intended beneficiary is an absolute bar to legal malpractice claims These states keep the strict privity rule due to the fear of splitting an attorney's loyalty between the client and nonclient beneficiaries. *But see Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.,* 192 S.W.3d 780 (Tex. 2006) (court held personal representative of estate had privity with estate planning attorney).

4. Beware of circumstances in which beneficiaries can establish that the attorney-client relationship was extended beyond the client to include the beneficiaries. *Vinson Elkins v. Moran,* 946 S.W.2d 381 (Tex. App. 1997) (attorney-client relationship was established with beneficiaries based on facts that lawyers advised them on estate administration and on four distinct legal issues; beneficiaries attended multiple meetings at law firm; law firm held itself out as representing several beneficiaries; and beneficiaries paid part of firm's legal fees).

5. There are an untold number of reasons that a disgruntled beneficiary will find to blame the estate planning attorney for his or her perceived loss of an inheritance. Below are a few recent examples in which attorneys lost malpractice suits brought by people who were not their clients.

a. Failure To Take Advantage Of Laws That Would Have Saved Taxes

i. In *Estate of Schneider v. Finmann,* 933 N.E.2d 718 (N.Y. 2010), the court held that when an attorney negligently advised a decedent to transfer a life insurance policy between himself, another entity, and back to himself, or failed to advise him differently — and the $1 million life insurance proceeds were included in his taxable estate, resulting in an increased tax liability — privity existed between the personal representative of the estate and the estate planning attorney. The court held that the personal representative stands in the shoes of the decedent and, therefore, has the capacity to maintain the malpractice claim on the estate's behalf. "The attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional." *Id.* at 721.

b. Scrivener's Errors

i. Leaving Out The Residuary Clause

(1) In *Young v. Williams*, 645 S.E.2d 624 (Ga. Ct. App. 2007), Mr. James Williams retained attorney Mr. Henry Young, to draft a will. The will Young drafted inadvertently left out the residuary clause, under which his real property was to be left to his surviving spouse. As a result, when James Williams died, his real property was distributed according to the rules of intestate succession, with his widow, Betsy Williams, receiving a one-third interest in the marital residence, and his children from a previous marriage receiving a two-thirds interest in the residence.

(2) Betsy Williams sued Young and Henry Young, Jr., P.C. (collectively, "Young"), for legal malpractice. Young admitted that James Williams intended for the marital residence to pass entirely to Betsy Williams and that he inadvertently failed to include such a provision in the will. He urged, however, that Betsy Williams could not bring a legal malpractice action against him because there was no privity of contract.

(3) The court held that the testator's widow was an intended third-party beneficiary of agreement between testator and the attorney who drafted will, and thus, the attorney could be held liable to the widow for legal malpractice arising out of his failure to carry out testator's intent that she inherit the marital residence. In this case, the attorney knew that the testator intended for his widow to receive the residence.

ii. Failing To Integrate The Documents

(1) It is imperative that all the estate planning documents work together to accomplish the same goal. If the beneficiaries of the will are not the same as the beneficiaries of a life insurance trust, make sure the boilerplate provision in the life insurance trust directing the life insurance proceeds to be distributed to the estate upon the death of the grantor within three years of its creation is not included in the life insurance trust. Otherwise, the beneficiaries of the life insurance trust have just been disinherited if the grantor dies within three years.

(2) A case just like this took place in which the drafting attorney failed to consider the terms of both documents to ensure that they worked together to form the intended plan. Therein lies a viable malpractice claim on behalf of the intended third-party beneficiaries of the life insurance proceeds, the testator's parents.

6. Standing

Though standing issues vary from state to state, in some cases that those with standing to sue for malpractice include intended beneficiaries, beneficiaries-to-be (should the documents not be signed prior to testator's death), and beneficiaries under prior wills.

7. Tolling Issues

If the statute of limitations runs from the date the negligence occurred, most claims would be barred as the negligence would not be discovered for years until the testator's death. States with relaxed privity standards, however, generally do not start running the statute of limitations until the injury is incurred or discovered, generally at the testator's death.

a. Aiding And Abetting A Breach Of Fiduciary Duty

Claims of aiding and abetting a breach of fiduciary duty may also be on the rise. This class of claims may arise whenever a plaintiff believes that one or more third parties knowingly assisted in an alleged breach. Likely potential defendants could include spouses and other close relatives of fiduciaries, as well as their attorneys and financial advisers. Attorneys may be particularly susceptible to such claims, as they often prepare documents to "paper-up" transactions for fiduciaries. They also have a larger ambit of reasonable knowledge of fiduciary relationships because of their education and experience.

8. Protecting Yourself And Your Clients

a. The previous sections discussed many of the myriad claims and causes of action that can be asserted by those challenging inter vivos transfers and noted the potential for expanding liability in coming years. Now the $64,000 question: What to do about it? How do fiduciary attorneys and financial advisers protect clients — and incidentally themselves — when advising, drafting, and effectuating clients' intent to make inter vivos transfers?

b. Of course, the first answer is the traditional bundle of advice: Know the law. Keep abreast of changes in the tax code, in regulations, and in case law. Be cognizant of the kinds of claims that can be asserted. Get all the relevant information from clients. Be judicious in dispensing advice and careful in drafting. Keep clients informed.

c. This is all good advice that should be followed. But, faced with a rising tide of emerging claims and liability over inter vivos transfers, is there anything more — and more specific — that attorneys can do to better protect clients? There are a few practical changes suggested for practices to furnish additional protection.

9. Adopt A New Mindset

a. The first change is how attorneys think and the mindset with which attorneys approach clients' estate planning needs. Attorneys need to embrace their role as counselors and plan client transfers keeping in mind knowledge of how potential conflicts arise. That means more than just knowing the names and elements of various claims that can be potentially asserted but recognizing the situations that commonly generate problems. Some of these include:

i. The Non-Traditional Beneficiary

As discussed above, when a significant inter vivos transfer is made to a non-family member, such as an unrelated caregiver, both the expected heirs and, eventually, the courts are suspicious.

ii. "E Pluribus Unum"

The Latin phrase "E Pluribus Unum," one of the first mottoes of the United States, means "From many, (comes) one." What it means for an estate planner is the situation in which there are many co-equal relations, but one is greatly favored by the testator/inter vivos transferor. Any time there is a single person who receives a substantial inter vivos transfer, and is sole or primary beneficiary under the will, and is the designated personal representative of the estate, the potential for conflict and for liability rises. Unless, of course, the person has little or no competition, as when he or she is the sole surviving child.

iii.. Means, Opportunity, And Motive

We must be especially careful when a beneficiary, whether of inter vivos transfer, testamentary transfer or both, has exclusive or near-exclusive access to a testator/transferor who is mentally or physically infirm, particularly when the beneficiary has pressing financial needs.

iv. Dead Hand Control

Locking up control of assets through long-term trusts and other mechanisms is a formula for creating unrest and, therefore, conflict. Most of these situations, and similar ones where the potential for conflict is increased, will be familiar to the experienced fiduciary attorney. But it's not enough just to recognize the peril-fraught scenarios, because in most cases the client isn't going to drastically change his estate plan just because it happens to fit a suspicious case — after all, clients want to favor those they want to favor. What is important is that we as attorneys and financial advisors — after explaining such situations to our clients and making sure they recognize the risk and want to go forward anyway — structure and effectuate the transactions in a way that realizes the client's intent while minimizing potential liability.

b. More Disclosures!

i. If there is one single, concrete thing attorneys can do to protect clients from potential conflict and liability, making full, complete, and accurate disclosures is it. Once a potentially tricky situation is recognized, attorneys need to disclose it to clients. This is the second step of the counselor function. But there is a further level of disclosure that is part of best-practices conflict and liability avoidance: disclosures not just to the client but also to potential claimants. Obviously, this needs to be done with client consent, but attorneys should encourage clients to make disclosures in an effort

to prevent and defuse conflicts. Such disclosures might be uncomfortable for clients, but getting the information out while they are alive makes disagreements much easier to manage. It just might mean the difference between passing on a large financial legacy to their relatives or instead leaving it to their heirs' lawyers.

ii. A few areas where disclosures are particularly recommended:

(1) Unequal Distributions

When an estate plan for clients results in unequal distributions among heirs, attorneys should encourage clients to make it clear to their beneficiaries what the distributions will be and the reasons for them. Doing so can permit the disfavored heirs an opportunity to air their grievances personally rather than through litigation and can preempt claims of undue influence and fraud.

(2) Structure And Purpose Of Asset Transfer Mechanisms

Clients should be aware of how transfers are structured and why, so as to reduce the possibility of unforeseen consequences that run counter to their intent (which reduces the potential for malpractice claims). Also a better understanding of the process among the beneficiaries can help prevent surprise and, where it is necessary (for example, when an asset transfer involves creation of a limited partnership or other ongoing organizational entity), encourage cooperation among them.

(3) Alternative Transfer Mechanisms

It is simply good lawyering to explain to clients alternative ways to effectuate their goals. For example, using a limited power of attorney or tenancy in common instead of joint-with-survivorship accounts could avoid conflict and accomplish similar goals. Clients often neglect to give their attorneys complete information simply because they do not sense the extra information's relevance. Likewise attorneys may not think to ask. Explaining alternative proposals increases the chances that more information will flow between client and attorney.

(4) Accountings To Heirs At Law/Family Members

Distrust nearly always permeates estate disputes; heirs who are left out of the process don't see where the money is going, and do not trust that their interests will be protected. If financial accountings are liberally provided to anyone with a potential interest, the process will be more open, heirs will be more comfortable with the diligence and loyalty of the fiduciaries, and disputes will be less likely. The extra expense, particularly in situations with high conflict potential, is usually worth it.

(5) In addition to the above-described disclosures to clients and to potential heirs, there is a final sort of disclosure that is recommended: disclosures from clients to their attorneys and financial advisers. When engaged by clients to effectuate inter vivos transfers, attorneys need to draw out of their clients all the information possible, both to protect their interests in the event of later disputes and also to further their interests by making sure that the transaction at issue harmonizes with other aspects of the estate plan.

(6) To protect clients' interests, attorneys should get in the habit of applying to inter vivos transfers facilitated the same solemnity that attorneys apply to will execution. As with wills, it is recommended that an inter vivos transfer "execution ceremony" take place, or at minimum a private meeting with the client, in which questions such as the following are asked:

(A) Who is present with the client, and what is the nature of their relationship?
(B) Is anyone other than the client giving instructions as to the transaction's substance, structure, timing, and so forth?
(C) Why is the client engaging in the transaction? What is the client's intent, and interest?
(D) Who set up or suggested the meeting, and the representation?
(E) Whose motivation is it to structure a tax-advantaged transfer?
(F) What is the client's over-all estate plan? What about other assets not included in this transaction?

(7) This last point is key to an attorney's duty to further the client's interest as well as protect it from potential litigation. One common problem with regard to inter vivos transfer disputes is that much of it concerns transactions — particularly the establishment of joint accounts — in which no lawyer is involved. Therefore, we need to find out about these sorts of transfers, as well as all the other various aspects of our clients' overall estate and asset distribution plans, so that we can best discover how to structure the piece that is before us at the time.

iii. Avoid "Scrivener's Errors"

(1) On the other end of the spectrum from the "counselor" approach I advocate is what I call the "scrivener" approach – attorneys who see their role as simply drafting the documents necessary to pass along their clients' assets with a minimum of tax liability. We are, or should be, more than that. In realizing this role, we need to avoid the most common error of the scrivener – the failure to look beyond the transaction, at what will or may happen after the transfer has been made. We need to pay attention to the post-transaction possibilities, because it is in them that many conflicts are born. In that regard, I suggest:

(A) Give Specific Thought To Ongoing Management By Those Chosen For The Task

In most cases, our clients' estate plans require ongoing management after their deaths, sometimes very extensive ongoing management. We should ask ourselves and our clients: Is the designated manager or fiduciary well chosen? A fiduciary must be diligent, capable and impartial; it is not enough that they be loved, or even trusted, by the testator or transferor. A fiduciary who doesn't do what he ought can be as dispute-creating as someone who does what he shouldn't. Ask the client why this person is a good choice. If the answer is equivocal, consider a corporate fiduciary.

(B) Consider Controls Or Limits On Powers

A fiduciary, even if well chosen, who has too much power can generate conflict as often as a poorly chosen one. Consider checks or limits on the power of fiduciaries. Although sometimes lowering efficiency, this can reduce distrust among non-fiduciary heirs and prevent conflicts, and also lower the chance of liability in the event that one arises.

G. Conclusion

Recent years have seen a dramatic increase in litigation regarding inter vivos transfers, abuse of authority, guardianship disputes, and malpractice claims against estate planning attorneys. As a result, fiduciary attorneys can no longer afford to see ourselves as mere scriveners or tax mavens. To fully protect our clients and their estates, we must embrace our role as counselors and advocates; we must anticipate conflict and areas of potential liability and take a proactive, disclosure-based approach to minimize the danger. Doing so inures to our benefit, and to the benefit of our clients.

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