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Repeal and Uncertainty Impacts Estate Administration

It's important to ascertain the decedent's intent.

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The situation described in the preceding two articles in this 4-part series could significantly affect both estates and beneficiaries. Strict application of formula bequests (tied to federal and/or state estate tax exemption amounts) in a will or revocable trust that was drafted before the repeal legislation may lead to results not intended by the testator. The qualified terminable interest property and credit

shelter (bypass or family part) trust are defined by estate tax references that have new (and different) meanings. The results may prove to be inconsistent with the testator's intent. This is why practitioners need to advise clients of the varying impact to put them on notice.

In a "friendly" family situation, the resulting issues with how assets are unintentionally allocated under a new tax regime might be resolved amicably by using a combination of disclaimers and having beneficiaries alter the disposition under a will or revocable trust by agreement (assuming that the rights of creditors and tax authorities are unaffected). However, in strained or complex family settings that abound, this could cause uncertainty and result in protracted litigation.

Related: Impact of Federal Estate Tax Repeal

Practitioners should consider extending any tax or legal filings until uncertainty can be resolved and should be particularly attentive to potential conflicts of interest. It may be more important in the coming few years than ever before to be certain that beneficiaries understand that counsel for the estate isn't their own counsel.

Ascertaining Decedent's Intent

Related: New Jersey (and Other) State Estate Tax Changes

In a potentially litigious situation, such as a second or subsequent marriage, or a dysfunctional family in a first marriage, it's likely that New Jersey (and possibly other state) courts will look to the "doctrine of probable intent."¹ The doctrine's purpose is to ascertain what the "probable intent" of the testator was by a "preponderance of the evidence" and to carry it out in accordance with the testator's wishes "even though they are imperfectly expressed."

In applying the doctrine of probable intent, courts attempt to put themselves in the testator's position by looking at proof of all the circumstances surrounding the testator at the time of will execution and until the testator's death. Proof includes

various forms of extrinsic evidence that the courts will review to determine whether the moving party has shown, by a preponderance of the evidence, that the proposed interpretation is more probable than not. If the burden has been met, the court will interpret the will in a manner that's consistent with the proponent's interpretation, even if that requires a reformation of the will.

Two Court Decisions

In *Matter of Estate of Branigan*,² the New Jersey Supreme Court used the doctrine to reform a will to maximize tax efficiency in light of tax laws effected after the will had already been executed. The *Branigan* court recognized that tax law changes often result in frustrating the intent of a testator who executes his will in reliance on the tax laws that existed at the time the will was drafted and that reformation is required to affect the testator's true intentions, regardless of subsequent tax law changes. While *Branigan* dealt with tax avoidance, the policy grounds behind the decision are equally applicable to wills affected by the 2016 legislation under the same line of reasoning.

In re Fisher,³ a later case, involved E. Warren Fisher's will, which divided his estate into two trusts, both of which provided for his wife, but each had different remainder beneficiaries. If Fisher's wife predeceased him (which is what occurred), both trusts would still be created and the assets would pass to the trust remaindermen. Trust A was to be funded with the smallest amount necessary to avoid the imposition of a federal or state estate tax as a result of the marital deduction, and its remaindermen were various charities. The remaining assets would pass to Trust B, which in this case would equal the amount that could pass estate tax free in 2008 in New Jersey, namely \$675,000. Trust B's remaindermen were various relatives.

Based on the value of the estate as of Fisher's death, Trust A would be funded with \$2,455,793, and Trust B would be funded with \$675,000. The will stated that in satisfying Trust A, "the value of said assets shall be that of the date of distribution." The estate's assets were invested in the stock market and when the trustee was ready

to make distributions, the available estate assets were worth \$2,335,715, a decline of approximately \$795,000.

Based on a literal interpretation of the will, the funding of Trust A would exhaust all assets on hand, and no assets would pass to Trust B. The institutional executor sought court approval for such a distribution plan. Of course, the Trust B beneficiaries objected. One of the Trust A beneficiaries sought summary judgment in favor of the executor's proposed distribution, which was denied. At trial, the judge found ambiguity about whether Fisher would want to adhere to the literal language of the will if that resulted in disinheriting the Trust B beneficiaries and, therefore, was required to consider Fisher's "probable intent." In essence, an otherwise crystal-clear will can be rendered ambiguous by an unforeseen event that produced an unexpected result. The judge ordered a reformation of the will, pursuant to which the remaining assets would be divided proportionally based on their shares of the estate at date of death values.

On appeal, one of the Trust A beneficiaries argued that the judge should have granted their motion for summary judgment in favor of the executor's proposed distribution, because there was no ambiguity about the provisions of the will. In rejecting this position, the appeals court noted that pursuant to N.J.S.A. 3B:3-33.1(a) "the intention of a testator as expressed in his Will controls the legal effect of his dispositions, unless the probable intention of the testator, as indicated by the Will and relevant circumstances, is contrary."

The appeals court found that the trial judge correctly determined that Fisher expected that both trusts would be funded and fashioned an appropriate remedy.

Current and future changes to the tax laws (both federal and state), as they impact formula bequests under wills and revocable trusts, may be abused by litigants seeking to obtain more than their fair share. An attorney representing inadvertently disinherited beneficiaries must be diligent in investigating and obtaining as much extrinsic evidence as possible that will aid the court in reaching the desired result.

Clarity is Paramount

The estate planner should advise his client to document his intentions in a properly executed will or revocable Trust, which clearly express the client's wishes should death occur in a year when the estate tax law is different from when the document was drafted/signed.

Endnotes

1. *See Fidelity Union Trust Co. v. Robert*, 36 N.J. 561 (1962).
2. *Matter of Estate of Branigan*, 129 N.J. 324 (1992).
3. *In re Fisher*, 2013 WL 560700, (N.J. App. Div. 2013).

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