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IN THIS ISSUE

How to Help Clients Avoid a Disastrous Will or Trust Contest

A will or trust contest can derail a client's final wishes, rapidly deplete their estate, and tear their loved ones apart. But it doesn't have to end like this. In this issue you will learn:

- What a will or trust contest is
- Who can contest a will or trust
- When a will or trust contest can be filed
- The legal grounds for contesting a will or trust
- How your clients can avoid a will or trust contest

If you want to learn more about how you can help your clients protect themselves against challenges to their estate plans, please call our office now.

What is a Will or Trust Contest?

A will or trust contest is a type of lawsuit that is filed to object to the validity of a will or trust.

If a will or trust is successfully contested (i.e., declared invalid), then the court "throws out" the will or trust. This essentially places the client's family in the position it would have been without the challenged will or trust. This can be a disastrous outcome for a client's intended beneficiaries.

Who Can Contest a Will or Trust?

Only a person who has legal "standing" can file a lawsuit. Standing means that a party involved in a lawsuit will be personally affected by the outcome of the case.

The following people may have standing to question the validity of a will or trust:

- Disinherited or disadvantaged heirs at law – Family members who would inherit or would inherit more under applicable state law if the deceased person failed to make a valid will or trust
- Disinherited or disadvantaged beneficiaries –Beneficiaries (such as family, friends and charities) named or given a larger bequest in a prior will or trust

Planning Tip: Not everyone involved in a client's life will have standing to challenge the validity of the client's estate plan. Even if you suspect that the will or trust of a client is invalid, you will not have standing to contest it (unless you are one of the client's heirs at law or named in the client's prior will or trust).

When Can a Will or Trust Contest Be Filed?
Nine states' laws allow residents (and in some states nonresidents) to establish the validity of their estate plan before they die: Alaska, Arkansas, Delaware, New Hampshire, Nevada, North Dakota, and Ohio. This pre-death validation process allows clients to confirm their estate planning decisions while they are capable of defending them, which, in turn, will bar challenges to the plan after the client dies.

The time limit for an interested party to file a pleading opposing the probate of a will is determined by the law and rules of the state in which the probate case is filed. By filing that pleading, the will opponent becomes entitled to notice of any probate court filings and hearing settings and has the opportunity to respond to the filings and be heard at the hearings.

With regard to trusts, the time frame to contest them varies greatly from state to state. In some states, heirs can be limited to as little as a few months to contest a trust, while in other states the time frame can be as long as a few years.

Planning Tip: It is important to understand the time limits that an interested party has to file a will or trust contest, since in many states missing the deadline will completely bar the party from filing one.

What Are the Legal Grounds for Contesting a Will or Trust?
In general there are four grounds to challenge the validity of a will or trust:

1. *The will or trust was not signed as required by state law.* Each state has specific laws that dictate how a will or trust must be signed in order for it to be legally valid (usually wills not entirely in the maker's handwriting must be signed in the presence of two witnesses who meet certain requirements).
2. *The person making the will or trust lacked the necessary capacity.* The capacity to make a will means that the person understands (a) their assets, (b) their family relationships, and (c) the legal effect of signing a will. Each state has laws that set the threshold that must be overcome to prove that a person lacked sufficient mental capacity to sign a will. Some states apply the same standard to establishing a trust and others apply the standards for capacity to make a contract (understand the purpose and effect of the contract).
3. *The person making the will or trust was unduly influenced into signing it*. As clients age and become weaker both physically and mentally, others may exert influence over the client's decisions, including how to plan their estate. Undue influence can also be exerted on the young and the not so young. In the context of a will or trust contest, undue influence means more than just nagging or verbal threats. It must be so extreme that it causes the maker to give in and change their estate plan to favor the undue influencer or disfavor someone else.
4. *The will or trust was procured by fraud*. A will or trust that is signed by someone who thinks they are signing some other type of document or a document with different provisions is one that is procured by fraud.

Planning Tip: While it is easy to assume that a will or trust that was signed in an attorney's office is valid, this is not always the case. Attorneys who do not specialize in estate planning may be unfamiliar with the formalities required to make a will or trust legally valid in their state. Therefore, it is important for clients to work with an attorney who is familiar with the estate planning laws of their state. Ensuring that an estate plan is protected against these legal grounds is particularly important if clients wish to disinherit or favor one part of their family.

How Can Clients Avoid a Will or Trust Contest?
When clients create or update their estate plans, one of their goals should be to insure that their final wishes are fulfilled. Clients who are concerned about challenges to their plan should consider the following:

1. *Do not "do it yourself"!* If the client is concerned about an heir contesting their estate plan, only an experienced estate planning attorney will be able to help the client create and maintain a plan that will discourage lawsuits. Also, note that unintended consequences can result from a "do it yourself" plan because a box or DVD cannot give legal advice and the do-it-yourselfer neither knows the law nor what they do not know.
2. *Let family members know about the estate plan.* It is not necessary to let family members know about all of the intimate details of the estate plan; at the very least they need to know that the client has taken the time to create one.

3. *Use discretionary trusts for problem beneficiaries.* Instead of completely disinheriting a beneficiary who may squander their inheritance or use it against the client's wishes, require the beneficiary's share to be held in a lifetime discretionary trust and name a third party, such as a bank or trust company, as trustee. This will allow the client to control when the beneficiary will receive distributions and who will inherit anything that is left when the beneficiary dies.
4. *Keep the estate plan up to date.* Estate planning is not a transaction, it is an ongoing process. Therefore, as the law and the client's family, assets and circumstances change, so should the client's estate plan. An up to date plan shows that the client took the time to review and revise the plan as their family and financial situations have changed. This, in turn, will discourage challenges since the plan will encompass the client's current estate planning goals.

The Bottom Line on Will and Trust Contests

Will and trust contests are on the rise. Educating clients about how to head one off will go a long way to giving clients and their families peace of mind.