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Representing Charitable Interests in Trusts and Estates

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David G. Samuels

Bequests in wills and trusts can be a considerable source of income for charitable organizations. Over the past few years, as members of the charitably oriented "baby boomer" generation enter their 60s and 70s, such bequests have become increasingly common. An attorney for a charitable organization—receiving a notice that an individual has died and left a considerable sum to the organization in his or her will or trust instrument—should be prepared to provide appropriate advice to the client on how to proceed.

What is the best way to ensure that the estate or trust is properly administered, and that the interests of the client are protected? A number of issues can arise in representing charitable interests in these trust and estate proceedings.

Testamentary Capacity

The testamentary capacity of the decedent can sometimes be a crucial issue, particularly when a decedent has executed multiple wills or trust instruments, has executed a codicil to a will or an amendment to a trust, has revoked a will, or has executed a document at a point where cognitive ability might be in question. Since any amendments might prejudice the interest of at least one party to the original instrument, it is common for the party whose interests are impaired to raise concerns regarding the capacity of the testator or grantor.

There is also a close interrelationship between the issues of testamentary capacity and undue influence. When the testamentary capacity of a decedent is challenged, questions might be raised as to whether a beneficiary exerted undue influence to induce the allegedly vulnerable decedent to transfer or bequeath money to that beneficiary.

Charitable organizations can face both sides of these issues of capacity and undue influence. Where a charitable organization receives favorable treatment in a will or trust, and a later codicil or amendment diminishes that interest, the charitable organization might dispute the decedent's mental capacity at the time of the execution of the later document. Such a claim can be established by presenting medical records and the testimony of witnesses who were familiar with the decedent's mental capacity at the relevant time. Moreover, if a beneficiary who had close contact with the decedent before his or her death receives particularly favorable treatment under the codicil or amendment, the charitable organization may assert undue influence by that beneficiary. Conversely, a charitable organization might be the beneficiary of a codicil or other modification of an existing will or trust, and itself might be accused of undue influence by an aggrieved beneficiary under the original will or trust.

The legal standard for establishing a claim of undue influence is onerous, and must be supported by "clear and convincing evidence," requiring a showing that it is "highly probable" (or reasonably certain) that undue influence was exerted. The elements of an undue influence claim are motive, opportunity, and the actual exercise of such influence. All three elements of undue influence must be established; no element can be inferred, for purposes of making out a prima facie case, from the presence of the other two elements.[1]

Due to the specter of undue influence claims, a charitable organization should be cautious when participating in the estate planning of an individual who wishes to leave money to the organization. Charitable organizations should keep meticulous records, and preserve all communications with the decedent, to preemptively combat any allegation of undue influence. In some cases, charitable organizations may wish to retain a lawyer to advise the organization with regard to any estate planning meeting, and it may be appropriate to advise the decedent to retain his or her own lawyer. There are circumstances where counsel for a testator or grantor might propose having the execution ceremony filmed to provide evidence of capacity.

Challenge by Family Members

Family members may also feel aggrieved when an individual chooses to leave substantial sums to charity in his or her will or trust instrument, which runs to the detriment of the decedent's family. Consequently, those family members (or alleged family members) of the decedent who would inherit in the absence of a will (defined as "distributees") might seek to challenge the validity of a will in an effort to gain the benefit of the rules governing intestate succession. Unless they would have the right to inherit in the absence of a will, they would lack standing to dispute the will.

Under the rules governing intestacy as set forth in New York Estates, Powers and Trusts Law (EPTL) §4-1.1, the estate of a decedent who dies without a will is distributed among the distributees in a manner and order prescribed by the statute. Generally, the estate is distributed first to the decedent's spouse and children (if they survive the decedent) and in the event that they do not, to more distant relatives. If there is a will that reduces or eliminates the bequest that would be received by a distributee (resulting in a challenge by a distributee), charitable organizations might join the executor's counsel in defending the validity of the will in order to protect their interests.

In cases where the decedent does not have a surviving spouse or child, the validity of a will might be challenged by a more distant relative, such as a cousin, seeking to gain the benefit of intestacy. Frequently, these relatives, because of the remoteness of their claim and the significance of the interests at stake, must prove their relationship to the decedent through a formal kinship proceeding. The interested parties to a kinship proceeding are the claimant, any

other alleged heirs, any beneficiaries under an alleged will, and the Attorney General of New York State, because the state maintains an interest in any intestate estate to which there are no heirs.

The kinship proceeding is conducted by a referee of the Surrogate's Court in the same manner as a court trying an issue without a jury, i.e., the referee may set a pretrial conference, supervise discovery, and schedule a hearing. At the kinship hearing, the claimant must offer a family tree showing the name, relationship, and date of death of each person through whom the claimant claims to be related to the decedent, and must prove that no other persons of the same or a nearer degree of relationship survived the decedent. Such proof can be provided through affidavit or testimony of disinterested persons.

Charitable organizations seeking to protect their interest in a disputed will might wish to participate in any kinship proceeding that could impact them. Moreover, because the New York Attorney General is a necessary party in proceedings where a charity has a residuary interest, cooperation and coordination with the AG's office can often enhance the likelihood that a charity will achieve a more favorable result either through litigation or settlement.

Executor's Expenses

Another issue of potential concern to charitable organizations in estate proceedings is the conduct of the executor. There are two scenarios (in particular) involving the conduct of executors which might affect the amount ultimately received by a charitable beneficiary to a will: first, an executor's management of estate assets might reduce the total value of the estate (such as through imprudent investments or inappropriate expenditures); and second, the legal fees charged by the estate's attorney could impact the estate's beneficiaries. In both scenarios, assuming the charity has an interest in the residuary (as a recipient of an outright bequest might not be impacted by these considerations), charitable organizations have a right to challenge the accounting submitted by the executor (whether it is a judicial accounting submitted to the court or an informal accounting submitted to the New York Attorney General and other interested parties.)

New York follows the prudent person standard with regard to an executor's administration of an estate. This rule provides that an executor holding estate assets must invest them in the same manner as a prudent investor seeking reasonable income and preservation of their capital. The New York Court of Appeals in *Estate of Donner* has interpreted the executor's heightened duty of care as one of "[n]ot honesty alone, but the punctilio of an honor the most sensitive."[2]

Generally, whether an executor has acted prudently in managing an estate's assets is a factual determination to be made by the trial court. In *Donner*, for example, the Court of Appeals upheld a Surrogate Court's determination that found two co-executors liable for mismanagement and surcharged them in the amount of the $786,000 loss incurred in the estate during the time of their administration. Because the assessment of an executor's conduct is factual in nature, however, courts' treatments of challenges to the accounting of executors vary, and not all instances of losses on estate investments give rise to liability.

The general rule is that a fiduciary should diversify the estate's assets, unless the fiduciary reasonably determines that it is not in the interests of the beneficiaries to do so. On this basis, New York courts have found liability for executors who unreasonably failed to diversify assets held for an estate. There is, however, no absolute duty to diversify investments. The party seeking to challenge an accounting has the burden of showing that a failure to diversify assets was unreasonable, and courts have declined to find executors liable where the executor made a reasonable determination that diversification was not in the beneficiaries' best interests. See *In re JP Morgan Chase Bank*, 133 A.D.3d 1292 (4th Dept. 2015); *In re Hyde*, 44 A.D.3d 1195 (3d Dept. 2007).

A wholly different standard applies to executors who hold themselves out as having particular investment skills. Under EPTL §11-2.3(b)(6), at least one New York court has held an executor liable for negligence, where the executor claimed to be a skilled financial advisor but failed to meet this heightened degree of care with regard to the handling of estate assets. See *In re Estate of Witherill*, 37 A.D.3d 879 (3d Dept. 2007).

Finally, charitable organizations might consider whether to challenge an executor's accounting where legal fees are excessive. SCPA §2110 provides that attorneys may be paid a legal fee equal to the "fair value" of their services: i.e., such legal fees must be "just and reasonable." In determining the reasonableness of a claimed legal fee, the factors to be considered include:

time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.[3]

Notwithstanding any agreement between the parties as to legal fees, the Surrogate's Court bears the ultimate responsibility to decide what constitutes reasonable legal compensation in trust and estate matters.

Conclusion

Attorneys representing charitable organizations should be cognizant of the various issues that can arise in estate and trust matters, many of which can potentially affect the benefit ultimately received by charitable beneficiaries. They should advise their clients to keep meticulous records of interactions with decedents or executors, and be prepared to vigorously defend their interests in the event of any claim that might reduce the ultimate charitable benefit.

Endnotes:

1. See *Matter of Kumstar*, 66 N.Y.2d 691, 693 (1985); *Matter of Zirinsky*, 43 A.D.3d 946, 948 (2d Dept. 2007).

2. *Matter of Estate of Donner*, 82 N.Y.2d 574, 584 (1993), quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

3. *Matter of Freeman*, 34 N.Y.2d 1, 9 (1974); see also, *Matter of Massey*, 73 A.D.3d 1179, 1179-80 (2d Dept. 2010).

David G. Samuels is a partner at Duval & Stachenfeld and the former deputy chief of the New York Attorney General's Charities Bureau. Russell Gallaro, an associate at the firm, assisted in the preparation of this article.