Estate Planning with a Pre-Emptive Strike

Delaware's Judicially-Supported Procedure for the Pre-Mortem Validation of Trusts Can Help Clients Avoid Costly Litigation

by
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Herbert Hoover once famously stated that "Older men declare war… but it is youth that must fight and die." In the world of estate planning, a disgruntled family member can mean the difference between an efficiently administered estate and a costly, knock-down, brutal conflict of epic proportions among the estate's beneficiaries.

When a grantor engaged in estate planning creates a will or trust that reduces the interest of a potential beneficiary (most often the grantor's child or further descendant) in comparison to other similarly-situated individuals, or eliminates such potential beneficiary's interest entirely, the grantor has effectively declared war. However, historically the grantor would not be involved in the ensuing legal fight initiated by the "problem" beneficiary, because the full details of the will or trust at issue might not become known by such beneficiary until after the grantor's death. This leaves the other interested parties of the estate, which will almost certainly include family members of the grantor and the problem beneficiary, to combat claims that the will or trust is invalid due to the grantor's lack of capacity or because the grantor was unduly influenced. Not surprisingly, a will or trust contest can be a bitter and emotional fight that can drain the estate due to legal fees. The situation is made even more difficult by the fact that the grantor is not present to defend her intention and prove that she was of sound mind when she implemented the estate plan, which often necessitates third party testimony regarding the grantor's intent and state of mind. As such, while it is the grantor who may be declaring war, it is often the grantor's children and other interested family members who must engage in the fight when the grantor's plan is challenged.

In order to address the difficulties inherent in the standard will or trust contest, several states have instituted a process often referred to as "pre-mortem validation." Although the details of the process differ depending on the jurisdiction, broadly speaking pre-mortem validation involves providing interested parties with notice of the existence of a will, trust or other estate planning document, and then giving those interested parties a specific period of time in which they can challenge the validity of the document. If an interested party who receives the requisite notice does not bring an action contesting the validity of the document within the statutory time period, then that party is *forever* barred from bringing such a claim. To take the war analogy even further (and at the risk of beating the analogy into the ground), the pre-mortem validation process is tantamount to a "preemptive strike" from the grantor against any potential challengers.

The potential benefits of this process are obvious. A living grantor who can personally take the stand and speak to her state of mind and the circumstances surrounding the creation of the estate planning document at issue is, under almost all circumstances, preferable to third party testimony from individuals with

differing interests under the document. In fact, the pre-mortem validation process may actually help to avoid a contest altogether by discouraging a problem beneficiary, who now must contend with a living grantor that is able to speak on her own behalf, from bringing what may be a frivolous claim of trust invalidity premised upon the grantor's lack of capacity or undue influence. In addition, states that give effect to no-contest provisions, such as Delaware[1], will present the problem beneficiary with a dilemma: is challenging the validity of the document worth potentially losing whatever interest the beneficiary *does* have under the document?

Pre-Mortem Validation in Other Jurisdictions

A brief look at other jurisdictions illustrates the variety of procedures in place involving pre-mortem validation. Currently, there are six states with some form of pre-mortem (also sometimes referred to as "ante-mortem") validation statutes.[2] In Arkansas, Ohio, and North Dakota, the statutes are only applicable to pre-death determinations of wills (and not trusts). Perhaps unsurprisingly, in Alaska and Nevada, the statutes allow for pre-death determinations of both wills and trusts.

Although no two states have identical pre-mortem validation statutes, there are similarities among them. For instance, each state has adopted the "contest model" of pre-mortem validation, meaning that those seeking to challenge the will or trust are provided with notice and have the right to challenge the document in an adversarial proceeding in open court. Additionally, each of the six states, other than Delaware, has adopted a "filing statute," whereby the grantor must petition the appropriate court to determine the validity of the document.[3]

Further, the purpose of pre-mortem validation in each of the states, other than Nevada, is solely to determine the validity of the document. Nevada enacted pre-mortem validation through amendment to its declaratory judgment statute, which now provides that "[a] maker or legal representative of a maker of a will, trust or other writings constituting a testamentary instrument may have determined any question of *construction* or validity arising under the instrument and obtain a declaration of rights, status or other legal relations thereunder."[4]

There is also considerable variation with respect to which parties are required to receive notice of the filing of a petition. In North Dakota, notice of a filing must be given to any beneficiary named in the will, as well as any of the testator's present intestate heirs.[5] Similarly, in Ohio, notice must be given to all persons named as beneficiaries in the will and all of the testator's intestate heirs as of the date of the filing.[6] Alaska's statutes provide for different necessary parties in actions involving a will, a revocable trust, or an irrevocable trust.[7]

Delaware's Pre-Mortem Validation Statute

In 2000, Delaware enacted a statute allowing for the pre-mortem validation of both revocable and irrevocable trusts, which currently reads, in relevant part, as follows:

> "(a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust was validly created may not be initiated later than the first to occur of:
> (1) *One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence*, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest

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> the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery notice mailed or delivered to the last known address of such person constitutes receipt by such person;…"[8]

Delaware's statute, in contrast to the other states with pre-mortem validation statutes, is not a "filing statute" and does not require any judicial filing on the part of the grantor or the trustee. Instead, the trustee provides notice to the interested parties and the parties then have 120 days to challenge the validity of the trust. Additionally, the statute does not require that any particular class of individuals be provided with notice. When initiating the process, the grantor and the trustee can be as restrictive or expansive regarding which parties will actually receive the statutory notice (although, of course, only those who so receive notice will be bound by the 120-day contest limitation). In 2015, Delaware enacted statutes expanding the pre-mortem validation process to include wills created by Delaware residents[9] and an exercise of a power of appointment.[10]

The *Ravet* Case

Although several states have statutory pre-mortem validation procedures for wills and trusts, Delaware is (or should quickly become) the most-favored jurisdiction for this process due to the fact that the Delaware statute has been tested, approved and directly applied by a court of competent jurisdiction (in this case, the Delaware Court of Chancery). The case at issue is often referred to as the *Ravet* case.[11]

On February 12, 2015, the Delaware Supreme Court affirmed a June 2014 ruling of the Delaware Court of Chancery that dismissed a petitioner's challenge to the validity of a Delaware trust as untimely based on notice given pursuant to the trust pre-mortem validation statute. Under the statute, notice is deemed given when notice is received by the interested party and , absent evidence to the contrary, it is presumed that the interested party received notice if that notice is delivered to that person's last known address.

The facts of the case are critical to understanding why the petitioner's challenge was dismissed. More than 150 days prior to when the petitioner first attempted to file his petition challenging the validity of a trust created by his mother, the co-trustees sent packages providing notice of the trust to the petitioner by way of first-class mail to the petitioner's home and the petitioner's P.O. Box, and by certified mail to both of those addresses. The petitioner admitted that those addresses were correct and also that he was frequently home in the days after the mailings were sent. The petitioner also admitted that he checked his P.O. Box at least weekly.

On January 29, 2014, after the conclusion of an evidentiary hearing, Vice Chancellor Glasscock ruled that the petitioner's testimony was not credible when the petitioner denied receipt of any of the following: the unreturned first class mailings sent to both his home address and his P.O. Box, the four certified mail notices sent to his home address and P.O. Box, and a Federal Express package subsequently sent to his home address. Notably, the first notices for the certified mail were left at the petitioner's home and P.O. Box about 150 days before he filed his petition – well beyond the 120 day statutory period provided in the pre-mortem validation statute. Based on its finding that the petitioner's myriad denials of receipt of notice were not credible, and on its finding that Delaware's pre-mortem validation statute is a statute of repose with a hard and fast deadline, the Court dismissed the petition with prejudice.

The January 29, 2014 ruling was a bench ruling, meaning that no written opinion followed. However, after the bench ruling, the petitioner moved for post-judgment relief seeking to have the Court amend, alter or reconsider the judgment. The court denied all such motions on June 4, 2014.[12] In rejecting one of the petitioner's arguments, the Vice Chancellor explained that "I construed only the language of the statute, determining that, to the extent the statute could be interpreted, as the petitioner argued, to create a presumption of delivery (or receipt) rebuttable by "evidence to the contrary," such evidence must at a minimum be credible evidence." The Court explained that it found, and continued to find, that there was no such credible evidence presented.

The Chancery Court's ruling in *Ravet* is significant because it is the first Delaware ruling—and possibly the first nationally—that dismissed a case based on notice pursuant to a pre-mortem validation statute. That the dismissal was affirmed by Delaware's highest court is also notable and provides a strong measure of support to the validity and enforceability of Delaware's statute. The most important takeaway from the *Ravet* case is that the statute worked exactly as intended by barring a claim against the validity of a trust because the claim was not properly brought within the applicable time period.

Remaining Questions

While Delaware's statutory language is clear and judicial blessing has been provided via the *Ravet* case, several questions regarding the pre-mortem validation process remain. If additional funds are added to the trust at issue, does the trustee need to provide another round of notices to the interested parties, even if the notice process was already completed upon the initial funding of the trust? What if the trust is amended or modified? What if an amendment or modification relates only to the trust's administrative provisions and in no way affects the beneficial interests of the trust beneficiaries? Can an interested party be bound if notice is provided to another individual who could virtually represent the interested party under Delaware's virtual representation statute? These questions can and should be resolved by continuing to refine and expand the statutory provisions over time, in order to ensure that Delaware remains on the leading edge of this process.

Conclusion

Delaware's pre-mortem validation process can be a powerful weapon in a grantor's arsenal to ensure that his or her intent is realized, and to be able to personally refute any challenge to the grantor's capacity or a charge of undue influence. Grantors and their advisors may even find that by choosing to "declare war" now, they can avoid a costly conflict altogether.

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Notes:
1- See 12 Del. C. § 3329.
2- The six states are Alaska, Arkansas, Delaware, Nevada, North Dakota, and Ohio.
3- See Ralph Lehman, Determining the Validity of Wills and Trusts – Before Death, Probate Law Journal of Ohio, July/August 2011, at 247.
4- Nev. Rev. Stat. § 30.040(2) (emphasis added).
5- See NDCC § 30.1-08.1-02.
6- See R.C. § 2107.081(A).
7- See AS §§ 13.12.565(a) - (c) and AS § 13.36.390(1)(A).
8- 12 Del. C. § 3546(a) (emphasis added).
9- 12 Del. C. § 1311.
10- 12 Del. C. § 1312.
11- In the Matter of Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust Dated Feb. 9, 2012, C.A. No. 7743-VCG, V.C. Glasscock (June 4, 2014).
12- IMO Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust C.A. No. 7743-VCG (June 4, 2014).