LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, OCTOBER 12, 2022

PERSPECTIVE

Estate planning pitfalls and probate litigation parachutes

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Probate litigators know that merely executing a will or trust does not guarantee that its instructions will be implemented upon its creator's death. What's worse, if costly litigation arises due to ambiguities, the beneficiaries may point the finger at the estate planning attorney. By avoiding the five common pitfalls outlined in this column, estate planners can not only limit the possibility of litigation for the intended beneficiaries and increase the likelihood that a client's true intentions will be effectuated after their death, but exposure to malpractice claims can be substantially reduced.

Keystone Law Group's sole focus on probate litigation sets us apart from others, with our firm handling thousands of cases related to disputed wills and trusts. As a litigation-focused firm, we are well acquainted with the estate planning provisions that are most often disputed and the arguments savvy litigators make to circumvent the language of a document. Since 2014, the firm has grown 800% and now boasts 23 attorneys, making us the largest probate litigation firm in California.

Modifying / Revoking a Trust

While most trust instruments contain a provision specifying the method that should be used to modify or revoke the trust, not every trust makes the defined method exclusive. It is advisable to do so because, if the method set forth in the trust is not the exclusive method, then the lenient statutory method (Probate Code sections 15401–15402) may be used, which only requires a writing, signed by the settlor, and delivered to the trustee.

While the statutory method's simplicity makes it easy for settlors to amend their trusts themselves, it also allows for a wrongdoer to prepare an amendment and unduly influence the settlor to execute it, without the assistance of counsel. By requiring more stringent procedures for a valid modification, and making those procedures the exclusive method, the potential for impropriety is reduced. Examples of more stringent requirements could be: requiring the writing to be notarized, sent by certified mail to the trustee, or specifically reference the modification provisions of the trust. A competent settlor, with the assistance of counsel, would easily be able to satisfy these requirements, whereas changes made on a whim or as the result of an unsophisticated influencer may not be able to satisfy such requirements. This may also narrow the scope of potential litigation over the valid exercise of a modification if a dispute arises.

Settlors should also be mindful of other provisions of the trust that may undermine these safeguards, e.g., if the procedure to exercise powers of appointment are less strict than modification/revocation powers, it could be easier to circumvent the latter by arguing that the writing is an exercise of the former.

Determining Incapacity

Another instance in which specific language can make a difference is in relation to evidence of a settlor's mental state. While most trusts include a definition of incapacity, they generally only require letters from two doctors without any temporal parameters — which means that a physician who has no history with the settlor can opine about the settlor's capacity, or that a non-current letter can be used to determine incapacity. It is simple to avoid such pitfalls by including language within the instruments that requires the letters to be obtained within a short period of time relative to the determination of incapacity, and either from a treating physician who has a history with the settlor or by a

physician who specializes in capacity evaluations.

Characterization of Community /Separate Property

Meticulousness is crucial in the characterization of community and separate property. To illustrate, a provision is usually included within a trust stating that property added to the trust retains its character, but if there is no identification of a property's separate or community character, then litigation could result calling for a tracing of assets, which is generally costly. Another factor to consider is a provision calling for the transmutation of property added to the trust to community property, which requires the adversely affected party to make an express declaration within the document that states the characterization of the property is being changed (*Speier v. Brace*, 9 Cal.5th 903 (2020)).

Forgetting No-Contest Clauses in Amendments

No-contest clauses can be effective in thwarting groundless claims surrounding the validity of estate planning documents, but only if the instrument has a no-contest clause. Incorporating by reference a no-contest clause of a previously executed instrument will not suffice. To avoid this pitfall, take care to include such a clause in all amendments.

Level the Playing Field in Beneficiary-Trustee Litigation

This last point is less of a pitfall and more of a plea to protect beneficiary rights.

Estate plans are partly created in the interest of beneficiaries, so it is important to remember that if a trustee breaches their duties, the beneficiaries must finance the breach claims against the trustee, who has the trust's resources at their disposal to defend themselves. Naturally, this gives the trustee substantial leverage, at times leading to inequitable settlements due to the financial pressure on the beneficiary to finance the litigation against an adversary with substantially more resources.

To uphold beneficiary rights and effectuate the intent of the settlor, planners should consider including these two provisions: (1) requiring the trustee to advance reasonable expenses to beneficiaries (chargeable against their share) and/or permitting the granting of an attorney's lien against their share (as an exception to the spendthrift clause) for claims implicating the trustee, and (2) requiring the trust to reimburse a prevailing beneficiary for reasonable attorney's fees and costs incurred in successfully litigating against a trustee for improper administration, and that such reimbursement be charged against the beneficial share of the trustee.

In conclusion, estate planners can help their clients and limit their own liability by considering these pitfalls when preparing estate plans. Estate planners can also start to level the playing field in beneficiary-trustee litigation by including the recommended provisions.

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