Trusts and Estates Primer

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> *"Death is not the end. There remains the litigation over the estate."*
>
> *~ Ambrose Bierce*

On any given Thursday morning, you will find fiduciaries and beneficiaries in Probate Court engaged in legal arguments over issues of undue influence, lack of testamentary capacity, or breach of fiduciary duty. The rapidly aging population, the rise in divorce rates, and the increase in non-traditional families have led to a growth in trust and estate litigation. There are three common claims in trust and estate litigation: 1) undue influence, 2) lack of testamentary capacity, and 3) breach of fiduciary duty. This article discusses these claims and offers practical solutions to prevent trust and estate litigation.

Undue Influence

All estate planning documents are the result of a certain amount of influence – but the law in Hawaii and in other jurisdictions draw a distinction between mere influence and *undue* influence. The key distinction is that undue influence involves the substitution of another's will for that of the testator, resulting in a testamentary instrument that the testator would otherwise not have made. In applying the doctrine of undue influence, the courts are careful not to interfere with a testator's right to make a free disposition of property, and a distinction is drawn between the undue influence, which invalidates an instrument, and the influence arising from the wish to please or gratify the desires of a loved one. Since direct evidence is rarely available, the act of undue influence is often proven by circumstantial evidence.[1]

In Re Estate of Herbert, 90 Hawaii 443, 979 P.2d 39 (1999) is the seminal Hawaii case which sets forth the elements of an undue influence cause of action. In *Herbert*, the Hawaii Supreme Court sets forth the standard in establishing an undue influence claim in the testamentary context. The *Herbert* case recognized that undue influence may be shown by circumstantial evidence, and in such cases, the plaintiff bears the burden to prove by clear and convincing evidence the following: (1) the susceptibility of the testator or testatrix, (2) the opportunity for the exertion of undue influence, (3) the disposition to exert undue influence, and (4) an inequitable or unnatural result in the will. The elements of undue influence must be operative at the time of the execution of a will or trust, and mere conjecture and suspicion of undue influence are not enough.[2] Thus, to sustain a claim of undue influence, the influence exercised must amount to fraud or coercion

destroying the testator's free will, or the influence must substitute another's will so that the product is not that of the testator.[3]

Susceptibility of Testator

In determining the susceptibility of a testator, the party seeking to set aside a will has the burden to prove mental weakness on the part of the testator.[4] Courts review factors such as the testator's age, lack of intellectual capacity, firmness of character, and physical debility.[5] Mental competence to make a will is not dispositive of the issue whether the testator was susceptible to undue influence.[6] Instead, the overarching question for courts is whether the testator's natural defenses were so lowered that the testator was not able to resist the persuasion of a stronger individual.[7]

Opportunity and Disposition To Exert Undue Influence

As a practical matter, undue influence may be inferred by showing the existence of an opportunity to assert undue influence, and that such opportunity was followed by the creation of a will in which the influencer unduly profits.[8]

Courts consider several factors when determining "opportunity" or "disposition," such as the nature of the relationship between the testator and the alleged influencer, whether there is an intimate or close relationship for relatively long, undisturbed periods, and whether there is a change in the testator's patterns of friendship and association.[9] These factors may signal an opportunity to exert undue influence, especially when the testator becomes isolated from family and friends in favor of the influencer.[10] Circumstances that do not necessarily constitute undue influence, particularly standing alone, include affection, kindness, honest persuasion or one person's power, motive, and opportunity to exercise undue influence on another.[11]

On the other hand, evidence of a confidential or fiduciary relationship between the testator and the influencer strengthens the proof that an opportunity to exert undue influence existed, and often gives rise to a rebuttable presumption of undue influence.[12] Fiduciary relationships are typically considered confidential in nature and include relationships between attorney and client, guardian and ward, trustee and beneficiary, and principal and agent.[13]

Result of Undue Influence

When determining whether there is an unnatural disposition in the will, courts consider whether the will provides for an unequal or unjust distribution of the testator's estate among the testator's heirs at law and the overall reasonableness of the testamentary provisions.[14] This element alone, however, does not raise a presumption of undue influence in the making of the will.[15]

Effect of Independent Advice

Whether a testator received independent or disinterested advice from an attorney or investment advisor is relevant in determining the existence of undue influence.[16] Although it is helpful to show that a testator had independent counsel and advice from an individual wholly devoted to the testator's interest, independent advice alone does not negate the existence of undue influence in all cases.[17]

Testamentary Capacity

Every individual that signs a valid will must possess the requisite testamentary capacity.[18] The requirement of testamentary capacity is derived from two important concepts: 1) that a testamentary instrument should be given effect only if it represents the testator's intent and 2) that the requirement of mental capacity protects the decedent's family.[19] If the testator lacks the requisite capacity at the signing of the will, the testamentary instrument will not be valid. The law presumes that a testator possesses the necessary capacity to execute a will.[20] The party challenging the validity of the will has the burden of proof, by a preponderance of the evidence, to establish that the testator lacked testamentary capacity.[21]

The test for testamentary capacity is comprised of four elements.[22] A testator possesses testamentary capacity if he or she has the ability to know: (1) the nature and extent of the testator's estate; (2) the identity of the beneficiaries and their relationship to the testator, whether by blood or other circumstances; (3) the disposition that the testator is making; and (4) the relationship between these elements so as to form a rational and orderly plan for the disposition of the testator's estate.[23] First, the testator must have knowledge of his or her assets. Second, the testator needs to know the names and relationships of the individuals that would naturally be considered beneficiaries of his or her estate. Third, the testator must understand the transfers he or she will be making through the will. Lastly, the testator needs to know how the prior three elements fit together to establish the testator's disposition of assets upon death. All four elements must exist at the time the will is executed. Even if the challenging party proves that the testator lacked testamentary capacity prior to the signing of the will, if the testator executed the instrument in a lucid interval, then the testator had testamentary capacity.[24]

The test for testamentary capacity does not require that the testator have perfect memory.[25] Even if the testator forgets the existence of a part of the testator's estate or fails to remember an individual that has a natural claim to the testator's estate, the will may still be valid.[26] In general, testamentary capacity requires that the testator remember the necessary facts, and not all of the details of his or her estate, the natural objects of the testator's bounty, and the duties toward them.[27]

Challenging the Will

A party must have standing to challenge the validity of the will based on lack of testamentary capacity or undue influence. A beneficiary under a prior will, whose bequest has been reduced by a subsequent will, has standing to contest the subsequent instrument.[28] The testator's heirs under the laws of intestacy also have standing to contest the will.[29]

A surviving spouse generally has

statutory rights to a deceased spouse's estate. Such rights are based on elective share and pretermitted spouse statutes, in addition to homestead, exempt property, and family allowances.[30] In general, a child does not have a statutory right to a share of his or her parent's estate. There are a few exceptions such as homestead, exempt property, and family allowances, and pretermitted children.[31]

Preventing a Will Contest

The roots of a contested will or trust proceeding often begin with the drafting and execution of the estate planning documents. If a will contest appears likely, the estate planning attorney should consider taking one or more preventative measures to minimize the likelihood of a will contest.

Although there are various steps that can be taken to prevent the likelihood of a will contest, the estate planning attorney will need to consider whether a particular method is appropriate given the testator's intent, the distribution of assets, the intended beneficiaries, and the testator's financial situation.

In Terrorem or "No Contest" Clauses

One approach is to include a provision in the document that provides for a penalty or forfeiture of a devise to a beneficiary that contests or challenges the testamentary instrument. Such a provision, typically referred to as an *in terrorem* or "no contest" clause, provides that any beneficiary who challenges the instrument would no longer receive an interest under the estate or would receive a significantly reduced amount. As a practical matter, the "no contest" clause is not effective unless the challenging party risks losing a significant economic benefit under the testamentary instrument. Furthermore, enforceability of a "no contest" clause is limited if probable cause exists for instituting proceedings.[32] Probable cause exists if a reasonable person, who has been properly informed and advised, would conclude at the initiation of the contest that there is a substantial likelihood that the contest will be successful.[33]

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The "no contest" clause should indicate whether a particular act would trigger the clause. A petition to reform or modify the testamentary instrument does not usually trigger a "no contest" clause.[34] Additionally, a petition for instructions to clarify the testator's intent, that is not seeking to evade the testator's intent, generally will not violate the "no contest" clause.[35] The drafting attorney may wish to provide that the "no contest" clause also applies if other related documents are contested such as deeds, beneficiary designation forms, or business succession agreements.[36]

Disinheritance Clause

Another way to prevent a will contest is to include a statement in the will which provides that the testator intends to omit the individual from the document. The drafting attorney should consider clearly stating in the will that the testator has specifically made no provision for the omitted heir. This would prevent the challenger from alleging that the testator did not know the natural objects of his or her bounty, or that a mistake was made. The attorney may want to avoid stating the reasons for disinheriting because a disinherited heir may contest the provision based on the testator's mistaken beliefs.

Videotape Execution

Some attorneys videotape the testator executing the will. A videotape might be effective to prove that the testator clearly possessed capacity and openly expressed his or her desires in a coherent manner. Some individuals, however, may appear unnatural or uncomfortable if a video camera is present. Furthermore, if the estate planning attorney does not videotape each and every signing, the existence of a videotape may highlight that the drafting attorney had concerns or even doubts regarding the testator's capacity.

Standard Procedures For Execution of Documents

Another method of minimizing estate litigation is to establish a routine practice of administering will signings. An attorney supervising the execution of a testamentary instrument should have a specific procedure for the signing of estate planning documents. The attorney should comply with the same formalities at every signing. Even if the attorney does not recall the exact details of a particular client's signing, he or she can attest that a definite business practice is followed. At the signing, the attorney should ask questions that elicit the testator's understanding of his or her assets and natural heirs. The attorney should also discuss the significance of the will and the dispositions that the testator is making.

Memorandum of Signing

The estate planning attorney should consider writing extensive notes or a memorandum to describe the reasons for an unequal disposition. Documentation explaining the testator's reasons for disinheriting an individual may become evidence in a will contest and will help to carry out the testator's

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intent. The attorney may consider gathering evidence showing family discord and supporting the testator's rationale for disinheriting a family member. It may be years or decades between the execution of the will and the death of the testator. After such time has passed, the attorney probably will not remember the client or the client's reasons for disinheriting the individual. The attorney's notes or memorandum will assist in ascertaining the testator's intent.

Collecting Proof of Capacity

The estate planning attorney could gather evidence to establish that the testator had the requisite capacity at the signing of the documents. Although testamentary capacity is a legal standard, evidence from health professionals, in the form of the testator's medical records or a physician's letter, might be helpful in establishing the testator's capacity. The doctor's evaluation or letter should be made as close in time to the signing of the will as possible because a client's capacity, particularly an older client, can change. In addition, the attorney might ask for affidavits of individuals who observed the testator's capacity at the time the testator executed the will. Affidavits of the testator's family members, close friends, accountants, and financial advisors might also be helpful in establishing capacity.

Excluding Family Members From The Estate Planning Meeting

If a family member or caregiver accompanies a client to a meeting with the estate planning attorney, the attorney should meet with only the testator and excuse any other individuals from the meeting. This practice will protect both the client and the intended beneficiaries, remove the likelihood of undue influence, and assist the attorney in ascertaining the testator's true intent. The attorney may wish to send the party accompanying the client a letter confirming that he or she was excluded from the meeting and that the attorney does not represent his or her interests.

Inform Heirs At Law

The attorney could suggest that the testator inform family members of the unequal disposition. Will contests are commonly driven by emotion, and family members often bring claims because they are seeking answers regarding the testator's decision to make unequal dispositions. Thus, keeping family members in the loop and having the testator provide an explanation for the testamentary decisions might eliminate the shock and surprise felt by family members upon the testator's death.

Series of Testamentary Documents

If the attorney or testator anticipates a will contest, the attorney should consider preparing a series of wills at different points in time. Each successive will could make only slight changes, but essentially restate the prior instrument in its entirety. If the challenger succeeds at invalidating the final will, the next to the last instrument controls the disposition of the testator's estate. Thus, the chal-

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lenger is forced to challenge documents in a series of separate proceedings in order to circumvent the testator's estate plan.

Non-Probate Transfers and Gifts

The attorney could consider whether it would be appropriate to utilize means other than a will to transfer the client's wealth. Rather than transferring assets upon death, the client can make inter vivos (lifetime) gifts, name a favored individual as the beneficiary of a life insurance policy or a retirement plan, or hold title to an account with an intended beneficiary as joint tenants with right of survivorship so that the survivor will automatically (without probate) receive the account upon death. Any challenge to the will would not affect the transfer of nonprobate assets. In addition, a contesting beneficiary must initiate a separate proceeding to contest the inter vivos transfer.

Gifts To Disfavored Heirs

The attorney might suggest making an inter vivos gift (either outright or in trust) to a disfavored heir at the same time the will is executed. A contemporaneous gift would provide a strong disincentive for the disfavored heir from challenging the testator's capacity. It would be inconsistent to allege that the testator had capacity to make a gift but that the testator lacked capacity to make a will. The amount of the inter vivos gift should be less than the intestate amount, but large enough to deter a challenge. Care should be taken to document the gift by a promissory note, a gift tax return, an agreement, or some other written means.

Breach of Fiduciary Duty

Trust litigation often centers on a beneficiary's claim against a Trustee for the Trustee's alleged maladministration of a trust. In Hawaii and in other jurisdictions, a Trustee must observe the standards in dealing with the trust assets that would be observed by a prudent person dealing with the property of another.[37] Trustees, personal representatives, conservators and guardians are fiduciaries, hence are held to a high standard of care. Conduct of fiduciaries must comport with the trust instrument and applicable law. Some of the Trustee's duties and responsibilities imposed by Hawaii law are summarized below.

Duty of Loyalty. A Trustee has the duty of absolute loyalty to the trust beneficiaries. The law is clear that a Trustee must act in a manner that benefits the beneficiaries and not the Trustee's own self-interest.[38] This duty also results in a prohibition against self-dealing. For example, a Trustee cannot buy any asset belonging to the trust or sell any of the Trustee's own assets to the trust without obtaining court approval even if the transaction is for fair and adequate consideration.

Duty to Identify, Marshal and Safeguard Trust Assets. A Trustee has a duty to identify, marshal, and safeguard trust assets. This duty includes the duty to preserve the trust estate and to defend the trust from attack. Depending on the assets in the trust, the implementation of this duty may include many actions, including obtaining insurance on trust assets. A Trustee should not simply rely upon the actions of the predecessor Trustee, but should independently verify that the trust assets are properly secured.

Duty to Segregate Trust Assets. A Trustee must keep the trust assets separate from the Trustee's individual assets and from assets of any other trust that the Trustee might be administering. If a Trustee is administering several different trusts, the Trustee must be careful to keep the assets of each trust separate.

Duty To Account and Keep Trust Beneficiaries Reasonably Informed. A Trustee must also keep the beneficiaries of the trust reasonably informed of the trust and its administration. Importantly, a Trustee must file appropriate tax returns (including estate tax returns, fiduciary tax returns, and the decedent's final income tax return), and render clear and accurate inventories and trust accounts on an annual basis.[39] It is important for the Trustee to

review the trust instrument to determine if the Trustee is directed to account on a particular basis (i.e., monthly or quarterly) and the identity of the parties entitled to receive accounts (i.e., all beneficiaries or only current income beneficiaries).

Duty to Invest. The Trustee has a duty to invest and make the trust property productive, and should dispose of nonproductive or underproductive trust assets. In exercising this duty, a Trustee should be aware of the "prudent investor rule" as provided in Hawaii Revised Statutes Chapter 554C. Under the broad duty to act as a "reasonably prudent [business person]" is the Trustee's specific duty to diversify trust investments.[40]

Duty of Impartiality. The Trustee has a duty of impartiality and must deal with all similarly situated beneficiaries impartially.[41] For example, if the trust instrument provides that all beneficiaries are entitled to an equal share of the trust assets, a distribution made to one beneficiary requires an equal distribution to all similarly-situated beneficiaries.

Duty to Comply with Terms of Trust. The Trustee has a duty to comply with the terms of the Trust in the manner prescribed by the trust instrument, which includes paying off creditors, making distributions to beneficiaries and defending and enforcing claims on behalf of the Trust.[42]

Selection of a Fiduciary

A settlor will often nominate the eldest or most favored child, or a trustworthy confidant to serve as a fiduciary. The settlor should be aware of the many duties and responsibilities required of a fiduciary. The fiduciary has many tasks, including the filing of tax returns, collecting trust assets, investments, paying creditors, preparing an inventory and accounting, and distributing the trust assets to the beneficiaries. In addition to the numerous responsibilities, it is critical that a fiduciary be knowledgeable of and qualified to handle the fiduciary duties. If a fiduciary breaches any of the duties and responsibilities, the fiduciary may be held *personally* liable. Administering a trust or estate can be both time-consuming and complex. Thus, the settlor should select a responsible individual or even multiple individuals that are capable of handling all of the duties and responsibilities of a fiduciary. To carry out these duties, a fiduciary is entitled to use trust funds to hire attorneys, accountants, and investment advisors. As an alternative, the settlor could consider retaining a professional corporate fiduciary that has the experience and resources to administer a trust. Corporate fiduciaries can make decisions with professionalism and objectivity, and can also provide expert record keeping services, which includes the preparation of inventories and complex trust accounts. In the appropriate cases, a neutral third party would alleviate strained relationships between family members and administer the estate without any conflicts of interest.

Conclusion

This article is meant to provide a general overview of the three most common claims litigated in the Probate Court, as well as some practical solutions to prevent will contests and other trust and estate litigation.

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1 *In re Estate of Herbert, 90 Hawai'i*, 443, 457, 979 P.2d 39, 53 (1999).
2 *Id.*; *In re Will of Charles Notley*, 15 Haw. 435, 440-41 (1904); *In re Estate of Afong*, 26 Haw. 147, 152-154 (1921).
3 *Herbert*, 90 Hawaii at 457, 979 P.2d at 53.
4 *Id.*
5 79 Am. Jur. 2d Wills § 371.
6 *In Re Estate of Borsch*, 353 N.W.2d 346, 349 (S.D. 1984).
7 79 Am Jur. 2d Wills § 381.
8 36 Am. Jur. Proof of Facts 2d 109.
9 *Id.*
10 *In re Estate of Burkland*, 504 P.2d 1143 (Wash. Ct. App. 1972).
11 25 Am. Jur. 2d Duress and Undue Influence § 37; *Raimi v. Furlong*, 702 So.2d 1273 (Fla. Dist. Ct. 3d Dist. 1997); *In Re Copelan*, 553 S.E.2d 278 (Ga. Ct. App. 2001); *In Re Marriage of Spiegel*, 553 N.W.2d. 309 (Iowa 1996).
12 79 Am. Jur. 2d Wills § 414.
13 95 C.J.S. Wills § 351; *Wiszowaty v. Baumgard*, 629 N.E.2d 624 (Ill. Ct. App. 1994).
14 95 C.J.S. Wills § 364.
15 *Id.*
16 *In Re Estate of Maheras,* 897 P.2d 268, 273 (1995) ("Where will's maker consults fully and privately about his will with person so dissociated from stronger party, that advice may be treated as having been given impartially and confidentially, [and] advice could be deemed independent.).
17 *In Re Olson's Estate*, 35 N.W.2d 439, 446 (Minn. 1948).
18 Haw. Rev. Stat. § 560:2-501 (1996); *Herbert*, 90 Hawaii at 454, 979 P.2d at 50.
19 *Herbert*, 90 Hawaii at 455, 979 P.2d at 51.
20 *Id.* at 454, 979 P.2d at 50.
21 *Id.* at 455, 979 P.2d at 51.
22 *Id.*
23 *Id.*
24 *In re Lopez*, 25 Haw. 197 (1919).
25 Page on Wills § 12.22.
26 *Id.*
27 *Id.*
28 *Herbert*, 90 Hawaii at 455, 979 P.2d at 51.
29 Haw. Rev. Stat. § 560:1-201 (1996).
30 Haw. Rev. Stat. § 560:2-301 (1996); Haw. Rev. Stat. § 560:2-402 (1996); Haw. Rev. Stat. § 560:2-403 (1996); Haw. Rev. Stat. § 560:2-404 (1996).
31 Haw. Rev. Stat. § 560:2-302 (1996); Haw. Rev. Stat. § 560:2-402 (1996); Haw. Rev. Stat. § 560:2-403 (1996); Haw. Rev. Stat. § 560:2-404 (1996).
32 Haw. Rev. Stat. § 560:2-517 (1996); Haw. Rev. Stat. § 560:3-905 (1996).
33 Roy M. Adams and Charles A. Redd, "Fiduciary Mistakes and Learning from Them and Knowing Fiduciary Boundaries," *Cannon Financial Institute, Inc.*, July 27, 2010
34 *Id.*
35 *Id.*
36 *Id.*
37 Haw. Rev. Stat. § 560:7-302.
38 *See* Haw. Rev. Stat. § 554C-5.
39 Haw. Rev. Stat. § 560:7-303.
40 *Steiner v. Hawaiian Trust Co.*, 47 Haw. 548, 562-563, 393 P.2d 96, 105-106 (1964).
41 *See* Haw. Rev. Stat. § 554C-6.
42 *See* Haw. Rev. Stat. § 560:7-306.

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