Hot Topics in Probate Litigation

Tri-State Trust Forum of the
Maine, New Hampshire and Vermont Bankers Associations

September 26, 2011

Radisson Hotel
Manchester, New Hampshire

By

John J. Pankauski, Esquire

Pankauski Law Firm PLLC

West Palm Beach, Florida

(561) 514 – 0906

www.pankauskilawfirm.com

pankauski

LAW FIRM
PLLC

1 **Guardianship Wars**

Scenario: Father amends his estate plan to dis-inherit Son. Son learns of this, and files a petition for guardianship of father, requesting that Son be appointed as guardian of the person and the property of father. While the determination of incapacity is pending, Son files a petition to rescind Father's recent amendments to his estate plan.

Competency hearing: procedural and evidentiary issues.

Attorneys Fees and Costs: statutory rules versus trends

2 **When Estate Planning and Family Law Collide—Part I**

Prenuptial and postnuptial agreements are common, particularly among second or third marriages. Estate plans for clients typically include a pour over will , and, among other documents, a living or revocable trust. But problems, and litigation, can arise when the estate plan does not match the terms and conditions of the marital agreement. Consider a postnup which states that surviving spouse shall, upon death of the other spouse, receive a certain amount of assets for life, remainder to children (from another marriage)---but the trust does not say that. The trust makes an outright distribution of assets to the spouse. Who has standing to enforce the postnup? Who must file creditors claims to enforce the postnup?

3 **Whose Life Insurance is That? Protecting Minors' Interests in a Child Support Order After the Death of a Parent (When Estate Planning and Family Law Collide—Part II)**

Upon parents' divorce, a court orders one parent to maintain life insurance for the benefit of the minor child in the amount of $500,000. That parent dies and

a. the life insurance beneficiary is not the minor child
b. a trust is the beneficiary of the policy---and the trustee is an adult child from another relationship
c. the beneficiary of the policy is a grandparent and the policy is for $1,000,000—who "gets" the "extra" $500,000?

4 **Elective Share**

Increasingly, states are altering their elective share statute to provide that a surviving spouse is entitled to "take" a fixed percentage (e.g. 30%) of the Decedent spouse's assets (i.e. "Elective Estate"). Recognizing most state's public policy of not dis-inheriting a surviving spouse, the "pool" or "basket" of assets from which the elective share may be paid is increasing (e.g. transfers within one year of death, will substitute/beneficiary designations, etc.)

"Doing the math".....most states provide that the surviving spouse shall receive 30% of the elective estate after payment of claims, but not administration expenses (e.g. PR/executor fees, and attorney fees).

This requires t/e attorneys to analyze a surviving spouse's rights pursuant to a will or trust (and probate assets) versus taking (or electing) an elective share. Consider: an estate which leaves all to spouse, but all it includes is a residence and checking account and personal property versus a life insurance policy with death proceeds of $1,000,000 which "goes" to a former spouse or an IRA which "goes" to a child from a prior marriage.

5 **Attorneys Fees in Probate Settings–Why Is Getting Paid So Difficult?**

Attorneys fees in probate matters, trust matters and guardianships are being hotly contested by adverse parties (those with standing) notwithstanding that most states provide that "reasonable compensation" shall be paid. Additionally, courts are scrutinizing attorneys fees much more closely.

6 Trustees Using Trust Funds to Defend Bad Acts—Conflicts of Interest

May a trustee who is sued in his/her individual, as well as fiduciary, capacity use trust funds to defend bad acts? Many courts state that such a circumstance creates a conflict of interest between a trustee's individual liability with his/her duty of loyalty to trust beneficiaries. Many courts recognize this conflict and require, at a minimum, that trustees seek court approval before using trust funds to defend such a lawsuit. Other states have enacted legislation which provides a distinct procedure for dealing with this issue.

7 Beneficiary Designations and Will Substitutes Post-Divorce

Consider: John marries Jane and names Jane as the beneficiary of a $2,000,000 life insurance policy which John owns. After five years of marriage, John and Jane later divorce and each "waives all rights to

the other's property except as set forth in this agreement ". The marital settlement agreement/property distribution divides assets between John and Jane. Post-divorce, John never removes Jane's name as the designated beneficiary on the insurance policy. John later remarries Susan, to whom he is married for 20 years. John dies survived by his spouse Susan. Who "gets" the $2,000,000 insurance policy----Susan the surviving spouse or Jane, the designated beneficiary? See Crawford v Barker.

8 Undue Influence

Undue influence is a common allegation when an interested party seeks to set aside a will or other testamentary document. Often, however, the allegation is not pled with the requisite particularity. Undue influence is, after all, a species of fraud. Are you pleading this allegation correctly or striking it when appropriate?

9 Slayer Statutes for Assisted "Suicides"

Most states have a "slayer statute" which prohibits one who causes the demise of a person to inherit from that person. The "easy" example is that a murderer cannot also inherit from the decedent. But what about doctor assisted suicides or actions by health care proxies at end of life?

10 Attorney Client Privilege and the Fiduciary Exception

Trustees owe beneficiaries duties of loyalty, faith and fair dealing. Beneficiaries are also entitled to relevant information about the trust and its administration. But how much information is a beneficiary entitled to when a beneficiary and a trustee are engaged in litigation? May the trustee prevent the beneficiary from obtaining documents or other evidence by claiming attorney-client privilege or does the trustee's duty to a beneficiary require that such information be disclosed? See U.S. v. Jicarilla Apache Nation. No. 10-382 June 13, 2011.

11 Trust Reformation

12 Trust ~~Busting and Re-Writing~~ Reformation—What Ever Happened to the Settlor's Intent?

Courts may reform trusts, even irrevocable trusts, to correct a mistake of law or fact, when it is in the best interests of the beneficiaries, or when it is not inconsistent with the settlor's intent. But some lawyers and beneficiaries may be using reformation procedures to re-write trust term and to "bust up" trusts and make immediate distributions. Truth be told, the guiding light of trusts—the settlor's intent—can be often ignored if all parties consent, and immediate distribution of funds to a beneficiary is not necessarily in that beneficiary's best interests.

13 Where Are My Parents' Assets?

14 Trustees Behaving Badly

15 Bank Account Litigation

16 Powers of Attorney and Will Substitutes

Powers of attorney are often mis-used by those attorneys-in-fact whose job it is to perform acts for the principal. Although many know that attorneys-in-fact may not self-deal, many do not realize that most powers of attorney cannot be used to change dispositions effective at the death of the principal—so called "will substitutes" such as totten trusts, beneficiary designations on retirement accounts and insurance policies.

17 Damages in Trust Investment Loss Cases