

A TRIAL LAWYER'S PERSPECTIVE ON TRUSTS & ESTATES LITIGATION

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Trusts & Estates litigation is inherently uncomfortable because it intertwines personal relationships (family history) with litigation strategy. As Tolstoy noted in Anna Karenina: "Happy families are all alike; every unhappy family is unhappy in its own way." Upon the death of the patriarch or matriarch, happy families do not sue each other. They mourn. Unhappy families view death as an opportunity to right old wrongs. Trusts & Estates litigation focusses on the unhappy families and self-interest.

Self-interest is the corner stone of the unhappy family litigating in Trust & Estate matters. According to a French mathematician, Benoit Mandelbrot (inventor of the efficient market hypotheses), we will not overpay for a stock because the market has all information equally. The underlying assumption is that people act in their own economic self-interest and with equal access to knowledge. We cannot apply this to trusts and estates litigation because beneficiaries do not act rationally--vengeance, history, petty disputes, and misperception are motivating factors. Family members will fight to the hilt over a broken Patek Phillipe watch or some forgotten World War II Airborne medals. Yale 136 Siblings will fight, when rationally they should shake hands and mourn the dead. If the litigation involves a real schemer, beneficiaries may plan for months or years ahead of the testator's death. Family members will literally brainwash (loud music/sensory deprivation) grandma, or take mommy and her full of Seroquel, or lock their own parent in a room and repeatedly pound yell hat another beneficiary should be cut out of the Will or Trust completely.² Fact is stranger than fiction.

These are my thoughts prepared for Professor Soojian's Class. My comments and observations are not attributable to my Finn, my clients, or pretty much to anyone. Lilah (my golden doodle) attests that everything I say here is right. (But, I must admit that she is readily subject to being bribed with cheese, or chicken, or pork, or beef, or bread, or anything I am eating.)

² The Manchurian Candidate, Conspiracy Theory, The Bourne Identity, and Captain America: The Winter Soldier-these are fiction. It is truly horrifying when you see what family can do to each other in real life.

Personally, I like representing the party that is being cut out, shunned, and otherwise treated poorly. Yale 144 (Son hires side-switching lawyer and new doctor, but doctor ignores that testator could not answer questions, was involuntarily admitted to Carrier clinic, and had Alzheimer's. In Re Sable, 2009 WL 321558 (NJ. Appellate Division, 2/11/2009). My thinking is simple, if you prevail for the Executor or the person whom the Will dictates gets the lion's share, what have you accomplished? If you uncover the lie, prove the backdating/falsification, successfully overturn the entire Will or **Trust-then you have taken down the Beast**. You sleep well knowing you have merit.

I. The forum matters

A. **Jurisdiction and forum matter.** Although many Wills and Trusts contain forum selection clauses, many do not contain a choice of law clause.³ Even within a given forum, the proper court may shift throughout the case. Even if a Will or Trust contains a forum clause, the question of what is procedural and what is substantive allows for havoc.⁴ (What is procedural? What is substantive? There is a great deal of latitude from this simple question.)⁵

1. **Trusts and Estates matters are tried in State court.**⁶ Many of those with money die at what had been their vacation homes. It is common to have a wealthy resident who lived all their lives in New York, Connecticut, or New Jersey die in Idaho, Nevada, Texas, Wyoming, or Colorado.

Having a successful estate plan is of course ideal and will not only assist in transition of wealth but also serve as oil on the water for beneficiaries, who cannot always be treated equally because there is only one family home. Nicole K. Mann and Peter B. Allport, Estate Planning, 47 Est. Planning 04 (September 2020).

⁴ Alexander G. Leveque, Esq., Parentage and Probate: Which Court has Jurisdiction to Determine Heirship in Trust or Estate Proceedings?, 30 Nevada Lawyer 18 (November 2022).

⁵ Yiddish saying applicable here: Man plans and God laughs.

⁶ Forum may vary from Surrogate's Court, Civil Court, or arbitral fora such as JAMS, Endispute, AAA. Where the fight is going to take place is critical because the dynamics within that system, experience/intelligence of the "neutral," and willingness to adhere to the Law vary tremendously. Richard J. Riordan, Trusts-Jurisdiction Trustee and Trust Assets Outside Jurisdiction of Forum, 55 Michigan L. Rev. 3 (1957); Michael G. Cumming, Michigan Estate and Trust Litigation in the 21st Century, 77 Mich. G. J. 1300 (December 1300); Jules M. Haas, Estate Accounting Proceedings Can be a Forum for Various Issues, New York Probate Lawyer's Blog, June 10, 2022;

2. **Does Testator's intent on jurisdiction matter?** Testator may have contemplated New Jersey or New York law to govern their Estate. They may have met with a New Jersey or New York Trust and Estates lawyer-but in their last years (the most vulnerable years) local lawyers somehow often get involved at the behest of one grandchild or one sibling.
3. **Be ready for a race to the courthouse.** If the Will or Trust contains an arbitration provision, the party benefiting from that forum (arbitration) will want to appoint an arbitrator immediately to wrest jurisdiction from the courts. The party that has a legal challenge (invalidity of the Will or Trust for example), will want to rush to Court.⁷ If you want a more challenging environment, add in some international issues such as a marriage of a US citizen to a foreign national where much of their lives are spent in both places.⁸ Although the bible says the race is not to swift,⁹ in trust and estates litigation I respectfully disagree.
4. **Families drift.** Generations have different values. First generation immigrants may see the world very differently than "American Born." Older generations have "traditional" values. Children grow and have their own lives and families. A Catholic or Jew marries out of the faith. Gay marriages. Family fights. **Your own politics do not matter-you have to see this through the lens of the Executor.**¹⁰
5. **Other Laws May apply beyond the Will and Trust.** The Uniform Prudent Investor Act (UPIA) was promulgated in 1994 b the Uniform Laws Commission. States then adopt or reject portions of UPIA overtime.

⁷ Stephen Wills Murphy, Enforceable Arbitration Clauses in Wills and Trusts: A Critique, 26 Ohio St. J. On Disp.. Resol. 627 (201 I).

⁸ D. Phil, Arbitration of Trust Disputes: Two Bodies of Law Collide, 45 Vanderbilt J. of Transnational Law, 1157 (October2012).

⁹ Ecclesiastes, 9:11.

¹⁰ Howard M. Heisinger, Advising the Trustor Estate Litigant: When to Raise or Fold, 37 Est. Plan 3 (2010)

B. **Forum can also be arbitration or mediation.** Mediation is typically the most likely waste of time because inherently the person who is getting the most money planned this for a while, and they are unlikely to suddenly grow a conscience. Arbitration has an entirely different set of dynamics and is at best a course and quick taste of justice. Perhaps the best thing about arbitration is that it is over relatively quickly, but I am unconvinced that it is a fair forum. Although many will disagree, my personal view is that arbitration is a forum chosen by those that cannot try a matter to conclusion. **Between corporations, arbitration has a place because obtaining an answer timely has as much value sometimes as the answer itself.** In Trusts & Estates litigation, however, the process of obtaining a just result can be the difference between a disenfranchised member's chance of economic survival. Further, the issues are uncomfortable ones that need full- throated discovery to address honestly. Arbitrators like easy answers, and avoid difficult questions. Trial courts deal with grit.

II. **Who is the Client**

To avoid losing your way, first ask and always remember **WHO IS YOUR CLIENT.** The issue of who is the client can be confusing if you represent the Executor, Administrator, or Trustee. It may seem simple but even seasoned trusts and estates lawyers conflate the people benefiting from the estate with the estate. They are not the same. **It is the EXECUTOR's Estate. Not the beneficiaries' estate.** Perhaps because all of the money (after taxes, expenses, etc.) will usually be transferred to the beneficiaries, many lawyers conflate the beneficiaries with the matter being THEIR ESTATE. It is not. At all times until money is transferred it is the Executor's estate alone.

The issue of who is the client may seem obvious, but it can easily become confusing if you don't keep your eye on the representation ball. For example, if husband and

wife form a corporation and have the foresight to recognize that one may predecease the other, whom do you have a duty of loyalty to when you represent the Estate but the deceased husband's heirs have an interest in the company but you represent the surviving wife? Yale 103. Yale 108-110.

One more issue here is whether the client is competent. Even if the testator is completely in the grips of incompetence, the common law is that at his or her last moments, the testator/grantor may have a moment of clarity and change their Will or Trust. Yale 148. In Re Sable. In 35 years of litigation, I have never seen a Court sustain this argument.

III. Standing

- A. **Merely being an heir does not create standing.** You have to be aggrieved, i.e., demonstrate that you have suffered pecuniary harm. Yale 92-94 (Chang).
- B. **Being displaced as an Executor does not create standing.** An Executor receives fees, but there is no right to be an Executor.
- C. **Heirs don't often trust the Executor.** One way to ensure a bad relationship is to withhold information for fear of missing some detail. Miscommunication is not as often the basis for trusts and estates litigation as is the total failure to communicate. I personally suggest strongly that the Executor provide interim accountings as required and note that they are subject to revision. Yale 117.
- D. **The Executor has a fiduciary duty (utmost care and good faith) to preserve Estate assets.** Yale 129. Failing to ensure those assets is not an Executor's problem and arguably not chargeable to the Estate.
- E. **The burden of proof and production bounces back and forth in trust and estates matters.** Proving undue influence is easy (special relationship and suspicious circumstances) but proving that this is so significant as to require voiding the Will or Trust is a Herculean task. Clear and Convincing v. Preponderance. Yale 149. Realistically, this difference in burden provides the Court with ample power to make a finding the judge believes is right.

- F. **Beware of large financial institutions.** They uniformly feel that they have their own internal rules and requirements, which the testator or grantor may have acquiesced to during their lifetime. Once litigation is filed, they will inevitably try and foist their requirements upon the Estate. Yale 162. Yale 176.
- G. **Caveats** are a way to throw rocks into the wheels of justice. Parisi (Yale 182). See also Chang.
- H. Motions to Disqualify counsel fly freely. No holds are barred when a beneficiary sees you standing in their way. Chang. Yale 183. Trial practice is not for the feint hearted.

IV. Get Ready For Trial!

Now that you are ready to go to battle in the Court room and right a wrong, let's discuss strategy. (If you see (a) Executor or family members changing donor's long-time lawyers or long-time physicians, moving grannie, etc.-buckle up! These are the tell-tale signs of someone improving their position now that grannie is mentally pliable.)

I. Forum typically dictates law:

- A. Common law
- B. Prudent Investor Act

2. Pressure points to focus upon

- A. Capacity
- B. Undue Influence
- C. Breach of Fiduciary Duty
- D. Unnatural Acts

3. Types of Disputes:

Claims of **breach of fiduciary duty**

Claims of vulnerable adult abuse

Claims of financial exploitation

Claims of **undue influence**

Claims of lack of testamentary capacity

Trustee-Beneficiary disputes

Personal Representative/Executor-Beneficiary disputes

Will contests

Trust contests

Enforcement of "**no contest**" clauses

Interpretation of tax allocation clauses

Conservatorship disputes

Guardianship disputes

Secured creditor claims

Unsecured creditor claims

Defense of debtors against estate claims

Trust administration

Estate administration

Pre-litigation planning

Charities-be careful.

4. Unnatural Disposition

5. Sweat and patience:¹¹

- A. Signatures are wrong
- B. Signed after death
- C. Signed in wrong places
- D. Language is too perfect
- E. Married twice-at the same time
- F. Sudden removal of sibling from another marriage
- G. Billing records-an overlooked treasure trove
- H. Decedent's correspondence, birthday cards, gift notes, etc. Another overlooked source.

¹¹ **Louis Nizer:**

Yes, there's such a thing as luck in trial law but it only comes at 3 o'clock in the morning. You'll still find me in the library looking for luck at 3 o'clock in the morning.

Oh, I get lucky a lot. I get lucky at four in the morning in the law library.

Case	Undue Influence	Breach of Fiduciary Duty/Self-Dealing	Granny Snatching	Plain old-fashioned Fraud	Other
Martini (NJ and NV) YALEI-7	X	YES (by Executor, counsel, fake wife)		X	Bigamy (found from Xmas card)/false records (deletion of tape)/backdating/lawyer executor self-dealing/Uniform Prudent Investor Act YALE 3 v. YALE 4 (will drafted in NJ-conflicted lawyer/executor files in Nevada)
Webster (NJ and ID) YALES-83	X	XXX	X	X	Brainwashing/paralegal's records don't match partners/intentional deletion of tape created by lawyer to prove competence/bank corruption
Chang (NJ) YALE84-100	X	X			Beneficiary enhancing his business standings as mom is failing, searching executor's phone/computer immediately after death
Sheeran (NJ) YALE101-141	X	X			Failure to account/legal malpractice/closely held business intertwined/Moonies
Sable (NJ) YALE142-150	X	X			Side-switching lawyer , conflicts/malpractice
Parisi (NJ) YALE151-182	(YES, by Trustee, not Executor)	X (Trustee, not executor)			Backdating, failure to provide medication, financial institution refuses to honor trustee's demand because of Bank's procedures
Glasser (NJ) YALE192-237	X	X	X		Seroquel and drugging mom, getting new lawyer and new doctor (shopping for one that works) Yale 222, Yale 226, Yale 227.
Anonymous	TBD	TBD			Greedy granddaughters, balancing honoring donor's intent while balancing growing incompetence (fiduciary duty of trustees)