Unequal Dispositions of Property Among Children and the Specter of Litigation: Pre-Mortem Trust Validation Statutes Provide a Solution

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It is an all too familiar situation: your clients set up a meeting to discuss changes in their estate plan and have spent considerable time deliberating their decision. Their daughter, a senior level executive, has done extremely well in her career and has accumulated three times her parents’ net worth. Their son is a school teacher and his wife stays at home to care for their five children; they do not own a home and are concerned about paying for their children’s college education, not to mention their own living expenses and saving for retirement. Your clients, who are in their senior years, have decided that they want to leave the majority of their assets to their son, and they have come to seek your advice. They also inform you that their children are very close, have a wonderful relationship, and will surely understand the reasons for the unequal distribution of their estate.

While you, the adviser, understand that equal is not always fair, and that fair is not always equal, a child receiving the smaller share of an estate often does not, especially immediately following the death of both parents. The child’s surprise, combined with the emotional difficulty of dealing with the loss of a parent, is a recipe for litigation. The child receiving the smaller share argues that the other child unduly influenced the parents, or that the parents were mentally incapable of making such decisions. The result: less money for everyone (except for the litigating attorneys). After marching through this “parade of horribles” with your clients, they nonetheless remain committed to the unequal distribution plan. As their advisor, the next step is to determine how best to implement the plan and eliminate the possibility of a will contest.

One option is to gift assets to the clients’ son now, while they are both alive. The daughter may never learn of such gifts, and thus not feel as though she has been slighted. But gifting may not be a good option if the clients’ have low basis assets. It would be far preferable for the clients to die owning these assets so they receive a step up in basis. In addition, your clients may not have sufficient liquid assets to make gifts of the magnitude necessary to meet their goals; or they may want to continue using their assets during their lifetimes. Also, your clients may have limits on what they are comfortable gifting during their lifetimes.

Another option is to include an in terrorem clause in your clients’ estate plan. An in terrorem clause revokes all distributions to a beneficiary who unsuccessfully challenges the estate plan. This provision, coming from the Latin “to fear,” was historically intended to “instill the fear of God” into ungrateful beneficiaries. However, many jurisdictions will not preclude a beneficiary who has probable cause from challenging a will on the grounds of mental incapacity, undue influence, or improper execution of the will. The time, cost, delay, and emotional turmoil
involved in such a case can tear apart an otherwise great sibling relationship. And, of course, this process depletes the assets in the estate.

To preclude years of wasteful litigation, and to save clients from metaphorically “rolling over in their graves,” planners should consider utilizing a pre-mortem validation statute. Such a statute allows a will or trust to be validated while your clients are still living—when evidence of their intent and capacity may be readily established and when children can question your clients directly. Utilizing such a statute is especially beneficial when clients desire an unequal plan of distribution.

Eight states have enacted pre-mortem will validation statutes: Alaska, Arkansas, Nevada, New Hampshire, North Carolina, North Dakota, and Ohio. However, only four states—Alaska, Delaware, Nevada, and New Hampshire—have enacted pre-mortem trust validation statutes. For a whole host of reasons (privacy, probate avoidance, the desire to make an inter vivos transfer, to name a few), trusts are often preferred over wills as a means of disposing of property.

Of the four states that have enacted a pre-mortem trust validation statute, Alaska, Nevada and New Hampshire each require a trustee to file a petition with the appropriate court in order to validate the trust. Only Delaware’s pre-mortem trust validation statute sets forth a procedure for providing notice to beneficiaries that does not involve filing a petition with the court, which, needless to say, substantially reduces the costs of the pre-mortem validation process.

Specifically, Delaware’s pre-mortem trust validation statute provides a process by which a trustee of an irrevocable or revocable trust can give notice to a potential aggrieved beneficiary and start the clock on a 120-day period during which the beneficiary must initiate a judicial proceeding. If a beneficiary does challenge the trust, your clients are alive and well and able to testify to their wishes. Such a challenge, however, is rare; a child will be far less likely to controvert a parent’s wishes while that parent is living than after the parent has passed away.

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1 AS § 13.12.530 et seq.
2 A.C.A § 28-40-201.
3 12 Del. C. § 1311.
7 N.D.C.C. § 30.1-08.1-01.
8 R.C. § 2107.081.
9 AS § 13.12.530 et seq.
10 12 Del C. § 3546.
11 Nev. R. Stat. § 30.040(2).
Enacted in 2000, Delaware’s pre-mortem trust validation statute has already withstood judicial scrutiny. On February 12, 2015, the Delaware Supreme Court affirmed a June 2014 decision of the Delaware Court of Chancery, which precluded an action to contest the validity of a trust where the trustor had provided notice to the beneficiaries in accordance with Delaware’s pre-mortem trust validation statute. In *Ravet*, the Petitioner claimed that the restatement of his mother’s revocable trust was the product of undue influence by his sister. The Delaware Supreme Court affirmed the Court of Chancery’s holding that the Petitioner’s claim against the co-trustees of the trust was time-barred because notice under 12 Del. C. § 3546 was delivered to the beneficiary’s last known address and Petitioner failed to challenge the trust within 120 days.

Delaware’s pre-mortem trust validation statute provides a viable and tested process for individuals who want to make an unequal disposition of their assets to their children and ensure that their wishes are honored. In addition, it saves valuable resources because a beneficiary will be less likely to attack the trust while the settlor is living. Further, if a beneficiary does commence litigation, such litigation will be unlikely to withstand a motion to dismiss if the beneficiary fails to commence litigation within 120 days of receiving notice. Dismissal at this stage of the proceedings is overwhelmingly less costly than after the parties have engaged in discovery and other motion practice.

It is important to note that a settlor of any trust need not reside in Delaware in order to take advantage of Delaware’s pre-mortem trust validation statute (though he or she will need to appoint a Delaware trustee if the settlor resides outside Delaware). Use of a Delaware trust will open a panoply of additional planning techniques and provide clients with the benefits of Delaware trust law. For example, among other benefits too long to list here, Delaware has well-established and longstanding case law protecting trusts that contain spendthrift clauses, Delaware statutorily authorizes the use of dynasty, directed, and asset protection trusts, and does not tax income accumulated in the trust for the benefit of non-resident beneficiaries. For these and many other reasons, individuals and their advisors should strongly consider utilizing Delaware’s pre-mortem trust validation statute for clients with trusts with unequal dispositive schemes.

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