

McDermott  
Will & Emery



# CUTTING THROUGH THE COVID-19 CHAOS: BULLET-PROOFING YOUR ESTATE PLAN

DAVID A. BAKER

MARGARET ELIZABETH SANNE

TONI ANN KRUSE, *MODERATOR*

Tuesday, June 2, 2020

[mwe.com](http://mwe.com)



# QUESTION SUBMISSIONS

**During this webinar you can submit questions through the Zoom Q&A function**

- Questions will be visible to the presenters immediately after you submit your question
- The presenters will answer as many questions as possible live

# BASIC PREMISES

- Decedent's wishes, properly documented, should be effectuated
- Every technique for assuring compliance is a tradeoff between dead hand and flexibility to address legitimate need for modification
- Litigation and cooperative tinkering should take a backseat to effectuating intent
- So, what to do?

# DRAFTING CONSIDERATIONS

- Drafting is half the battle
- Need to understand avenues to modification, in order to defeat them with drafting and planning
- Defensive measures often go beyond mere drafting techniques
- But beware unintended consequences

# BULLET-PROOFING TOOLS

- Videotaping Will and Trust Execution
- Arbitration Clauses
- Psychiatric Competency Exams and Autopsies
- Opting Out of NJSAs, Decanting, Unitrust Conversion and Directed Trust Statutes
- In Terrorem Clauses
- Defending Against the Intentional Tort



# VIDEOTAPING WILL & TRUST EXECUTION

# VIDEOTAPING WILL AND TRUST EXECUTION

- Consider the objectives
- Analyze evidentiary rules
  - No state has flatly rejected it as evidence
- Presentation is key—ultimately, any evidentiary value may be undermined by a “horror show” video
  - With basic training, it can be scripted and managed, but unless scripted, surprises arise
  - Never use if testator simply comes off as impaired

# VIDEOTAPING WILL AND TRUST EXECUTION

- Presentation Rules
  - Testator should look good on tape
  - Testator should understand the documents, and
  - The scene should be scripted and rehearsed
- Handled right can be persuasive in court; but amateurish or infirm testator is worse than no tape
- Things can really backfire if tape is incriminating
- While a clear-cut demonstration of the reason for a legatee cut out can be persuasive, too much detail can suggest confusion, mistake of fact, or undue influence






# ARBITRATION CLAUSES

# ARBITRATION CLAUSES

- Gives the testator control over dispute resolution process
  - Can effectively set jurisdiction and venue
  - Can choose the mediator / arbitrator
- Enforcement varies from state to state
  - Due process almost always the focus of an enforcement dispute
    - At least one court in Texas has held that a beneficiary constructively consented to an arbitration clause by accepting a benefit under the document
    - California courts have held arbitration clauses unenforceable where contestant has not yet agreed to accept a benefit, but enforceable for disputes over administration

# ARBITRATION CLAUSES

- Clauses are most likely to be enforced on a case by case basis
  - May be viewed as consistent with testator's intent and desire to move administration forward and avoid lengthy court proceedings
- Potential downsides should be considered
  - Opens the door for questionable evidence (hearsay/Dead Man's Act) in cases where trial courts would justifiably exclude such evidence
  - May have side-show litigation over whether the clause is enforceable
- Overall, if including an arbitration clause is important to the grantor, the clause should be included




# PSYCHIATRIC COMPETENCY EXAMS & AUTOPSIES

# PSYCHIATRIC COMPETENCY EXAMS AND AUTOPSIES

- Capacity is always at issue in a will or trust contest
- Unless you expect a surprise, a pre-death psychiatric competency exams should be obtained
  - An experienced, qualified doctor—typically, a geriatric psychiatrist—should conduct the evaluation
- Post-death evaluations are based on review of an evidentiary record
  - Comprehensive medical records and testimony of observers should be made available—the value of a post-death evaluation is entirely the function of record reviewed

# PSYCHIATRIC COMPETENCY EXAMS AND AUTOPSIES

- In the courtroom, pre-death competency exams are valuable to trier of fact
- Evaluations by geriatric psychiatrist are particularly valuable
  - The doctor's medical opinion should specifically relate to the impact on the testation process
  - Persuasiveness may depend on when in sequence to will execution the exam was conducted, and whether anything changed after evaluation
  - May be particularly important in insane delusion cases
- Post-death competency exams are less valuable in court



OPTING OUT OF  
DECANTING, NJSAs,  
UNITRUST  
CONVERSION &  
DIRECTED TRUST  
STATUTES

# OPTING OUT

- Modification tools available under statutory and/or common law
  - Decanting Statutes
  - Unitrust Conversion Statutes
  - Directed Trust Statutes
  - Nonjudicial Settlement Agreements
- Unbridled modification powers could potentially override intent
- Opting out creates tension between preserving the plan and limiting ability to deal with changed circumstances and fix legitimate problems in irrevocable documents



# OPTING OUT

- Courts still have equitable powers to modify documents and outcomes, if required
- If opting out, make sure to do it effectively
  - NJSAs are tricky—they are a substitute for judicial process and opting out may not be effective. If you opt out, you are taking the position that the court can do it better
- Modifications by statute still generate litigation over the proposed modification and its consequences




# IN TERROREM CLAUSES

# IN TERROREM CLAUSES

- In terrorem clauses should be used even if a fight among the beneficiaries is not anticipated or a primary concern
- Enforceability has been considered by nearly all jurisdictions
  - Indiana and Florida are the only states that expressly prohibit; Vermont not yet decided
- Courts have carved out exceptions to enforcement
  - Construction actions or challenge to the appointment of a fiduciary are typical exceptions
  - Probable Cause / Good Faith exceptions
- When enforced, in terrorem clauses are narrowly construed and should therefore be broadly drafted to include a wide variety of challenges and contests

# IN TERROREM CLAUSES

- Increased willingness to enforce *in terrorem* clauses stems from growing frustration with baseless cases
- Judges tend to be in favor of enforcing *in terrorem* clauses against prohibited beneficiary behavior like will and trust contests, but less inclined to enforce them as a shield for fiduciary misconduct
- If desired, an *in terrorem* clause should be drafted inclusively—the more you say is prohibited, the more a court will prohibit



# DEFENDING AGAINST THE INTENTIONAL TORT

# DEFENDING AGAINST THE INTENTIONAL TORT

- The intentional tort was designed to remedy cases where splitting up the pie was not an adequate remedy
- Creating the tort opened the floodgates for misuse and abuse—if a contest is anticipated, including the intentional tort in the *in terrorem* clause is critical
- Not every state limits application to cases where the testamentary documents are still subject to challenge
- Challengers will use the tort strategically to get around standard in terrorem clauses and force the fiduciary or favored beneficiary to self-fund their defense

# DEFENDING AGAINST THE INTENTIONAL TORT

- Courts are increasingly skeptical about the use of the intentional tort
- Facts and circumstances will dictate whether a court will allow the tort to proceed—courts will consider whether there is a separate harm that cannot be remedied by will or trust contest, or whether the tort is being used strategically
- The tort creates a procedural mess that can side-step the integrity of the estate plan and result in unnecessary fees and expenses
- Including the intentional tort in an in terrorem clause should be strongly considered; however, ethical and conflict issues arise with paying defense fees to third parties for the tort

# THANK YOU



**David A. Baker**  
Partner  
+1 312 984 7597  
dbaker@mwe.com

David A. Baker advises clients in the areas of estate, trust and guardianship litigation; probate, estate, trust and guardianship administration; and charitable foundation and exempt organization administration and litigation.



**Margaret Elizabeth Sanne**  
Partner  
+1 312 984 3235  
msanne@mwe.com

Margaret Elizabeth Sanne focuses her practice on aspects of estate planning and trust and estate controversy.



**Toni Ann Kruse**, *Moderator*  
Partner  
+1 212 547 5766  
tkruse@mwe.com

Toni Ann Kruse has a broad-based estate and wealth transfer planning practice in New York. She advises ultra-high net worth individuals and families on estate, gift and generation-skipping transfer tax issues, trust and estate administration, state fiduciary income tax planning, and charitable gifting, as well as contested trust and estate matters.

This material is for general information purposes only and should not be construed as legal advice or any other advice on any specific facts or circumstances. No one should act or refrain from acting based upon any information herein without seeking professional legal advice. McDermott Will & Emery\* (McDermott) makes no warranties, representations, or claims of any kind concerning the content herein. McDermott and the contributing presenters or authors expressly disclaim all liability to any person in respect of the consequences of anything done or not done in reliance upon the use of contents included herein. \*For a complete list of McDermott entities visit [mwe.com/legalnotices](http://mwe.com/legalnotices).

©2020 McDermott Will & Emery. All rights reserved. Any use of these materials including reproduction, modification, distribution or republication, without the prior written consent of McDermott is strictly prohibited. This may be considered attorney advertising. Prior results do not guarantee a similar outcome.

