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Estate Planning Update Summer 2024 - Emerging Trends in Will Contests

If you are considering challenging a family member's will, there may be some new options available to add to your legal quiver. Traditionally, bringing a claim to enforce your right to an inheritance was based on undue influence, lack of capacity, or tortious interference with inheritance (the idea that someone intentionally interfered with your right to an inheritance). However, many states have adopted unique principles that may open the door to a greater number of claims, particularly those involving undue influence.

Undue influence is the assertion that someone has overcome the judgment and genuine wishes of another through fraud and coercion – physical, mental, or otherwise. If a claim of undue influence is successful, the challenged will is thrown out. If a prior will exists, it may be "revived" and declared valid by the court. If no prior will exists, assets may pass by way of intestacy.

A claim of undue influence can be hard to prove. Direct evidence of a bad actor's misconduct rarely exists, because the primary witness (i.e., the person who signed the will) has died and is not available to give testimony. To counteract this, some states allow a finding of undue influence to be based largely on circumstantial evidence. Circumstantial evidence allows testimony of facts from which conclusions can be drawn.

In addition, many states permit burden-shifting if the person who supports the will and benefits from it was in a fiduciary relationship with the decedent prior to death. For instance, Mary names her neighbor John as her power of attorney. John quickly arranges for Mary to sign a new will leaving all her assets to John. If Mary's children challenge the will, rather than Mary's children having the burden to prove that the will was the product of undue influence, the burden may "shift" so that John may have to prove that undue influence did not exist. Having the burden to prove undue influence may deter some folks from bringing such a claim.

Another obstacle to an undue influence claim can be the economics of the court case. Even if a person is successful in challenging a will, courts do not often award damages or permit recovery for legal fees. Therefore, if you win your will contest, you can receive what you were due under the will but you pay your own legal fees and do not receive any extra monetary damages. These economics can dissuade people from bringing claims.

Unfortunately, many undue influence claims involve the elderly, who are often the targets of scams and bad actors. To deter such acts, some state legislatures have enacted laws to equate undue influence with the crime of elder abuse. In Connecticut and Florida, for example, elder abuse includes financial abuse or financial exploitation through undue influence. A criminal claim of elder abuse may also give rise to a jury trial, the findings of which may be indicative of how a potential will contest would fare in a civil trial. Witnessing a criminal trial of elder abuse may be valuable to a person seeking to invalidate a will based on undue influence.

As a result of the problems pursuing an undue influence claim, the theory of tortious interference with inheritance has gained steam in recent years, serving as a proverbial second bite at the apple. Tortious interference allows those challenging a will to bring similar claims in a different court that affords different remedies. In some instances, the alternative remedies may include damages and attorneys' fees.

Finally, some states (such as Alaska and New Hampshire) have adopted laws that allow a person to probate his or her will while still living. The theory is that the best witness in a will contest is the person who signed the will, and accordingly,

allowing the person to validate his or her will while still alive is the best way to protect his or her intentions. Probating a will while a person is alive has its challenges. The person has to be competent. He or she may not want to expose private affairs in a public forum while alive. A court action may destroy or further deteriorate family relationships. It can be emotionally draining. Any changes to the will in the future would require another court appearance. Nonetheless, this strategy could provide legal certainty and peace of mind for someone who is worried about family members fighting each other in court after he or she dies, and that concern may have priority over all else.

For more information, please contact your Day Pitney estate planning attorney.