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Fiduciary LITIGATION

Keys to carrying out defensive estate planning

The key to the success of most estate litigation is counsel's ability to shape the facts of the case long before litigation ever ensues. Defensive estate planning is the development of a heightened awareness of facts or circumstances that may give rise to a contested will, trust or gift, and then taking the appropriate steps to memorialize and document the transaction to facilitate the proof of the validity of the transaction if a contest ensues.

Before discussing some ways to shape or at least memorialize the facts, I will provide a brief primer on probate litigation.

There are three basic grounds upon which to challenge the probate: 1) compliance with the statutory requirements of due execution; 2) the testamentary capacity of the testator; and 3) a third party's undue influence on the testator.

The first ground, which was the subject of the previous article (*The Daily Record*, June 12), is least often litigated. Instead, most estate litigation focuses on the remaining two grounds where counsel's ability to shape the facts before litigation ensues is critical.

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The proponent of the will bears the burden of proof on testamentary capacity. To satisfy this burden, the proponent must only prove that the testator: 1) understood the nature and consequence of executing a will; 2) knew the nature and extent of his or her property; and 3) knew who were the natural objects of his or her bounty, see *In re Estate of Kumstar*, 66 N.Y.2d 691 (1985), rearg. denied, 67 N.Y.2d 647 (1986).

Sustaining the testamentary capacity of the testator is relatively simple. Courts have found a testator to have had sufficient testamentary capacity even though he might have suffered from mental dementia and physical frailty, see *In re Estate of Ruso*, 212 A.D.2d. 846 (3rd Dep't 1995) and *Matter of Hedges*, 100 A.D.2d 586 (2nd Dep't 1984).

Likewise, a testator who was semiconscious and unable to talk, but able to nod in response to questions, was held to have sufficient testamentary capacity, see *In re Estate of Holcomb*, 150 Misc. 684, aff'd 242 A.D. 889 (3rd Dep't 1934).

While sustaining the burden of proof on testamentary capacity seems relatively simple for the proponent, sustaining the burden of proof opposing probate on the grounds of undue influence is a daunting burden on the objectant.

The law on undue influence is clear. The influence must amount to a moral coercion that destroyed independent thought that "constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist," *In re Will of Walther*, 6 N.Y.2d 49, 53 (1959) (quoting *Children's Aid Soc. v. Loveridge*, 70 N.Y. 387, 394-95 [1877]).

Unfortunately, the facts of most cases litigated in probate are not clear cut. The cost of litigation through trial is high, and it is "winner take all," high-stakes litigation. As a result, many will contests ultimately result in settlement, but only after a great deal of litigation, expense, delay, and risk have been incurred.

Counsel is rarely in control of shaping the facts and circumstances of a commercial dispute, and probably never able to shape the facts and circumstances of an accident that leads to a personal injury action. In those cases, counsel must work with the facts he has, not with the facts he wants. Witnesses certainly cannot be prepared before the event giving rise to the action.

However, unlike counsel involved in commercial or tort litigation, counsel may shape, and indeed control, the facts and circumstances of an estate litigation case long before litigation ever ensues. Counsel most often supervises the execution ceremony or witnesses the document and, thus, is likely to be called to testify at a will contest.

Planning situations require considerable thought when dealing with a client who may be of marginal capacity. Indeed, a client of marginal capacity is most often also the target of increased efforts by others to influence testamentary dispositions.

Counsel should consider the following questions whenever he

Continued ...

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Continued ...

makes an initial assessment of testamentary capacity or influenced decisions:

• Who selected counsel? The client or the intended beneficiary?

• Who arranged the appointment with counsel? The client or the intended beneficiary?

• Who is paying the legal fees? The client or the intended beneficiary?

• Did the client come to the appointment alone? If not, was the client accompanied by the intended beneficiary? Is this behavior consistent with past experiences with the client?

• Did a third party (not necessarily the intended beneficiary) participate in the initial meeting with the client? Did a third party participate in any discussions involving the estate plan? Did the client look or appear to look to the third party for ratification of the plan?

• Does the plan overly favor someone similarly situated with other family members?

• Is the plan a departure from past estate plans? Does the client have rational reasons for any such departure?

• Did the plan discussed at the initial meeting change before the documents were signed? Why?

• Is the plan consistent with any marital agreement? If not, should the marital agreement be amended?

• Does the primary beneficiary have a favored or "confidential relationship" with the client (e.g. attorney-in-fact, home health aide, etc.)?

When confronted with an affirmative answer to any or all of those questions there are a number of steps an attorney may take to minimize the risk of litigation or, at the very least, create facts that will help achieve a successful outcome:

• To the extent possible, contacts and communication should be directly between attorney and client.

• To the extent possible, the client should act independent of any aid or assistance by prospective beneficiaries (i.e. the client should travel and/or meet with attorney alone).

• Take notes and be prepared to testify as to why someone lost a testamentary gift or a beneficiary was favored.

• Consider the use of an in terrorem clause, and be certain to include dispositive provisions for any potential contestant to make sure that there is a "risk" to any litigation." See EPTL 3-3.5.

• Consider obtaining a medical or mental evaluation when warranted.

• Make sure the client has fully and sufficiently reviewed a draft of any documents to permit thoughtful consideration.

• Select attesting witnesses who are appropriate to the situation recognizing that they may be testifying and will be critical to the success of the case.

• Avoid having favored beneficiaries present during the execution ceremony.

• Carefully conduct any execution ceremony rather than the usual five minute ceremony with the three standard questions: "Is this your will?" "Do you want us to witness the will?" "Does it reflect your wishes?"

• Consider an audio or videotape of the execution ceremony, but be careful what you ask for and are making a record of. These records are discoverable. An elderly client who may seem quite competent to you may not appear as such on a videotape played for a jury.

The key to any litigation is typically the strength of the facts. Counsel should always be cognizant he or she is in the unique position to shape and document the facts of a will execution ceremony. Counsel should ensure that there will be credible testimony available to fully explain any questionable circumstances.

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