

I N S I D E T H E M I N D S

Trusts and Probate Litigation

*Leading Lawyers on Managing Client Expectations,
Handling Complex Cases, and
Navigating Recent Legal Developments*



ASPATORE

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Proactive Measures and
Key Concerns for the
Trust and Probate Attorney

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The Reasons for the Rise in Trust and Probate Litigation: Demographics and Increasing Complexity

For a variety of reasons, it seems that the “baby boomer” generation is the most litigious generation the world has known. The baby boomers’ parents—the so-called “greatest generation”—are also the wealthiest generation to date; they have more money than anybody ever had in the past. Now those parents are becoming disabled or dying and their children—the baby boomers—are fighting over their estates. Consequently, we have a situation where the most litigious generation is fighting over the funds from the wealthiest generation. This combination has led to a dramatic growth in probate and trust litigation over the years—a trend which is only going to continue. The first set of boomers just turned sixty-five and the boomers’ parents are well into their eighties. The boomers’ parents will begin dying in large numbers, which will only add to more litigation.

Another cause for greater litigation is that estate planning techniques have become a lot more sophisticated over the years—but sometimes people do not know what they are doing when they are setting up or administering these complex structures. In fact, unless you are a bank or a large institution, it can be difficult to serve as trustee or executor of one of these new trusts that contain sophisticated terms and vehicles. Due to lack of knowledge, people are making mistakes, which lead to more errors and more breach of fiduciary duty actions. Essentially, the more complicated things are, the more litigation there is.

Causes of Actions in Estate and Trust Contests

There are three primary causes of action in will and trust contests: lack of mental capacity, undue influence, and tortious interference with an expectancy. The facts of the case will determine whether one or all three causes of action ought to be plead. Below is a brief outline of the elements necessary to plead each cause of action.

Lack of Mental Capacity

The threshold for sufficient mental capacity to execute a will or testamentary trust is quite low. The contestant must establish that the testator/settlor

lacked the mental capacity to (1) know the nature and extent of his property; (2) know the natural objects of his bounty; and (3) have the ability to make a disposition of his property in accordance with some plan formed in his mind. In order to contest the execution of an *inter vivos* trust based on lack of mental capacity, the contestant must establish that the settlor lacked the capacity contract. In other words, you need to have a higher level of capacity to execute an *inter vivos* trust than a will or testamentary trust.

Undue Influence

Undue influence is present where the testator or settlor is prevented from disposing of his property in a manner he or she chooses. Instead, his or her free will is so overcome that the disposition of his or her property reflects the wishes of the wrongdoer rather than the testator/settlor. Undue influence is rebuttably presumed if the contestant can establish the following: (1) a fiduciary relationship existed between the testator/settlor and the person who benefits under the will/trust; (2) the primary beneficiaries were in a position to dominate and control the dependent testator/settlor; (3) the testator/settlor reposed trust and confidence in these beneficiaries; and (4) the beneficiaries were instrumental in the procurement or preparation of the will or trust. This presumption is rebuttable, however.

Tortious Interference with an Expectancy

To state a cause of action for tortious interference with an expectancy the plaintiff must allege: (1) the existence of an expectancy; (2) the defendant's intentional interference with this expectancy; (3) the interference involving conduct tortious in itself, such as fraud, duress, or undue influence; (4) reasonable certainty that the devise to the plaintiff would have been received but for the defendant's interference; and (5) damages. In Illinois, if the contestant could receive adequate relief through a will contest and he was aware of his claim prior to the expiration of the limitations period, he must seek redress through a will contest. *Inter vivos* transfers, however, cannot be recovered through a will contest. Thus, if the contestant believes someone tortiously interfered with his expectancy to receive certain assets, such as insurance policies or a 401k, he may file a tortious interference action against that alleged tortfeasor.

Breaches of Fiduciary Duty by Executors and Trustees

A fiduciary is “a person who has a legal duty, created by his undertaking, to act for the benefit of another in matters connected with his undertaking.” Stephen H. Gifis, *Black’s Law Dictionary* (5th ed., 2003). A fiduciary relationship may exist as a matter of law or as a matter of fact. Examples of fiduciary relationships that exist as a matter of law are: a trustee of a trust, an executor of a will, and an agent under power of attorney. Courts have found a fiduciary relationship to exist in fact where, for example, an individual took care of an elderly person’s health care and finances even though power of attorney documents were never executed. A fiduciary’s duties include *inter alia*: using reasonable care, skill, and caution, serving loyally and impartially, and not delegating his or her responsibilities.

In regard to trusts, a trustee has fiduciary obligations to the trust beneficiaries. A trustee may be sued for breach of fiduciary duty for, *inter alia*, failing to invest trust assets prudently, not looking out for the best interests of all the beneficiaries, taking money from the trust, or failing to account to trust beneficiaries.

In regard to wills, an executor has fiduciary obligations to the beneficiaries of the estate. The fiduciary may be sued for breach of fiduciary duty for, *inter alia*, failing to collect all estate assets, self-dealing (i.e., selling the estate-owned home to himself for below fair market value); or failing to administer the estate according to the terms of the will.

The Impact of the Current Economic Landscape on Trust and Estate Litigation

The economy has not had a negative impact on my practice. My business has actually increased, but that could have more to do with the trajectory of my career than with the actual economy. I am a relatively young partner, and my business is expected to grow. However, I have noticed that there have been fewer cases involving huge sums of money in the past year, largely because many of the big estates are not as big as they used to be due to the real estate crash and market instability. Likewise, there tends to be less willingness to litigate what I would consider to be mid-sized estates because of the cost-benefit analysis. Many of the cases that would have

been brought a few years ago are not being brought now, simply because the litigants do not have the money to fund litigation and because the potential payoff is not as great.

One area of estate litigation that has increased dramatically is the number of breach of fiduciary duty cases brought against banks who serve as trustees. Trust beneficiaries want someone to blame for the downturn in the economy and the reduction in their interest income or the total value of their trust. Since they cannot sue the chairman of the Federal Reserve or Congress, they are suing the bank that served as trustee of the family's trust. I defend banks in these types of cases. These cases are particularly sticky because the issue is whether the bank acted in accordance with the prudent investor standard when investing trust assets during the recent real estate and stock market crash. Under these circumstances, it is difficult to determine whether a corporate fiduciary was acting imprudently. Was it really imprudent for the corporate trustee to invest trust assets in the stock market? Can the corporate trustee be liable to the beneficiaries for failing to cash out before the crash?

Jurisdictional Considerations

Probate and trust litigation are practically always done at the state level. All of my cases, for example, are in Illinois. For this reason, you must learn the laws and customs that govern the state and county you are practicing in. For example, in Illinois, we have what is called a substitution of judges by right, which some states do not. Essentially, each party is allowed to suggest a judge's substitution. Therefore, if you are not familiar with the judge in your case you have to research their previous rulings and talk to other people about the judge, and then discuss with your client if you want certain matters brought in that courtroom.

While there are state statutes that govern where I can file suit (i.e., a will contest must be brought in the county where the decedent died), when I have the choice I prefer trying cases in Cook County. Of course, that is not to say that the judges in other counties are bad. In fact, the trust is far from it. However, they do not see the volume and breadth of cases the judges in Cook County see. In the smaller counties, where judges handle more than just probate, attorneys generally have to educate the judge more so than we

do in Cook County because we have judges that deal exclusively with probate.

While estate and trust litigation is typically handled on the state level, it is important to stay abreast of trends in other states. I have partners across the country, and we discuss issues we are seeing and how courts are resolving them. Communicating with attorneys outside Illinois allows me to learn new strategies and arguments that may be appropriate for my cases here in Illinois.

Components of Trust and Probate Litigation Strategy

Client's Goals and Key Motivations

The first motivation in most trust and probate litigation is money, and the second is probably a person's ego or desire to be vindicated on "principle." I have found that whenever someone says that he or she is engaging in litigation to defend a principle, it is usually because of his or her ego. The third motivation is some combination of affection, emotion, and family history. For example, clients often tell me that there is no way their mother could have wanted one of their siblings to receive more of an inheritance because she always told the client that he or she was her favorite. The person usually initiates litigation to defend the belief that he or she was the favorite and some wrongdoing had to have occurred for his or her mother to leave so much to the other siblings rather than to him or her.

At the outset of any trust and probate litigation, I always try to identify the goals of my client—i.e., what is it they want, and what is it that they expect to achieve. From that point, I figure out what is legally possible. I do this because what the client wants and what you can actually legally achieve are often very different things. As stated earlier, many of these cases are driven by emotions: some clients just want to know that their mother loved all of her children equally, but their mother is dead. Other times the client really wants their sibling to apologize, and that is just not going to happen, whether we settle or win at trial.

I always advise my clients to think seriously about whether or not they want to bring litigation; it is emotionally and financially draining. If the client will

end up spending \$200,000 on litigation, and the most they can get out of it is \$300,000, they need to decide if they should go through with it. Some will choose to proceed because they are emotionally invested in vindicating what they believe to be the decedent's true intent. Others will be more pragmatic and may recognize it is not worth the fight.

Therefore, when I build a litigation strategy, it is important to identify the client's goals and what is legally possible. Then I talk to the client about those issues, and try to get them back down to earth if necessary.

Educating the Client and Setting Expectations

Client education is extremely important in these cases. If a client's expectations are improperly managed, you will have a very unhappy client. In fact, I will decline cases where the client has unreasonable expectations about what he or she can or cannot do in a will or trust contest.

When working with a client on a probate or trust matter, it is important to listen and never condescend. The counseling process is part therapy and part education. If you seriously consider the client's feelings or emotions, you will often be able to recognize what is really motivating them in bringing or defending the litigation. You have to spend some non-billable time on the phone with the client discussing their motivation. They have generally been thinking about these issues for a long time, and they want to share their feelings with someone who cares—their attorney.

I tend to not have to educate bank clients as much because these clients are professionals who do this for a living. They frequently know almost as much about the law as I do. Again, however, individual clients typically have no background in estates and trusts and require continuous education on the law and the process of estate/trust litigation.

I try to make a client wait a couple of days before deciding to move forward with non-mandatory litigation. It is crucial for the long term. It is not necessarily the best business decision to rope a client into doing something they do not necessarily want to do, because, in the end, they are not going to want to pay for it. Litigation is a huge emotional and financial investment; the client has to be committed. Therefore, I try to make them

wait a couple days before they make the decision to go forward and that very rarely backfires. In fact, it usually allows the client to come up with more questions, and only then will they be ready to decide whether they are going to actually commit to the litigation.

Stay Organized and Simplify Your Case

In order to succeed in these cases, you need to know your facts and the law very well. Keep yourself and your facts organized. The discovery process will lead to an overload of information, so it is important to be organized from day one. Create timelines and summaries and always have a running list of questions that you will go back to check and recheck. This will help you narrow down your case and stay focused on what you need to prove. In every case, you must prove to a judge or a jury that your facts demonstrate that only one legal outcome is appropriate. In order to do this, you must pinpoint your goal and simplify your case. Judges and juries respond to simplicity.

You want to give the judge and jury an explanation they can easily agree with. If you take a complex issue and make it easy for them to understand, it is easier for them to agree with you. This strategy is sometimes easier to achieve with a jury than with a judge. The judge may have used such strategies themselves and may reject them. Regardless, it is always a good idea to simplify your case as much as possible.

Achieve Early Victories

It is important to consider what you can do to bring about an early settlement that is favorable to your client—and one way to do that is to try to quickly obtain early moral and legal victories. I will often try to somewhat demoralize the other side by defeating any unfounded claims as early as possible and poking holes in their facts. Basically, I try to get rid of the big dramatic elements in the other party's case while attempting to score an early legal victory. Even a small victory develops momentum, which will make the other side reconsider the strength of their case. Each party comes into litigation thinking that they know the truth and they are going to win. The mentality is: *how could a judge or jury ever decide otherwise?* However, you have to show the other side as well as the judge or jury that the case could indeed be decided otherwise. You must attempt to achieve as many of those

victories as early as possible. All of these early efforts will allow you (and the judge) to properly assess the strengths of the case. By achieving early victories in court and persuading the other side of the strength of your case, you are educating the judge and making them familiar with your side of the story—this helps in the long run.

I will always try to bring an action in a way that leverages the strengths of my client's case. My goal in every case is not necessarily to win at trial. I want to win, but I do not defend litigation based solely on how it would play out at trial. Early victories typically allow me to reach a settlement with the other side, making trial unnecessary.

Educate the Judge

It is important to educate the judge on the simple theory behind your case early as possible. For example, in some instances it may be important to file a certain motion, not because you absolutely believe you will win the motion, but because it is an opportunity to educate the judge on the facts or theory of the case. I have also filed certain motions in order to educate the judge on the unsavory tactics of my opposing counsel, so that the judge is on notice of whom she or he is dealing with. Educating the judge on the facts benefits my client in the long run.

Preparing for Litigation: Building your Team:

Legal Assistants

Some of the best litigators have amazing assistants. In fact, in my opinion, you cannot become a successful attorney, especially in litigation, without an assistant who understands the basics of the law, gets along well with clients and opposing counsel, and can handle many of the procedural aspects of these cases, thus alleviating the responsibility and worry from you.

Associates/Partners

Associates and paralegals are crucial in a successful trust and estate litigation practice. The number of such people on a case varies with the complexity of the case. I will handle a smaller case myself, but there are some cases

where I have four partners and three or four associates working with me, because the case is complex and involves a lot of work.

I benefit from working in a larger firm where I can have other partners look at the issues in my case to get an outlook from a fresh set of eyes. Because probate and trust litigation may touch on many areas of the law, I will also bring in a partner who specializes in tax or real estate or whatever the case requires in order to provide my client the best possible team to litigate his or her case.

Advice and Counsel from Attorneys outside the Case

When you are working on a case with people in your firm, you sometimes tend to suffer from group think. For example, associates may adopt my interpretation as their own, rather than thinking about an issue for themselves. In an effort to avoid group think, I have been known to retain outside attorneys to analyze a specific subject or specific issues. Of course, it will cost the client a little more, but not too much more, because they would have paid me for that time anyway. Most importantly, I will be able to get a different perspective from someone who is not immersed in the case, which can bring a favorable outcome to the client.

In addition, the probate attorneys in Chicago are a pretty collegial bunch who are often willing to give a few minutes of their time to analyze an issue or recommend an expert referral.

Experts

Outside experts are extremely important in trust and estate litigation. Since the testator/settlor's mental capacity is often at issue, it is generally necessary to present his or her physician or another medical expert who can discuss his or her mental capacity and medical condition. Physicians and nurses are frequently retained for this reason.

In addition, forensic accountants are frequently used as experts. For example, if a trust owns shares of a family business, an accountant may be brought in to analyze the value of the business. Similarly, if a trustee sued for breach of fiduciary duty, compiling a complete trust accounting and

analyzing the trustee's actions with respect to the trust's assets will also require an expert accountant.

I frequently rely on word of mouth for finding the appropriate expert for a case. Over time, I have developed good relationships with some doctors and accountants, who I will call on since I know and respect their level of professionalism. I tend to avoid hiring experts who have referred me business because I do not want any bias to affect my client's case.

Complex Trust and Probate Cases

Successive Documents

What I consider a complex trust or probate case is a case that involves a lot of successive documents—i.e., the client executed a new trust every year for fifteen years, and they were either unduly influenced or lacked capacity to execute those documents over the last six years. Therefore, you have to contest six successive documents. That usually entails six successive trials to contest the validity of each document. That gets very expensive, which usually encourages settlement.

Tax Issues

If a case involves trust construction, undue influence, or lack of capacity matter, *and* taxes are at issue, the case frequently becomes infinitely more complex. Our tax code has changed a great deal over the years, and when estate documents have been executed in different years, the challenge involves trying to figure out why the client did what they did, and how the tax law has changed since that time. Basically, you are trying to argue to the judge that the client did certain things for a particular reason, and that makes the case a bit more complex—i.e., if when the client executed their estate documents, they were trying to take advantage of a law under the tax scheme that existed at that time, which may be very different than the present laws.

Multiple Parties and Conflicts of Interest

Multiple invested parties with conflicting interests also make for a complex trust or probate case. I have had cases where there were fifteen attorneys, all

representing different clients and with different agendas. In such a case, I may be aligned with half the parties and against half the parties on certain motions. Resolving such a case takes incredible organizational skills and a good team.

The Fine Line in Breach of Fiduciary Duty Cases

Another type of complex case is if a beneficiary files a breach of fiduciary action and the facts are unclear as to whether there was in fact a breach of duty. Many of these cases involve investment decisions that were made over the last four or five years. Issues in these types of cases are whether a particular bank should or should not have taken a certain action, and whether its action or inaction constitutes a breach of fiduciary duty. These cases are becoming more complex, because in the past when the market was always going up and you lost money, it was easier to prove a breach, but in this economy, a loss of 10 to 15 percent may or may not necessarily be a breach. Therefore, you are dealing with a lot more financial and economic data than in most cases, which often requires the use of an expert to sift through it and draw conclusions.

Recent Trends and Changes in the Law

A Tortious Interference with an Expectancy Action May Be Filed After the Six Month Period for Filing a Will Contest Has Past

The Illinois Supreme Court held in *In Re Estate of Ellis* that a tortious interference with expectancy action, in certain circumstances, may be filed after the six month statute of limitations to file a will contest has expired. *In re Estate of Ellis*, 236 Ill. 2d. 45, 923 N.E.2d 237 (2009). In *Ellis*, the decedent named Shriners Hospitals for Children as beneficiary under her 1964 will, provided she had no descendants. In 1999, the decedent wrote a new will naming her pastor as the sole beneficiary of the estate. The decedent died in 2003 with no descendants and her 1999 will was admitted to probate. Shriners did not learn of their interest under the 1964 will until 2006, well after Illinois' six month claim period to file a will contest had run. Shriners brought suit against the estate alleging, among other things, tortious interference with an expectancy.

Shriners alleged that the reverend knowingly interfered with Shriners' expectancy under the 1964 will by abusing his position of trust by unduly

influencing the decedent to execute a new will. Shriners alleged that but for the reverend's interference, Shriners would have received the estate. The lower courts dismissed the claim as untimely because it was not filed within the six month limitation period for filing a will contest that they applied to tortious claims. The lower court reasoned that the legislature could not have intended to bar a will contest after six months but permit identical allegations to proceed in through a tort action. This had been the general understanding for years.

The Supreme Court reversed, finding that a tortious interference claim is not limited by the six month limitation period in the Probate Act because the six month limitation period explicitly states that it only applies to will contests. Moreover, the purpose of a will contest, even if the allegations are the same as a tortious interference action, is entirely different. A successful will contest will set aside a decedent's will, whereas a tortious interference action is directed toward the individual tortfeasor and if successful will result in a judgment against the individual defendant. The Illinois Supreme Court noted that had Shriners known about their interest early enough to file within the six month limitation period they would not have waited until after the period ran to file their tort action.

In sum, the Illinois Supreme Court held that while a tortious interference action is not governed by the six month limitation period, if the contestant knew about the tort and could have brought the action during the six month limitation period and received adequate relief through a will contest, the contestant is required to file a will contest instead of a tortious interference action. If, however, a will contest will not provide adequate relief, then the contestant can proceed with his or her tort action. The Illinois Supreme Court allowed Shriners' claim to proceed because Shriners did not learn about their expectancy until well after the limitation period, and a will contest would not have provided it adequate relief because numerous assets were transferred to the reverend outside of probate.

This case is important because it expands the opportunity to litigate estates. Prior to *Ellis*, most practitioners and trial court judges understood the law to be that any action to contest a will or trust, or to bring a tortious interference action, had to be filed within the six month limitation period. While the Illinois Supreme Court attempted to narrow their decision to the

facts of *Ellis*, the case has nevertheless opened the door for parties to litigate estates well after they have been administered based on a claim of tortious interference, provided the contestant did not have notice within the six month limitation period. As a result, attorneys who administer estates may want to consider giving notice to any individual or entity known to have had an interest in a prior will in order to foreclose on an individual or entity bringing an action well past the six month limitation period. Of course, providing them that notice may invite litigation as well.

This case obviously benefits litigators in that it expands our opportunity to bring a cause of action. However, litigators nevertheless need to be mindful when bringing such a case. Litigators need to consider whether his or her client will be able to gather sufficient evidence to plead and prove tortious conduct like fraud or undue influence. The longer it has been from the date of the purported fraudulent transaction, the more difficult it is to prove. Additionally, it is important to consider the likelihood of recovering the assets allegedly subject to interference. Is your client actually going to be able to recover or is your client going to get a judgment against an insolvent tortfeasor? This will affect whether your client wants to proceed with the case.

Pre-Death Will and Trust Amendments and Contests

I am increasingly seeing fights over who should be appointed guardian of a disabled person in order to propose estate planning documents, or more commonly, to amend the existing estate plan of the disabled person. In other words, why wait until the person dies when you can fight over their estate while they are still alive? Recently, the First District of Illinois chimed in on this issue. In *In Re Estate of Henry*, the First District held that individuals cannot contest a will or the validity of a revocable *inter vivos* trust agreement in which a legacy is provided by the settlor's will until after the testator/settler is deceased. *In re Estate of Henry*, 396 Ill. App. 3d 88; 919 N.E.2d 33 (1st Dist. 2009). In this case, Richard Henry was adjudicated disabled in 2006 and a guardian of his estate and person were appointed. The guardian of the estate subsequently filed a citation action against the disabled person's caretaker that resulted in a finding that the disabled person lacked decisional capacity since December 31, 2003 and his caretaker had misappropriated more than \$1 million from the disabled person. After this ruling, the guardian of the estate petitioned the court to execute a new codicil, will, and trust on behalf of the

disabled person claiming his 2004 will was not a valid expression of his intent because its primary beneficiary was the caretaker and a nephew. The disabled person's prior 1999 will left most of his estate to charity. The guardian of the estate basically wanted to reinstate the terms of the 1999 will. The court permitted the guardian of the estate to execute the estate planning documents, thereby removing the caretaker and nephew's interest therein. The caretaker and nephew appealed.

The First District dismissed the caretaker and nephew's appeal holding that they did not have standing. The court held they did not have standing to challenge the trial court's order on behalf of the disabled person because they were not the disabled person's guardian. Additionally, the court held that they did not have standing to challenge the order on their own behalf because they did not have an injury: a will is not legally operative until after death. Since the nephew and the caretaker did not have a property interest until after the testator dies, they, like all the other legatees, had to wait until after the testator's death to challenge the disposition of his property. Similarly, the court held that beneficiaries of a revocable *inter vivos* trust, which is a legatee under a will, lack standing to challenge amendments made by the settlor during his lifetime. The court cited section 8-1(f) of the Probate Act which specifically states that "an action to set aside or contest the validity of a revocable *inter vivos* trust agreement or declaration of trust to which a legacy is provided by the settlor's will which is admitted to probate shall be commenced within and not after the time to contest the validity of a will."

This case is important because it reaffirms that a party does not have standing to file a will contest or contest the validity of a revocable *inter vivos* trust agreement in which a legacy is provided by the settlor's will until after the testator/settler is deceased. Recently there has been a trend in people attempting to modify an individual's estate plan after he or she has lost capacity but before the person has died. Some people simply come to court and try to contest the will and/or revocable *inter vivos* trust as invalid during the settlor/testator's lifetime. This is clearly not permissible under the Probate Act, which the holding in *Henry* reinforces.

The proper procedure for modifying the estate plan of an individual who does not have the mental capacity to modify it himself or herself is to petition for guardianship over the individual. Once a guardian of the estate is in place,

the guardian may petition the court to modify the disabled person's estate plan. I have petitioned the probate court to modify estate plans on numerous occasions. In one case, the disabled person left all of his non-probate assets to the sister with whom he was particularly close. He did not have a will, and as a result, his probate estate would pass by intestacy. Based on his selection of sister as beneficiary of all of his non-probate assets and the fact that he did not have a relationship with his other siblings, I successfully petitioned the court to name his sister as his sole beneficiary of his estate. Cases are not always as simple or obvious as the example I just provided or the facts in Henry. If a client comes to you with a goal of becoming guardian simply to try to modify new estate planning documents for the alleged disabled person, carefully consider whether his plan is appropriate for the alleged disabled person based on the facts of the case.

Divorce Decrees

Another trend that I see in probate these days—and was mentioned to me by a sitting probate judge—is enforcement of divorce decrees in decedents' estates. If a spouse is not meeting their obligations under their divorce decree, the surviving ex-spouse or children who are entitled to certain benefits are bringing claims in the decedents' estates. Therefore, some probate judges have had to learn family law quickly.

Settlement Structures

Settlement structures for trust and probate litigation in today's economy often depend on the type of case and the individuals involved. These cases frequently involve the sale of real estate. Recently I have noticed a lot fewer structured payouts. On the other hand, a few years back during the real estate boom, people were more comfortable with structured settlements or getting third parties involved to finance settlements.

Emerging Practices to Prevent Probate Litigation

What Estate Planners Can Do

The estate planner is the first line of defense in trust and probate litigation. The estate planner should always meet with the client alone when working

on their estate plan to make sure that this is what the client really wants. The estate planner should take steps to ensure that the execution of the will or trust cannot be questioned. For example, if the testator is going to leave everything to his niece, the niece should not be contacting the estate planner to arrange the execution of the will, nor should the niece be driving the testator to the estate planner's office. These raise red flags that perhaps the testator was unduly influenced by his niece. During the meetings with the client, it is important that the estate planner take detailed notes, because they will end up being a useful tool if the estate planning documents are litigated and the estate planner is required to testify regarding the documents he or she drafted.

Estate planners need to take particular caution when they are advising an older client with memory impairments. Just because a client is old and forgetful does not mean he or she is incapable of executing estate planning documents. In regard to mental incompetency, a red flag exists where a client knows you are her lawyer, but cannot remember your name, or the client knows where she lives, but she would not be able to find her way home on her own, or she thinks her house is worth \$200,000 when it is worth \$1.2 million. All of those symptoms are potential red flags for future probate litigation. Therefore, the attorney of such a client should commemorate the fact that she has capacity by having her see a doctor who can confirm in writing that the client was competent at the time she executed her estate plan.

Doctrine of Election

I have found that many people are taking offensive action to prevent trust and probate litigation these days. In Illinois, for example, we have what is called the doctrine of election, which is like a waiver. If someone dies, and you are a beneficiary of his or her will or trust, and you then receive at least part of your designated benefit from that document, you are later prohibited from challenging the trust or will. Consequently, as soon as someone dies and the executor or trustee assumes fiduciary status, he or she should try to make partial distributions from the estate or trust as soon as possible.

For instance, if someone is supposed to ultimately inherit \$250,000 plus a seashell collection, the trustee should give that beneficiary the seashell

collection right away, or perhaps \$5,000. The trustee has no obligation to tell them why they are doing that. Essentially, making a partial distribution from a trust or will early on makes it much harder for a beneficiary to contest the trust or will at a later time. This emerging tactic has been used by some of the smarter people in this area for quite a while, and many other practitioners are now catching on.

The Role of Technology and the Discovery Process

Today, every piece of information that comes into our office is basically made part of our technological database, and we have various ways of storing it, manipulating it, organizing it, and linking it so that we can do internal searches of all of the discovery documents within minutes—a process that would have taken hours or days in the past. Also, in terms of organization, there is now less fear of losing a case in a situation where you realize that you forgot about or cannot find a document at the last minute. It is interesting how the more paperless we become, the more documents are produced in discovery. Thus, while there is more to sift through and organize, there are luckily better tools to do both.

Final Thoughts

Stay Current and Build Relationships

Most probate cases are settled; therefore, you do not hear about what transpires in those cases, other than by talking to your colleagues or by attending continuing legal education programs. Consequently, many of the strategies I have learned in my practice stem from conversations with my colleagues, including some former opposing counsel. I cannot stress enough the importance of having strong relationships with people in your field. I have learned much of what I know from people whom I argue cases with and against. When we are not opposing each other, we are swapping ideas and information. Learning from other attorneys in your field benefits both your practice and theirs. In fact, I have found that the more successful and knowledgeable attorneys tend to be the ones that most people like. Sometimes you have to play the bully to pursue your client's goals, but that does not mean you have to do it all the time.

This practice area requires that you have an understanding about many different areas of the law, including civil litigation, estate planning, probate, mental health law, and tax law. It is important that you attend continuing education seminars and solicit help from attorneys and other experts who have an expertise in an area that is important to your case so you can competently represent your client. For example, in a lack of mental capacity case you will have to understand medicine because a physician is inevitably going to be a witness. If you are going to be an excellent estate litigator, you should know more than your witness does, which frequently means learning the medical issues in your case with the same degree of competency that an excellent personal injury attorney would.

Continuing education is important because the law is constantly changing. It is frustrating to go up against an attorney who does not know what she or he is doing. Unfortunately, we see that a lot, especially as this area grows. Conversely, it is always good to go up against a great attorney, because you get a better outcome for all parties. When you are negotiating with someone who knows what could happen in court, they can advise their client correctly; whereas if you go up against someone who may only know a little about these issues, they may be giving their client awful advice that is causing them not to settle on a certain issue. In such a situation, my client may wind up winning at trial, but it will also cost them another \$50,000, whereas if we were dealing with an attorney who knows what they are doing, the case would not go that far.

Maintain Client Satisfaction

Finally, it is crucial that your client feels a part of the team and is on board for what lies ahead. Litigation is extremely unpredictable—your client needs to be aware that there is no guarantee. I find that the best way to keep a client happy with my service is to maintain constant communication. I always try to take a client's call, and if I cannot, then I call them back as soon as possible. Each and every client should feel like their case is your number one priority. Litigators must be good at balancing a multitude of cases that all have unexpected twists and turns. Because of the unpredictable nature of litigation, it is important that litigators do their best to control what they can: client expectations and client relationships are in the attorney's hands at all times.

Key Takeaways

- At the outset of any trust and probate litigation, I always try to identify the goals of my client. When working with a client on a probate or trust matter, it is important to listen and never condescend.
- It is important to consider what you can do to bring about an early settlement that is favorable to your client—and one way to do that is try to quickly obtain early moral and legal victories. I will often try to somewhat demoralize the other side by poking big holes in their claims, and try to defeat the most ridiculous issues they are bringing up.
- A successful attorney, especially in litigation, needs an assistant who understands the basics of the law, who gets along well with clients and opposing counsel, and who is able to handle all the procedural aspects of these cases so that you do not have to worry about them. Hiring outside experts, such as medical professionals, is also important.

The two main causes of action in trust and probate litigation are lack of capacity and undue influence. A good estate planner will look at the elements of those causes of action and have a doctor verify the client's mental state, if necessary.

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Mr. Koenig has extensive trial, appellate, and mediation experience in state and federal courts. He is frequently appointed guardian ad litem and defense counsel by judges in guardianship cases, and has been appointed special administrator in probate matters. Mr. Koenig has also been appointed Illinois Special Assistant Attorney General in numerous matters.

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