LEGAL EXCELLENCE WEEK

Playing Monday-Morning Quarterback:

Fiduciary Litigation Evidence for the Estate Planning Attorney

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“I have no desire to suffer twice, in reality and then in retrospect.”

– Sophocles, Oedipus Rex

"Oh, well, of course. *Everything* looks bad if you remember it."

– Homer J. Simpson

Overview

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Drafting attorney is key participant in estate planning disputes

- Value as fact witness – theoretically an unbiased “window” into settlor/testator intent and capacity
- Affirmative obligation, in “borderline” capacity cases, to "take steps to preserve evidence regarding the client's testamentary capacity." American College of Trusts and Estates Counsel (ACTEC) Commentaries on the Model Rules of Professional Conduct (5th Ed. 2016), Rule 1.14.
- Dead Man’s Statutes may exclude other parties’ testimony

Undue influence cases identify role of drafter/relationship to settlor/testator as significant factor. *Moore v. Smith*, 321 Md. 347 (1990); *Conrad v. Gamble*, 183 Md. App. 539 (2008).

Overview

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Themes

- Two broad categories of cases to consider: 1) “direct” attacks and 2) cases dealing with interpretation, construction, or implementation of the estate plan
- The non-probate “revolution” – historical vs. current role of wills and codicils

Goals of presentation

- Introduce and explain evidentiary concepts that dictate when and how the estate planning attorney can testify as a witness
- Highlight major evidentiary distinctions between a “traditional” will/codicil case vs. non-probate case
- Provide, from litigator’s perspective, “front-end” drafting, planning and practice considerations

Extrinsic Evidence – Plain Meaning Rule

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“Plain Meaning Rule” - The plain meaning rule requires that a testator's donative intent is found strictly from the language used in a will, regardless of the certainty derived from extrinsic evidence that such language misstates the testator's actual intent.

A testator's intent is gathered from the "four corners" of the will, with the words of the will given their plain meaning and import; the Court is aided by canons of will construction and (as discussed below), "surrounding circumstances" evidence that does not contradict the will. *Friedman v. Hannan*, 412 Md. 328, 338-43 (2010)

Extrinsic Evidence – Plain Meaning Rule

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Latent ambiguity exception: As a general rule, extrinsic evidence is admissible to resolve a latent, but not a patent, ambiguity. *Friedman v. Hannan*, 412 Md. 328, 338-43 (2010).

Latent Ambiguity

- A latent ambiguity is an ambiguity where the terms of the will appear clear and without ambiguity, but those terms yield more than one meaning once the extrinsic evidence is permitted
- Example: A bequest to my cousin John if evidence extrinsic to the document reveals that the testator had no cousin named John when he executed the will but did have a nephew named John and a cousin named James.

Patent Ambiguity

- Arises from an apparent contradiction within the document itself or where a term that is used in the document could yield several meanings.
- Example: A bequest of “my money” – does it apply to decedent’s cash, or more generally, to his assets?

Extrinsic Evidence – Plain Meaning Rule

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Hypothetical #1:

Testator's Will provides a specific bequest of "all my personal property" to his children in equal shares; residuary bequest is to an *inter vivos* trust.

Approximately ½ of the Estate consists of stocks, bonds, and bank accounts; Estate also contains a small amount of tangible personal property

Petitioner sought to adduce evidence by testimony, including testimony from the drafting attorney, that testator intended the phrase "personal property" to apply only to tangible personalty, thereby disposing of non-tangible personal property (stocks, bonds, bank accounts) under the residuary clause

Was the testimony admissible to prove that the phrase "personal property" actually meant tangible personal property?

Extrinsic Evidence – Plain Meaning Rule

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Hypothetical #1:

Testimony was NOT ADMISSIBLE

The phrases “personal property” and “tangible personal property” have technical and widely-used meanings; the language and structure of the will were not internally inconsistent

Will did not contain a latent ambiguity: the proffered extrinsic evidence did not result in the plain language of the Will being susceptible to multiple interpretations (for example, the Will did not purport to bequeath personal property that the testator had never owned in the first place)

Extrinsic evidence could not be admitted for the purpose of demonstrating the testator’s intent

See *Emmert v. Hearn*, 309 Md. 19 (1987)

Extrinsic Evidence – Plain Meaning Rule

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Hypothetical #2:

Testator's Will purports to bequeath 104 shares of his Class B stock in a corporation to various beneficiaries. The residuary clause bequeaths his residuary estate to the corporation.

At the time of the Will's execution and the testator's death, the corporation had outstanding Class B shares, but the testator did not own any. At all times, the testator owned only Class A shares.

Can extrinsic evidence be introduced to demonstrate that the bequest of 104 "Class B" shares actually applies to and disposes of the Class A shares owned by the testator?

Extrinsic Evidence – Plain Meaning Rule

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Hypothetical #2:

Extrinsic evidence was ADMISSIBLE

This was a case of a latent ambiguity.

The Will was, on its face, unambiguous. However, the extrinsic evidence that the testator did not and never had owned Class B stock created an ambiguity that could only be resolved through the introduction of explanatory extrinsic evidence

See *Wm. D. Shellady, Inc. v. Herlihy,* 236 Md. 461 (1964)

Extrinsic Evidence – Surrounding Circumstances

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In ascertaining the testator's intent, the court may consider the situation of the testator and his relations with the parties to whom he has devised or bequeathed his property. In that regard, the will must be read in the light of the surrounding circumstances existing at the time of its execution. *Castruccio v. Estate of Castruccio*, 239 Md. App. 345, 362 (2018), cert. denied 463 Md. 149; Miller, Edgar G., THE CONSTRUCTION OF WILLS IN MARYLAND §§ 12, 44 (1919).

Extrinsic evidence of "surrounding circumstances" that does not contradict, modify, or vary the terms of the will is always admissible

Extrinsic Evidence – Surrounding Circumstances

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Facts in *Castruccio*:

Testator's Will contained two items relating to his wife. The first item purports to bequeath to her his residuary estate, provided that she survive him and have made and executed a Will of her own before the testator's death. The second item, labeled "residuary clause," stated that if wife does not have a Will on file with the Register of Wills at the time of his death, the residuary estate shall pass to a third party.

The wife did have a Will at the time of the testator's death, but it was not filed with the Register of Wills.

Extrinsic Evidence – Surrounding Circumstances

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Facts in *Castruccio* (cont'd):

A party sought to introduce evidence showing that the testator had been attempting to get his wife to prepare a joint will or joint estate plan, and that those attempts had somewhat unsuccessful; that the testator disliked the extended family of his wife; and that he personally (as opposed to his attorney) drafted some of the language at issue

Extrinsic evidence was admissible under "surrounding circumstances" rule. It does not modify, vary, or contradict the Will. Rather, it explains the rather idiosyncratic drafting choices in the Will, and helps harmonize the two provisions at issue by tying them to the testator's underlying intention at the time the Will was drafted

Extrinsic Evidence – Hearsay Limitations

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Rule 5-803(b)(3) “State of Mind” Hearsay Exception

Three exceptions to hearsay rule if “statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)” is offered:

1. To prove the declarant's then existing condition;
2. To prove the declarant's future action; or
3. A statement of memory or belief offered to prove the fact remembered or believed, but only if it “relates to the execution, revocation, identification, or terms of declarant's will”

Extrinsic Evidence – Hearsay Limitations

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Hypothetical:

Decedent executed account documents adding his brother as a joint owner on several of his bank accounts.

The Personal Representative has asserted that the funds in the accounts belong to the estate, and the brother has asserted that the funds belong to him.

The Personal Representative seeks to introduce testimony from witnesses to the effect that the decedent had told them, approximately a year after processing the account changes, that he had “put his brother on the accounts to pay the bills and take care of things” and then the decedent’s children could “divide up the estate.”

Note: Ignore FI 1-204 (multiple party accounts) and any Dead Man’s Statute issues

Extrinsic Evidence – Hearsay Limitations

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Step One: Is it hearsay?

Out of court statement (by the decedent) offered to prove the truth of the matter asserted (that the accounts were, in fact, intended to be divided with the decedent's estate. Rule 5-801.

The statement is hearsay.

Step Two: Is it inadmissible hearsay?

The Rule 5-803(b)(3) exception applies. *Ebert v. Ritchey*, 54 Md. App. 388 (1983). However: was this a "backwards-looking" case (thereby equating the joint accounts with the declarant's "will"), or was it a "present-looking" or "forward-looking" case? *Figgins v. Cochrane*, 174 Md. App. 1, 28 (2007) (classifying *Ebert* as a "backwards-looking" case); *but cf. D.A.R. v. Goodman*, 128 Md. App. 232, 238 (1999) (implying that *Ebert* related to forward-looking statements of intent).

Extrinsic Evidence – Privilege Issues

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The attorney-client privilege, codified at CJP § 9-108, generally precludes disclosure of confidential communications made by a client to his attorney for the purpose of obtaining legal advice.

The client holds the privilege, and therefore may waive it. The privilege survives the death of the client. *Zook v. Pesce*, 438 Md. 232, 241 (2014) (citing *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998).

Extrinsic Evidence – Privilege Issues

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Testamentary Exception to Attorney-Client Privilege: Attorney-client privilege does not apply to certain statements relating to the decedent's estate plan.

"It may be laid down as a general rule of law, gathered from all the authorities, that, unless provided otherwise by statute, communication by a client to the attorney who drafted his will, in respect to that document, and all transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a suit between the testator's devisees and heirs at law, or other parties who all claim under him." *Zook*, 438 Md. at 243 (quoting *Benziger v. Hemler*, 134 Md. 581 (1919)).

Although the name of the exception implies that it is available only in disputes regarding wills or codicils, in *Zook* the Court of Appeals concluded that the exception applied to a "living trust" that was, in effect, a will substitute. *Zook*, 438 Md. at 251

Extrinsic Evidence – Privilege Issues

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Attorney-client privilege may be waived

Who holds the privilege after death? Cases have held that the Personal Representative may waive the privilege under certain circumstances.

- Generally, this may occur in circumstances where the waiver would operate in the interest of the client, his estate, or persons claiming under him, and would not damage the client's reputation
- Example: Respondent/executor could waive attorney-client privilege to allow decedent's attorney to testify that the decedent had transferred shares of stock to the respondent prior to death and consequently such stock was not an estate asset. *Matter of Estate of Thomas*, 179 A.D. 3d 98 (N.Y. App. Div. 4th 2019)

Personal Representative does not have blanket authority to waive, however. *In re Miller*, 584 S.E.2d 772 (N.C. 2003) (wife/executrix not permitted to waive attorney-client privilege in the context of a pre-trial murder investigation in which the husband/decedent was apparently a suspect).

Wills vs. Trusts and Non-Probate

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The Plain Meaning Rule applies to wills and codicils only. *Shriners Hospital for Crippled Children v. Maryland Nat. Bank*, 270 Md. 564, 581-2 (1973).

Parol evidence is admissible to correct a unilateral mistake by the settlor/grantor in inter vivos trusts; reformation (or the imposition of a constructive trust to remedy a mistake) has also been available for deeds of gift, life insurance contracts, and other instruments that serve to transfer wealth upon the decedent's death

Wills vs. Trusts and Non-Probate

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Maryland Trust Act clarifies that extrinsic evidence is admissible in many circumstances to reform or modify the terms of a trust (whether inter vivos or testamentary)

In fact, the Maryland Trust Act defines the "terms of a trust" as "the manifestation of the intent of the settlor regarding the provisions of a trust as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." ET § 14.5-103(aa).

Wills vs. Trusts and Non-Probate

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Reformation of trusts (ET § 14.5-413):

- The court may reform the terms of a trust, even if unambiguous, to conform the terms to the intention of the settlor if it is proved by clear and convincing evidence that both the intent of the settlor and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."
- The statute broadens the traditional doctrine of reformation in allowing extrinsic evidence even where the trust instrument is unambiguous

Modification of trusts

- Modification for Unforeseen Circumstances (ET 14.5-411(a)) – subject to “probable intention” of settlor
- Modification for Impracticability or Waste (ET 14.5-411(b))
- Modification to Achieve Tax Objectives (ET 14.5-414) – subject to “probable intention” of settlor

Pre-Mortem vs. Post-Mortem Gifts

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A "confidential relationship" between the testator/settlor/donor and the beneficiary can dramatically shift the burdens at trial.

For inter vivos transfers, the existence of a confidential relationship between the donor/settlor and donee/beneficiary creates a presumption that the gift or transfer is the product of undue influence. *Figgins v. Cochrane*, 403 Md. 392, 411 (2008); *Sanders v. Sanders*, 261 Md. 268, 276 (1971)

"Confidential relationship" may be found "whenever two persons stand in such relationship to each other that one must necessarily repose trust and confidence in the good faith and integrity of the other." *Green v. Michael*, 183 Md. 76, 84 (1944); *Tracey v. Tracey*, 130 Md. 306, 318 (1931).

Pre-Mortem vs. Post-Mortem Gifts

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The issue of a confidential relationship is generally a question of fact. *Sanders v. Sanders*, 261 Md. 268, 276 (1971).

Certain types of relationships can create a legal presumption of a confidential relationship (e.g. attorney-client and trustee-beneficiary). Under modern case law, there is no presumed confidential relationship between parent-child or husband-wife. *Upman v. Clarke*, 359 Md. 32, 42 (2000)

Factors to consider: "dependent" party's advanced age, physical debility, cognitive impairment, and dependence or reliance upon the "dominant" party for care and protection or guidance in business affairs. *Figgins v. Cochrane*, 403 Md. 392, 410 (2008)

Pre-Mortem vs. Post-Mortem Gifts

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Inter vivos transfers:

- Existence of a confidential relationship between the donor/settlor and donee/beneficiary creates a presumption that the gift or transfer is the product of undue influence. *Figgins v. Cochrane*, 403 Md. 392, 411 (2008); *Sanders v. Sanders*, 261 Md. 268, 276 (1971).
- To rebut the presumption, the donee/beneficiary bears a "heavy burden" (sometimes characterized as the "clear and convincing" standard) and must show "the fairness and reasonableness of the transaction," and demonstrate that the transfer was “the free and uninfluenced act of the grantor, upon full knowledge of all the circumstances connected with it and of its contents." *Figgins*, 403 Md. at 411.

Post-mortem transfers: For testamentary (or testamentary "type") transfers, a confidential relationship is a significant factor in determining whether undue influence was present, but there is no burden shift. *Upman*, 359 Md. at 43-44

Practice Points

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Estate planning attorneys have an ethical obligation, particularly in "borderline" cases of testamentary capacity, to take and preserve evidence of their clients' capacity and intent.

Testimony regarding the decedent's mental status and donative intent will usually not be excluded as inadmissible hearsay, but will fall within a 5-803(b) exception (frequently, the "state of mind" exception of 5-803(b)(3)). However, a "backward-looking" statement of memory or belief by the decedent introduced to prove the truth of the matter asserted (e.g. "My son and I had a falling out in 2003") will generally be excluded as hearsay, unless such a statement relates to the execution, revocation, identification, or terms of declarant's will (or, perhaps, a will substitute)

Practice Points

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Choice of instrument carries significant consequences in litigation

Wills (and codicils) are subject to the plain meaning rule. Extrinsic evidence of settlor intent that contradicts the express terms of a will (or codicil) is not admissible unless there is a latent ambiguity. Such extrinsic evidence is not admissible even in the case where there is a clear "scrivener's error." Non-contradictory "surrounding circumstances" evidence will always be admissible.

Inter vivos trusts (and under the Maryland Trust Act, probably testamentary trusts as well) are not subject to the plain meaning rule. Under the Maryland Trust Act, extrinsic evidence of settlor intent may be introduced even if it contradicts the express language of the trust agreement or declaration

Practice Points

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Pre-mortem vs. post-mortem planning, particularly inter vivos gifts compared to other modes of wealth transfer, carry significant litigation consequences

A lifetime gift, where the donor/settlor has irrevocably parted with beneficial or control rights in the property, is subject to closer scrutiny than a purely post-mortem transfer.

- A lifetime gift to a close family member, advisor, or person upon whom the donor/settlor relies (i.e. someone with whom there is a "confidential relationship") may be presumptively invalid as the product of undue influence
- The presumption can be rebutted through testimony demonstrating that the settlor/donor was fully informed as to the consequences of the gift and it was settlor's/donor's the free and uninfluenced act.

A post-mortem bequest is not subject to the same level of scrutiny as a lifetime gift, and the opponent of the bequest will still bear the burden of demonstrating the bequest was the product of undue influence