

Probate Litigation CLE

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Probate Litigation Map

- A. Beneficiary Liability
- B. Fiduciary Liability
- C. Interpreting Testamentary Intent
- D. Revoked, Multiple, Contested Wills
- E. Common Will Construction Problems
- F. Objections to Accounts and Petitions

A. Beneficiary Liability

A beneficiary can be liable for:

- attorney's fees or
- withholding a will from probate

KS - *Tracy* (2006) - innocent beneficiary can probate a Will after 6 month deadline where another party knowingly withheld will

MO – *Perry* (2005) tolling deadline for military member

- Possession or knowledge of Will -> affirmative duty to offer the Will for probate
- Suppressing a will = tort

B. Fiduciary Liability

A probate fiduciary must act with “reasonable care, skill, and caution”

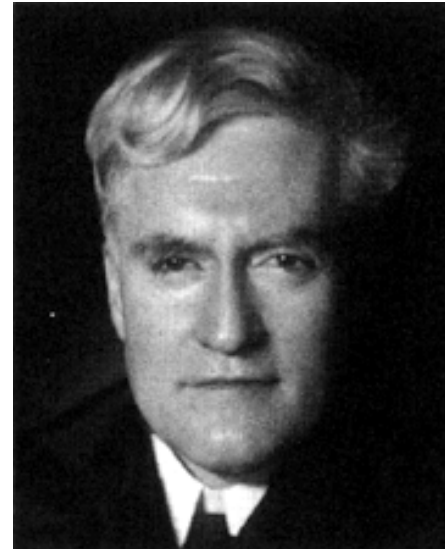
Fiduciary duties:

- (1) good faith administration,
- (2) loyalty solely to the beneficiaries’ interests,
- (3) impartiality,
- (4) prudent administration, and
- (5) to reasonably inform and report

Fiduciary must control/protect property - collecting property from a prior fiduciary and reasonably enforcing/defending claims

Fiduciary duty

- Cardozo on fiduciaries
- KS/MO fiduciary duties
 - Administer in good faith
 - Loyalty
 - Impartiality
 - Prudent administration
 - Inform/report
- Who wants to be a fiduciary?
 - Advisors held to higher standard since more training/knowledge



Justice Benjamin Cardozo
(1870-1938)

Fiduciary Liability: Taxes

Fiduciary duty to file decedent or estate's tax returns

Form 56 alerts the IRS to a fiduciary's status

Breaching fiduciary duty = Punitive damages (2x amount taken)

C. Interpreting Testamentary Intent

Testamentary intent = “heart of the will”

Person’s desire that document is her Last Will and Testament

Adult of sound mind (testator) makes a will, witnessed by two people, disposing of the testator’s bounty

Probate law honors freedom of disposition

Start with Will’s face for intrinsic evidence, look at related extrinsic evidence of testator’s circumstances and interactions with other parties

Will Execution

Will execution:

- (1) testator's signature,
- (2) witnesses' signatures,
- (3) notarization, and
- (4) self proving affidavit

Executed by (1) adult (2) of sound mind (3) with testamentary capacity (4) who knows objects of their bounty and (5) communicates in writing who receives objects of their bounty upon death and (6) signs document (7) in witnesses' and notary's physical presence

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Anatomy of a Will

A will needs to:

- (1) identify testator and family,
- (2) dispose of testator's property,
- (3) appoint fiduciaries,
- (4) specify fiduciary's powers and duties (pay debts/
taxes), and
- (5) be duly executed by testator, witnesses and/or
notary

Proving Testamentary Intent

Best practices:

- Review Will's provisions with client before witnesses and notary arrive
- Ask client questions in witnesses and notary's presence

Notarizing a Will

Notary ≠ witness

Physical presence required to notarize a document

MO notary must keep notary journal (KS recommends)

Invalid notarization voids will -> notary liability

MO notary changes seals/commissions every 4 years

-> probate litigation route

Signing a Will

Testator must sign will

Kansas – testator must “subscribe” will (at end)

Best practice: have testator & witnesses initial each page to show nothing switched out

Witnesses

2+ competent adult witnesses must sign will in testator's, each other's, and notary's physical presence

Interested witnesses limited to intestate share

Self Proving Affidavit

Self proving affidavit = will admitted without witness testimony to Probate Court

More convenient for our global, mobile world

But if will contest on self proving part or not included, witnesses must testify

Prima facie evidence of due execution/testamentary capacity

All KS & MO self proving wills must be notarized

Burden of Proof

- Will proponent bears burden to show Will duly executed -> admit to probate
 - Prove testamentary capacity by self proving aff or Will's *prima facie* due execution
 - Contestant must offer substantial evidence to prove the will's invalidity by taint of undue influence, fraud, mistake, improper execution, lack of capacity, forgery, duress, revocation, insane delusion, or other disqualifying ground
- When proponent makes *prima facie* case, burden shifts to contestant

Burden of Proof

- Kansas will contestant: prove undue influence by “clear, satisfactory, and convincing evidence”
- If fiduciary/confidential relationship, showing “suspicious circumstances” shifts burden to Will proponent to show valid execution

Presumptions

- Law presumes testator's sanity and testamentary capacity -> favors probating decedent's will and honoring decedent's testamentary intent
- Kansas: due execution shifts burden to contestant to show incapacity
 - Valid self proving will meets proponent's capacity burden
- Missouri: proponent offers a *prima facie* case of due execution and testamentary capacity
 - Then burden shifts to contestant to show substantial evidence for a jury trial on due execution or testamentary capacity
- A Missouri gift/asset transfer to fiduciary presumed undue influence if beneficiary actively causing/ assisting will execution -> beneficiary has burden to show fair/equitable gift

Probate Litigation Evidence

- Evidence & civil procedure rules apply
 - Relevant evidence admissible, “tendency” to “prove any material fact”
 - Evidence of testator’s acts and conduct relevant & admissible
 - If undue influence lurks, evidence of an influencer/ 3rd party’s acts/conduct is admissible
- Evidentiary “conviction or persuasion” -> proof
- Burden of proof: (1) giving evidence of a fact in issue, (2) “persuading” the judge/jury evidence true
- Fail step 1 = judge, not jury, decides
- Persuasion if both parties have met their burdens and all relevant evidence heard

Probate Litigation Evidence

- Probate = authenticating a written will using best evidence rule
- Best practice: testator executes one Will, then make copies (not sign multiple “original” copies)
- Will contest is “adversarial proceeding”

D. Revoked/Multiple/Contested Wills

- Revoking a will:** (1) physical destruction, (2) marriage and a child's birth, (3) adoption, or (4) divorce.

Physical destruction/revocation by (1) burning, (2) tearing, (3) cancelling, (4) obliterating, or (5) destroying the Will with intent and for the purpose of revoking the Will

Revocation requires destructive action *and* intent

- Reviving a revoked will - republication: If a testator makes 2nd will and later revokes it, revocation doesn't revive 1st will unless published in 2+ competent subscribing witnesses' presence

Lost Will

- Lost Will can be probated if provisions proven clearly & distinctly
- Must prove will's terms, it cannot be located, was properly executed, and was not revoked
- Will lost in decedent's possession presumed destroyed & intentionally revoked
- MO presumes lost will physically revoked, burden on proponent to show will not intentionally destroyed

Multiple Wills

- If multiple wills, last in time controls
- MO: when 2+ wills play, judge/jury decides which will controls
- Later Will could overrule prior Will's probate

Will Contests

Courts favor admitting every legally executed Will to probate

KS and MO allow will contests to challenge a Will's admission to probate

Will contests rare - 1% of probate cases and most fail

Grounds: capacity, improper execution, undue influence, fraud, and duress

Contestants: (1) intestate heirs, (2) a prior will's devisees, heirs, legatees, assignees, or fiduciaries, (3) a surviving spouse whose rights would grow, (4) persons under contrary contract with the decedent, (5) creditors, (6) the state (under escheat) if the decedent had no heirs, or (7) fiduciaries of the will under attack

Will Contests

- KS - Interested party can launch will contest
- MO – will contest statute – VAMS §§473.083, -.340
- In rem* proceeding, limited to interested parties w/ financial benefit adversely affected, including fiduciary, heir, devisee, trustee or trust beneficiary
- KS jury allowed (not right), but MO can demand jury trial (right)

Capacity

- Testamentary capacity = hallmark of intent
- Medical records can clarify
- Witnesses – depositions & interrogatories
- Testator's financial advisors
- KS: (1) know/ understands property's nature/extent, (2) understand desired disposition, (3) know natural objects of bounty, and (4) comprehend desired heirs
- MO: (1) of sound mind, (2) understood life's ordinary affairs, (3) knew property's nature and extent, (4) knew natural objects of bounty, and (5) appreciated obligations to those people

Capacity Attacked/Undermined if

- Testator lacked mental capacity
- Presumption of lack of testamentary capacity, or
- Testator suffered from an insane delusion
- Remedies: throw out (1) entire will or (2) part of will

Diminished Capacity

- Diminished capacity
- Senility
- Insane delusion
- Meet with client separately from family
- Compassion, empathy, and loyalty - Golden Rule -
treat each client as you would want to be treated
 - Talk slowly/loudly, draw pictures, simplify
 - Best practices: document client meetings, write a memo to the file for meetings/signings, think about extra witnesses, photos, or video of meetings or document executions

Undue Influence

- Testamentary capacity vs undue influence
 - Undue influence most common will contest route
 - Undue influence = “unfair persuasion” by “coercion” destroying or “overmaster[ing]” the party’s free will and “free agency” for the influencer’s “goals
- KS/MO: prove undue influence by clear and convincing evidence
- KS: undue influence must rise to coercion, compulsion and restraint which destroys testator’s free agency, and by overcoming his power of resistance, obliges or causes him to adopt another’s choice, including a suspicious will execution
- MO: undue influence must be present, in active exercise, and sufficient to destroy testator’s free agency and free choice
- Speculation and conjecture not enough; mere motive and opportunity alone fail

MO Undue Influence Factors

•8 MO undue influence factors:

- (1) an unnatural disposition,
- (2) influencer asking for favors,
- (3) change in testamentary intent,
- (4) unusual will execution,
- (5) beneficiary's hostility toward family/expected recipients,
- (6) beneficiary's derogatory remarks to testator about contestant,
- (7) testator's finances makes distribution to beneficiary unlikely,
- (8) will recitals show undue influence

Fraud & Duress

- Fraud = (1) false representations knowingly made to testator (2) intended to (and did) deceive testator and (3) testator relied on to sign a will wouldn't have signed *but for* false representations.
- Fraud vs undue influence: in fraud, testator keeps free agency, but was misled
- Undue influence can happen with truths, fraud rests on false statements
- Duress - hinges on testator's free and voluntary intent, eroded by duress if testator faces physical compulsion or threats and fear

Probate Litigation

- Standing = who can sue
- Interested party has standing – any person with an interest in the decedent's estate
 - Named executor under prior will CAN'T contest the new will
- An heir who takes equally regardless of the Will cannot contest the will

Will Contest Jurisdiction

- *Personal Jurisdiction* = court's power to bring a person under its authority
- In rem jurisdiction for probate estates
- *Subject Matter Jurisdiction* = court's power to hear cases in a particular realm of law, state courts hear probate cases.
- *Venue* = proper court to hear a case and its connection to the case's events, the plaintiff, or defendant.
- *Forum non conveniens* = allows court to hand case to another court if more convenient for parties

Resolving Will Contest

Options:

1. Fight out in court
2. KS valid/family settlement agreement
3. MO compromise agreement

E. Will Construction Issues

- *In Terrorem*/No Contest Clauses – disfavored, but given effect, enforceable to protect fiduciary's role unless beneficiary has probable cause for will contest
 - Probable cause voids *in terrorem* clause
 - Probable cause = Party has reasonable belief that (1) facts exist on which claim based and (2) valid legal claim
- Scrivener's Error
- Vague and Ambiguous

F. Objections to Accounts and Petitions

- Objecting to Accounts
 - Fiduciary has duty to timely file
- MO Asset Discovery & KS Disclosure Hearings
- Objecting to Petitions
 - Procedural
 - Substantive
- Probate Appeals - KS & MO

Questions?

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