

People Behaving Badly: Trusts and Estates Conflicts

Conflicts involving trusts and estates are some of the most difficult contested matters, both because of the legal issues involved and because they are emotionally wrenching, more like divorce than civil litigation. These conflicts are sometimes referred to as “fiduciary litigation,” “financial elder abuse,” or “will contests,” and typically involve undue influence and/or incapacity. These conflicts have multiplied in recent years. Demographics play a role—as the baby boom population ages and ultimately dies, there is opportunity for conflict over financial assets. Although all families can have conflict over inheritances, blended families are more prevalent today and typically have more conflict.

Financial Elder Abuse and Will and Trust Contests

Many cases we handle involve someone taking advantage of an elderly person and gaining access to their financial assets, or convincing the person to change their estate plan. The most likely perpetrators are those who have influence and access to the elderly -- spouses, children, employees, and even lawyers, or other trusted advisors.

Malfeasance is often not discovered until the person dies. At that point, the heirs may discover that the scope of the decedent’s assets is much different than they expected; perhaps because assets were depleted during the person’s lifetime by someone who gained access to accounts via a power of attorney or other means, or perhaps because a deed or beneficiary designation was changed to divert assets away from the estate plan. Such actions are easier than convincing someone to change their Will or trust, which involves a lawyer who could frustrate the objective. Often some level of diminished capacity is involved coupled with undue influence.

Unlike some other countries, in the U.S., an individual has a right to leave his or her assets to anyone he or she wishes. The presumption as to beneficiary designations, transfer on death designations and Wills and trusts is that they reflect the intention of the decedent. Therefore, the crux of proving financial elder abuse or invalidating a Will or trust is proving that the decedent was incapacitated or unduly influenced--which is not easy.

Incapacity

If an individual cannot form the intent to direct the disposition of his or her

POSTED:

Jan 16, 2020

RELATED PRACTICES:

[Trusts and Estates](#)

<https://www.reinhartlaw.com/practices/trusts-and-estates>

RELATED SERVICES:

[Trust, Estate and Fiduciary Litigation](#)

<https://www.reinhartlaw.com/services/trust-estate-and-fiduciary-litigation>

RELATED PEOPLE:

[Jennifer R. D'Amato](#)

<https://www.reinhartlaw.com/people/jennifer-damato>

assets, then the Will or trust will be void. Establishing that someone is legally incapacitated is difficult. The capacity to form the necessary intent to establish an estate plan is quite low. In most states, generally understanding one's assets, one's "natural" beneficiaries (such as spouse or children) and forming an intention to leave assets in a particular way is all that is necessary. In many cases, the actions occurred months or years before death, making it difficult to prove a person's competency at that given moment in time. Further, the law provides that even someone who is generally incapacitated can have a "lucid moment." Many times we are unable to prove incapacity as a matter of law, but we are able to prove that someone had diminished capacity rendering them more susceptible to undue influence.

Undue Influence

Wisconsin uses a four-element test to prove undue influence which requires showing: 1) susceptibility to undue influence; 2) disposition to influence; 3) opportunity to influence; and 4) coveted result. However, if the alleged influencer has a "confidential relationship" with the victim, then an easier, two-prong test applies: 1) the existence of a confidential relationship between testator and favored beneficiary; and 2) suspicious circumstances surrounding the making of the will.^[1] Typically in such cases, there is "confidential relationship" which would include either a family or fiduciary relationship (such as a lawyer or other trusted advisory) between the victim and the perpetrator. It is difficult to prove undue influence unless you can also prove limited capacity (due to age or other factors).

^[1] In re Estate of Kamera, 81 Wis. 2d 151, 259 N.W. 2d 733 (1977)

Trustee Malfeasance

Another type of conflict we increasingly see is where a fiduciary, typically a trustee, but sometimes an agent under a financial power of attorney, or a personal representative named in a Will, abuses his or her position of power. A fiduciary has a duty to manage financial assets for the benefit of the named beneficiaries. When the fiduciary instead uses his or her power to enrich him or herself, this is a breach of those duties. This might take the form of excessive fees, control of a business or other assets for the fiduciary's benefit, or diverting funds for his or her own use.

For more information, please contact Jennifer D'Amato or another Trusts & Estates attorney.



These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.