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Wills: What Happens After the Reading

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Presenter: Robert Bancroft, Robert H. Bancroft, Attorney at Law, PC

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WHAT HAPPENS AFTER THEY DIE:

VARIOUS FORMS OF PROBATE DISPUTES.

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Robert H. Bancroft practices law throughout the State of Michigan. He received his undergraduate degree from the University of Michigan. He subsequently attended Detroit College of Law at Michigan State University graduating with honors in 1986. In 1987, he attended New York University and received an LLM in taxation. He also previously authored a chapter on taxation for the Institute of Continuing Legal Education. He has also previously been selected as the Genesee County Pro Bono Lawyer of the Year. Mr. Bancroft practices in the area of estate planning, including the preparation of Wills and Trusts and probate litigation.

Mr. Bancroft is an avid outdoorsman and has taken numerous wilderness expeditions to Alaska, Canada and Siberia. This has included ice climbing, rock climbing and mountaineering.

Overview

This presentation provides an overview of various probate disputes that a sole practitioner or small firm may encounter in the regular course of practice. It is not a detailed survey of each area of law discussed in the summary. If you desire a more detailed discussion, each state bar typically has an Institute of Continuing Legal Education with excellent summaries of your state law on the subjects discussed briefly in this outline.

The objective of this presentation is to provide some practice tips relating to issues that I have encountered in handling will contests and related probate litigation over several years of practice.

I.
OVERVIEW

1. Historical Anecdotes: The Howland Estate. The Howland Estate is a fascinating and now forgotten will contest. The case involved a fortune made in the whaling industry by Edward Robinson. In 1865, he died leaving an estate worth almost $6 million. Almost immediately thereafter, his wife Sylvia Howland died. Her estate was $2 million. The niece, Hattie Robinson was a beneficiary under Edward's will, from which she received $900,000, plus income from the remaining $5 million. Under Sylvia's will, half the estate went to other individuals, and half as a life estate to Hattie Robinson.

Hattie Robinson was not satisfied with her aunt's will. She sued and claimed that a true "second page" of the will left everything to her. While there were numerous legal issues, the case essentially hinged on the second page of the will. Hattie maintained it was authentic. The Howland Estate maintained it was forged.

The authenticity of the signatures was the core issue. Everyone agreed that the signature on the 1862 will was legitimate, having been witnessed by three people. The estate maintained that the copies of the second page, produced by Hattie, were forgeries. The signatures were all virtually identical.

This was the "All-Star" case of it's time. Witnesses included John Quincy Adams, a grandson of the former president. Oliver Wendell Holmes, Sr. and Louis Agassi. They testified that the signatures must be legitimate after examining them under a microscope.

Other famous individuals also testified on behalf of the estate. Benjamin Pierce testified that based on "up-stroke and down-strokes" in the signatures, the chance of an identical signature was greater than 2 trillion to 1.

In the end, after an extensive trial and substantial expenses, the case was decided on a technicality. Hattie Robison left town, and years later, upon her return from London, built an empire. Ultimately, she was referred to as the witch of Wall Street. She died in 1952, with an estate over $200 million. She was the wealthiest woman in the United States.

2. Legal Plan Coverage: Various legal plans have coverage and referrals for protection of inheritance rights. Even with reduced fee agreements, this is a great source of potential business

3. Demographics: An Increase in Will Contest: Demographics and economic conditions are at a crossroads. These convergent factors are driving up the number of probate disputes and will contests. The Baby Boomers are aging. By 2030, all members of the Baby Boom generation will have reached 65 years old, and fully 18% of the nation will be at least that age (Pew Research Center). In the next year, 80% of the Baby Boomers will be 65. Roughly 10,000 Baby Boomers will turn 65 today (Pew Research Center). At the same time, recent economic conditions have created significant economic hardship for the younger generation. As economic difficulties increase, there is incentive for people to attempt to manipulate aging relatives. This often occurs through requested changes in wills, life insurance beneficiary designation forms and the addition of individuals to deeds and bank accounts as joint tenants with full rights of survivorship.

II.
TESTAMENTARY CAPACITY

The legal basis for determining whether someone has capacity to execute a will involves the following basic test:

1. The individual knew the natural object of their bounty at the time of signing the will;

2. The individual knew the nature and extent of their bounty;

3. The individual was able to make a rational plan for devising their property.

In Michigan, testamentary capacity consists of the testator's ability (1) to understand that he or she is providing for the disposition of his or her property after his or her death, (2) to know the nature and extent of his or her property, (3) to know the natural objects of his or her bounty, and (4) to know the manner in which the document disposes of his or her property. *In Re Sprenger's Estate*, 337 Mich 514 (1953).

In a proceeding for the probate of a will, it is presumed the testator had the mental capacity to make a will. MCL 600.2152. To have testamentary capacity, an individual must be able to recall the natural objects of his bounty, to comprehend the nature and extent of his bounty, to understand that he was providing for the disposition of his property after his death, and to understand the disposition of the property. SJI2d 170.41; *In Re Vollbrecht Estate*, 26 Mich App 430 (1970), quoting *In Re Sprenger's Estate*, 337 Mich 514 (1953).

A. Natural Objects of Bounty:

This is one of the enumerated tests for competency. Obviously, if the natural children are being disinherited, or the testator is leaving property to a non-family

member, this issue can be argued before the finder of fact. It is useful to examine the document disinheriting the person to determine whether there has been any reference to natural children or close relatives in the will or trust. This typically would set forth the recitation provision of the document.

B. Nature and Extent of Bounty:

An interesting line of questioning when deposing the attorney who prepared a will or trust is to raise inquiry regarding the nature and extent of a person's assets. After I have thoroughly researched the testator's assets, including a review of real property records, I raise inquiry with the Scrivener regarding the testator's assets. I have been surprised to find out how many times this was never discussed with the testator.

In a New York Surrogate's Court case, the Court concluded there was lack of testamentary capacity on the grounds that the testator was not aware of the nature, extent and condition of his property. The Appellate Court stated: "While a testator need not have precise knowledge of the size of his estate, the authorities clearly hold that a testator's lack of awareness of or ability to keep in mind without prompting the general nature and extent of one's real and personal property requires denial of probate. *In the Matter of The Estate of David R. Fish, Deceased*, 135 Misc.2d 928 (1987).

III.
UNDUE INFLUENCE

1. Overview. Most undue influence claims involve an individual with close personal relationships where there is little direct evidence of what took place between the vulnerable adult and the person exerting the influence. These claims are dependent on indirect evidence. See *Tinsley v Metropolitan Life Ins. Co.*, 227 F3d 700, 705 (CA 6

2000). Michigan law recognizes that undue influence may be shown where the testator was subject to threats, misrepresentations, undue fraud or physical or moral coercion sufficient to overpower volition and compel testator to act against her inclination and free will. *Matter of Leone,* 168 Mich App 321 (1988). This principal was also recognized in *In Re Wileys Estate*, 9 Mich App 245. In *Wiley*, there did not need to be actual violence or threatening force to constitute undue influence. Instead, all there needed to be was unreasonable pressure upon the mind of the testator amounting to psychological or moral coercion so that free agency is destroyed and the volition of the person applying pressure is substituted.

2. Time Frame for Relevant Evidence. In *McPeak v McPeak*, 233 Mich App 483 (1999), a man's daughters from a first marriage complained that their father's second wife unduly influenced him into making her the beneficiary of his life insurance policy. The man made that change on a specific date, but the daughters relied on evidence that came before and after that date, covering a two-year period of time. That was proper, said the appeals court, because the timeliness of the evidence is a question of weight, not admissibility: Defendant suggests that the trial court improperly admitted evidence of defendant's conduct during periods when (the decedent's) susceptibility to defendant's conduct was not at issue. We disagree. . . The timeliness of the evidence of undue influence bears on the weight of the evidence and not on its admissibility. *McPeak*, 233 Mich App 483, 496 (1999).

In *Sprenger v Sprenger*, 298 Mich 551, 299 NW 711 (1941), the Michigan Supreme Court reversed the lower court when the lower court failed to set aside a trust

instrument. In this case, a younger brother stood in a fiduciary relationship to his elderly bachelor brother and his sister, both of whom were uneducated, inexperienced, and ignorant about property matters. The younger brother, without consideration, procured a trust instrument conveying to him and his heirs his brother's and sister's remainder interest in property valued at more than $400,000. The younger brother failed to sustain his burden of proving that the settlors fully understood the terms, import, and effect of the instruments executed and, if they understood, that he exerted no fraud or undue influence to procure the instruments.

3. A presumption of Undue Influence: A presumption of undue influence is established when a person with a confidential relationship actively procures a benefit from another.

A presumption of undue influence arises when there is a relationship of trust:

> " [T]here is a presumption of undue influence which attaches to a transaction where the evidence establishes (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary (or an interest which he represents) benefits from the transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction. ... The establishment of this presumption creates a mandatory inference of undue influence, shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence."

Mikeska, 140 Mich App at 121.

Thus, if someone has power of attorney, a confidential relationship exists. In Michigan, this creates a presumption of undue influence.

4. Things to look for:

A. Unusual behavior from the testator: A person abruptly cut off ties with family members towards the end of her life

B. Vulnerability: The testator relies on certain individuals for care; these individuals then use their power and involvement in the testator's day-to-day life to exert undue influence on preparation of estate planning documents. The testator may be afraid to refuse their demands. They may also isolate the testator from other people in various ways.

C. Isolation of the testator: The next red flag is when the testator becomes isolated by the trusted caregiver. This increases the dependency

D. Issues of mental capacity: Even if the testator is not officially mentally incapacitated, they may still be prone to forgetfulness or confusion. The greater the diminished capacity the less influence is required to prove "undue" influence. *In Re Johnson*, 326 Mich 310 (1949).

IV.
CONSTRUCTIVE TRUSTS

A Constructive Trust is an equitable doctrine. This remedy is used in various circumstances, including situations involving:

1. Improper completion of Life Insurance Beneficiary Designation Forms: Example: A divorced spouse's name remains as a beneficiary on a life insurance policy after the divorce.

2. Improper Deeds: A person obtains an interest through a deed under mistake or as a result of fraud.

3. Improper IRA or other Beneficiary Designation Forms: A divorced spouse's name remains as a named beneficiary on the IRA.

This equitable remedy is used by courts to prevent such individuals from being unjustly enriched because beneficiary forms or similar documents are completed incorrectly or are the subject of some type of fraud or undue influence.

A. LIFE INSURANCE AND QUALIFIED PLAN BENEFITS:

1. Federal law and ERISA consideration. If the benefit was an ERISA benefit, it is subject to Federal Court jurisdiction until the benefit is paid. For example, in *Egelhoff* v Egelhoff, 532 US. 141(2001), the Supreme Court held that a Washington state statute substantially similar to Michigan's statutory divorce insurance provision was expressly preempted by ERISA and was therefore ineffective to revoke the beneficiary designation of an ex-spouse on her former husband's employer-issued life insurance policy. 532 U.S. at 143. The Sixth Circuit has also "explicitly and repeatedly held that state court divorce decrees purporting to affect the benefits payable from an ERISA plan are preempted." *Central States, S.E. & S.W. Areas Pension Fund v. Howell*, 227 F.3d 672, 676 (6th Cir.2000) (citing cases). It is thus beyond debate that "ERISA requires that a plan administrator discharge his duties 'in accordance with the documents and instruments governing the plan ….' 29 U.S.C. §1104(a)(1)(D)." *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990).

B. MICHIGAN LAW:

1. An Equitable Doctrine. When property is obtained by intentional concealment or misrepresentation of a material fact, the holder may be charged as a Constructive trustee for the defrauded person. *Ferd L Alpert Indus, Inc v. Oakland Metal Stamping Co*, 3 Mich App 101 (1966). All that is necessary to impose a Constructive Trust is that the property has been wrongfully acquired or unconscionably withheld. *Nelson; Kent v Klein*, 352 Mich 652 (1958).

The Michigan Supreme Court has held that a Constructive Trust is not a Trust, but merely a remedy used for breaches of trusts. *Blachy v. Butcher*, 221 F.3d 896, 905 (6th Cir.2000) (quoting *Soo Sand and Gravel Co. v. M. Sullivan Dredging Co.*, 259 Mich. 489, 494, 244 N.W. 138, 140 (1932)). A Constructive Trust may be imposed upon a finding of fraud, concealment, misrepresentation, or any other circumstances that would render an unconscionable outcome or when an inequitable outcome would result. *Blachy*, 221 F.3d at 903-4. A Constructive Trust may also be imposed where such trust is necessary to do equity or to prevent unjust enrichment. ... *Ooley v. Collins*, 344 Mich. 148, 158 (1955). The trusts' forms and varieties are practically without limit, being raised by courts of equity whenever it becomes necessary to prevent a failure of justice. *(Kent v. Klein*, 352 Mich. 652 (1958)).

2. Life Insurance: In *Perry v. Bankston*, 1997 WL 33349249 (Michigan Court of Appeals, May 13, 1997) a man took out a life insurance policy insuring his life and he named his mother the beneficiary of that policy. It was clear to the court, however, that the man wanted his son to receive the insurance proceeds. When the man

died, his mother refused to give her grandson the insurance money. Analyzing these facts, the appeals court wrote:

> "We are convinced, as was the trial court, that although plaintiff did not wrongfully acquire the insurance proceeds, she unconscionably withheld them from Brandon, her grandson. Plaintiff will, indeed, enjoy a windfall resulting in [her] unjust enrichment, [and] reap a profit in a situation where honor itself furnishes rich reward should plaintiff be permitted to retain the life insurance proceeds. . . We find that a constructive trust is warranted here to prevent such a failure of justice." (Unpublished opinion, p. *4).

A Constructive Trust will be imposed when equity regards that as seen which ought to be seen, and, having so seen, as done that which ought to be done. *Kent*, 352 Mich. at 656.

3. Real Estate: Consider the case of *Kent v. Klein*, 352 Mich. 652 (1958), where a mother gave title to acreage intended for her son (who was mentally unwell) in the name of her daughter. The court found that the mother intended for her son to receive the land. She apparently trusted that her daughter would hold the land for the son, but the daughter refused to surrender it to the son's estate after he died. The court imposed a Constructive Trust over the property, writing: Fraud in the inception we do not require, nor deceit nor chicanery in any of its varied guises, for it is not necessary that property be wrongfully acquired. It is enough that it be unconscionably withheld. *Kent,* 352 Mich. at 657. Quoting Justice Benjamin Cardozo, the court noted that a Constructive Trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good

conscience retain the beneficial interest, equity converts him into a trustee. It arises by operation of law.

In *Estate of Queen*, 1998 WL 1992920 (Michigan Court of Appeals, March 6, 1998), a mother deeded three properties to herself and her two sons with the three of them being joint tenants with survivorship rights. Her attorney urged her not to do this and explained that if one of her sons predeceased her, the property would pass completely to the other son upon her death. However, the mother believed that the surviving son would do the right thing and treat the deceased son's family fairly. The trial court imposed a Constructive Trust over the properties and the appeals court upheld that ruling. In so ruling, the appeals court noted that the surviving son did not act wrongfully, but that equity still demanded the imposition of a Constructive Trust so that the mother's intentions would take effect.

V.
DISPUTES INVOLVING JOINTLY HELD PROPERTY

Frequently, the way in which individuals improperly obtain a death benefit is to have their name placed on a joint bank account, a joint financial account or as a joint tenant on real estate.

In Michigan, and in many other jurisdictions, assets owned jointly by a husband-and-wife are presumed to be a tenancy with full rights of survivorship. However, jointly held property between an individual and a non-spouse requires specific language of "joint tenants with full rights of survivorship". Without these specific words, the relationship is a "tenancy in common".

1. Examine the documents creating the joint tenancy. Do not take for granted that just because the bank of financial statement lists the account as a joint tenancy, that this is in fact accurate or determines the true nature of the account.

A. Subpoena the documents creating the bank account. Both Michigan and New York Law require that the signature specifically provide language "with full rights of survivorship". Examine the documents to verify the signature of the individual creating the account and look for the specific survivorship language.[1]

This is also true not only for bank accounts, but also for deeds and for other investment accounts.

New York law clearly requires the Client Relations Agreement or bank account to contain Survivorship language.

> "§6-2.2 When estate is in common, in joint tenancy or by the entirety
>
> (a) A disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy."

* * *

1 I successfully prevailed on a case where the bank statements said joint tenancy with full rights of survivorship, but upon examining the underlying initial signature cards, it was revealed that the box providing joint tenants with full rights of survivorship was never marked. As a consequence, it was a tenancy in common, and my clients ended up receiving half of the account.

The New York case of *In re: Timoshevich,* 133 A.D. 2d 1011, 521 N.Y.S. 2d 311 (1987) stated the following at page 1012:

> "We agree with Surrogate's Court that the entire bank account is properly included as part of decedent's estate. Initially, we reject petitioner's contention that Banking Law §675, which creates a presumption that a decedent intended to create a joint tenancy with a right of survivorship, applies here. It is clear that Banking Law §675 applies only where specific words of survivorship appear on the signature card signed by a decedent (see, *Matter of Burns,* 126 A.D. 2d 809, 811, 510 N.Y.S. 2d 732; *Matter of Camarda,* 63 A.D. 2d 837, 838, 406 N.Y.S. 2d 193). No survivorship language appears on the signature card in this case; the word "or" contained in the title of the account is insufficient to bring this case within the range of Banking Law §675."

See also *In re: Stalter,* 270 A.D. 2d 594, 703 N.Y.S. 2d 600 (2000) which stated on page 595 the following:

> "In order for the statutory presumption to be triggered, however, the "survivorship" language must appear on the signature card for the subject account."

Obtaining the original documents creating the joint account also provides names of potential witnesses who can testify to the circumstances regarding the creation of the account.

2. Challenges to joint bank and financial accounts. The creation of a joint bank account, absent fraud or undue influence, is prima facie evidence that the depositors intended to vest title in the survivor. MCL 487.703. This creates a presumption that can only be rebutted with reasonably clear and persuasive proof. *Lau v Lau,* 304 Mich 218, 224 (1943);

Michigan law provides that joint accounts passing to survivors can be contested by proof that the decedent intended otherwise. Courts will recognize evidence to show that the account was established for convenience purposes. *Jacques v Jacques,* 352 Mich 127 (1958). To challenge these accounts, and overcome any statutory presumptions, it must be shown that the decedent established the account for paying bills and for convenience factors. Is also important to show that there was a statement made by the personal establishes that the account was intended only for convenience purposes.

3. Incompetence challenges. A financial accounting may also be challenged based on lack of mental capacity. In Michigan, see *Henry Walker's Estate*, 270 Mich 33 (1935).

VI.
PROVING YOUR CASE AND RELATED EVIDENTIARY ISSUES

1. **Relevance: Acts predating or occurring after the signing of the will**: When are prior acts and subsequent conduct admissible for proving a lack of capacity or undue influence? It depends on your jurisdiction. In some instances, acts several years ago may be admissible. With other Courts, the time frame may be limited to months if not days. Obviously, if you have something that is very persuasive, and perhaps it is two years ago, it is important to try and find a series of other events that link this evidence to the will signing. Example, if grandma had a serious stroke two years ago, medical records supporting her continued problem after that stroke could

make the stroke admissible in the will contest. See *McPeak v. McPeak*, 233 Mich App 483 (1999).

2. **Subpoena all written checks over the last 5 years**. After reviewing the checks, I have often found a continual degradation of the signature of the decedent. While this factor alone does not prove lack of competency, placing these checks next to each other on an exhibit board on front of a finder of fact is persuasive. If Aunt Mary was preparing and signing her own checks in 2007, and in 2012 she is scribbling her signature with an "X", this makes a judge or jury very suspicious. Further, even if it will not carry the day on the threshold of capacity, it can be relevant to undue influence. In the past, I have discovered that the person who is benefiting under the trust or will was also signing all the checks. In one case, I found a granddaughter buying a significant amount of personal items from her Grandfather's account.

3. **Subpoena the nursing home records and police reports.** The people at nursing homes and assisted living centers often keep very careful notes. They usually document bizarre behavior of residents for their own protection. Do not overlook this source of information. If Grandma signed a trust leaving everything to Uncle Joe, and three weeks earlier, Grandma was chasing ducks down at the pond with a 3 iron, the jury or judge are going to be very suspicious about alleged competency or the presence of undue influence at the time of the signing of the trust. This will be true no matter who witnessed the subsequent will.

4. **Review prescriptions and medications.** Subpoena the pharmacy records. I look for patterns of excessive refills. Moreover, I look at who was filling those prescriptions. Again, if Aunt Suzie is feeding Grandma with Vicodin and Xanax, this strongly supports a claim of undue influence or lack of competency.

5. **Contact the neighbors.** It is also very important to discuss matters with the neighbors. I have had a will contest where the best facts regarding undue influence came up only after I had interviewed the neighbors. In one particular case, I learned that the family members who were unduly influencing the testator had literally locked her in the house and barricaded the front door. The attorney who actually prepared the will had no idea this was taking place.

6. **Folstein Test.** A Folstein Test is a brief 30-point questionnaire used to screen for cognitive impairment. It is commonly used to screen for dementia. It is an effective way to document an individual's response to treatment. In many geriatric assessment settings, a social worker or geriatric specialist will conduct the Folstein Test. This test examines such things as whether somebody can count backwards, draw the hands of a face of o'clock and related simple test. Often times, people with geriatric problems in nursing home settings have had a professional complete a Folstein Test. A review of the test and the notes can be very useful. While there can be some debate about relevance, if the testator could not count,

or draw a picture of a clock, such information is going to have some influence on a jury.

7. **Expert witnesses**. Expert witnesses can be very useful in a will contest, undue influence or other related types of claims. A full discussion of expert witnesses is beyond the scope of this outline.

   a. Daubert. Watch out for these challenges. But be prepared to establish that your expert has the proper qualifications, that their opinion is based on some type of learned treaties or accepted practice in the profession and that there is a factual basis for their opinion.

8. **Attorney-client privilege and will contests**. The existence of an attorney-client privilege creates certain problems. In Michigan, the Supreme Court has determined that all communications between the lawyer and the client are privileged. *Grunewald*, 313 Mich 666 (1946). This case did acknowledge that the personal representative of the estate is the person with proper authority to waive the attorney-client privilege. Obviously, if you are challenging the will, it is likely that the proponent of the will plans to have the attorney testify regarding competency and related issues. This will work to waive the privilege. Further, the privilege is waived if the communications took place in front of third parties.

9. **It is All of the Above.** As with most things, it is not one single fact that makes the case. I do not rely on one particular piece of evidence to build up the argument of undue influence, a lack of competency or other legal arguments for setting aside the will or trust. Sometimes, each of the foregoing individual events may not be enough.

However, when they are all combined, they can create a compelling narrative for the finder of fact.

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