VOICES FROM THE GRAVE: Preserving Testimony of Settlors and Testators

By Michelle C. Harrell

Many thousands of wills and trusts are signed every year, although the number of wills and trusts that are enforced or operative at any given moment is not known with certainty. Key issues regarding the enforcement of the provisions in a will or trust by a court when contested are whether the settlor or testator had sufficient mental capacity to make the will or trust, or was subjected to any undue influence by another person. If a will or trust is successfully challenged upon one of these grounds, the intent of the testator or settlor may not be followed. However, if the testimony of the settlor or testator can be preserved for later use after death, his intent may be easier to discern and sustain in the event of a challenge. The Michigan Court Rules, at MCR 2.303(A), provide a mechanism to allow the testator or settlor, and other interested parties, to preserve testimony from the testator or settlor, and other persons, for use as evidence in the future challenge proceeding.

The instances of court review of grantor mental capacity are expected to increase in frequency. The National Center for Health Statistics (NCHS) reported that 2,626,418 people died in 2014 in the United States. In the United States, there are an estimated 5 million individuals with age-related dementias. The NCHS projects that these numbers will continue to rise with the aging of the U.S. population. It is estimated that 1 in 6 women, and 1 in 10 men, who live past the age of 55 will develop dementia in their lifetime. Alzheimer’s disease accounts for up to 70% of the dementia in the elderly, with vascular dementia accounting for the majority of the remaining dementia cases in the elderly, according to the NCHS. As a result of the increasing number of elderly persons who suffer from these mental conditions, there may be a higher number of challenges to wills or trusts established by those persons.

Dissatisfied heirs and beneficiaries often utilize an argument that the testator or settlor lacked sufficient mental capacity to make the will or trust to try to overturn the will or trust, or leverage a settlement payment. Under Michigan law, sufficient

mental capacity for purposes of creating a will consists of the testator's ability (a) to understand that he is providing for the disposition of his property after his death; (b) to know the nature and extent of his property; (c) to know the natural objects or recipients of his property; and (d) to understand in a reasonable manner the general nature and effect of his act in signing the will. MCL §700.2501(2). Arbitrary dislikes and feelings, the testator's unwarranted accusations, suspicions or conclusions about relatives, or mistaken beliefs about relatives' motives, feelings or designs towards the testator and his property alone are not a sufficient basis to conclude that the testator lacked sufficient mental capacity or suffered from a delusion. *In re Solomon's Estate*, 334 Mich. 17 (1952). In other words, just because a person is disagreeable, eccentric or somewhat odd does not mean that he lacks sufficient mental capacity to create a will. *In re Volbrecht Estate*, 26 Mich. App. 430 (1970).

Regarding trusts, the Michigan Trust Code provides that a settlor must possess the same level of capacity to make a trust as would be needed to make a will. MCL §700.7601 provides: "The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will." In other words, the same test applies.

Some dissatisfied heirs or failed beneficiaries may also allege that the testator or settlor was subjected to undue influence from some other person (perhaps another beneficiary or heir) and therefore the will or trust is invalid. To establish undue influence as a challenge to a will or trust, it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. *Kar v Hogan*, 399 Mich 529 (1976). Not all influence is undue influence, and the influence must be found to be *undue* influence to support a challenge. It is not improper for a child, spouse, friend, parent or other relative to advise, implore, flatter, argue or otherwise appeal to the grantor's fears, prejudices, affection, pity or other feelings to influence the grantor's decisions about his estate, as long as the grantor retained the power to resist the influence if he wished and he retained his free will to act as he chose to do.

If there is a challenge to a will or trust after the death of the settlor or testator, the question arises about how to defend against such a challenge when the grantor is deceased and cannot testify or be examined. MCR 2.303(A) provides a

mechanism to meet this challenge by allowing for a deposition to be taken of the testator or settlor, and his physician or psychologist, to establish that he had sufficient mental capacity and was not subjected to any undue influence when he created his will or trust. MCR 2.303(A) allows a “person who desires to perpetuate his or her own testimony or that of another person, for use as evidence and not for the purpose of discovery, regarding a matter that may be cognizable in a Michigan court.” The process is begun by filing a verified petition asking that a court issue an order authorizing the petitioner to take the depositions of the persons listed in the petition for the purpose of perpetuating their testimony. The verified petition must be served upon all expected adverse parties, and a hearing must be held. If the court is persuaded that the perpetuation of testimony may “prevent a failure or delay of justice,” the court must issue an order providing for the depositions. If a deposition to perpetuate testimony is taken under MCR 2.303, the deposition testimony may be used as evidence in an action involving the same subject matter subsequently brought in a Michigan court. MCR 2.303(A)(4).

The perpetuation of testimony of the settlor or testator, and other witnesses, regarding his will or trust can significantly impact the chances that a post-death challenge will either be filed or be successful. Because adverse parties, such as relatives who are being disinherited or have a limited bequest, will receive notice of the petition to perpetuate testimony of the grantor, and the reasons why the testimony should be preserved, they will be on notice at that time while the grantor is still living. Often, hearing the grantor explain in his own words that the will or trust contains his specific, known and intentional provisions removes any doubts that heirs or beneficiaries may have about whether his wishes are truly embodied in the document. Also, a disgruntled heir or beneficiary may be dissuaded from filing a challenge proceeding when there is preserved, direct testimony from the grantor, and often even the grantor’s physician or psychologist, about his mental capacity, his intent and the lack of any undue influence. Even if a challenge is filed, such evidence can be quite compelling to a court. This is particularly true if the deposition is recorded by video and the grantor can be viewed giving testimony as if he were alive and present in court to testify. This testimony from beyond the grave can alter the outcome of a challenge proceeding and ensure as much as possible that the grantor’s wishes are followed.

The process to petition for, and preserve testimony, has several technical, procedural requirements that if they are not followed could result in the testimony being disregarded. As a result, please contact us if you would like more information about planning your estate or this process.