AVOIDING CHALLENGES TO ESTATE PLANS

Avoiding Challenges for Undue Influence and Lack of Mental Capacity

A. CHALLENGES TO ESTATE PLANS

A.1 Overview. This memo is directed primarily to anyone who is wanting to prepare or modify an estate planning document that (1) reduces or eliminates the share of someone previously included, (2) implements planning that others may consider irrational or the product of undue influence, or (3) is to be signed when the signer's mental capacity to understand documents could be called into question because of age, illness, senility, or diminished mental abilities. Litigation relating to estate planning and estate-planning documents[1] seems to be increasing all over the country, and it is not limited to large estates. Steps can be taken to reduce the potential for successful attempts to frustrate or defeat estate planning choices.

(a) *Exploitation*. Part of the increased litigation is because of increased exploitation of the elderly or the infirm, who are attractive victims for con artists who endeavor to become beneficiaries of their victims' estate plans. Unfortunately, disgruntled beneficiaries may use the laws that frustrate exploitation to their advantage, muddying the waters by asserting that there has been exploitation even when there has been none. This forces a judge to ascertain whether exploitation has occurred, which can lead to lengthy and costly legal proceedings.

(b) *Nuisance Litigation*. Those adversely affected by changes in a will or trust may choose to raise challenges, even without meaningful evidence, hoping to receive some money just to settle the case without protracted litigation. Sadly, it is often cheaper to pay a challenger than it is to litigate, which only serves to encourage nuisance litigation.

A.2 Legal Balancing. Nevada's estate-planning laws were written to give everyone the unlimited right to say who shall receive his or her assets after death, while at the same time restricting conniving people from receiving benefits under false pretenses. If a person does not want to share their wealth with their children or other family members, that person should have the right to designate others to be their beneficiaries. On the other hand, children or other existing beneficiaries should not be disinherited when someone has become a beneficiary because the parent has become deceived, has been coerced or unduly influenced, or who lacks sufficient mental capacity to understand what is being done. The law and the judges try to balance these competing goals.

B. COMMON SCENARIOS

B.1 Old Age; Illness; Weak-Minded. When a person becomes older, ill, or weak-minded, there is a natural presumption (but not always a legal presumption) that he or she is (1) less likely to understand the document and (2) more susceptible to undue influence. Death-bed planning is automatically suspect.

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[1] For the purposes of this memo, an "estate-planning document" includes any document that provides for a transfer of assets that is effective during life or at death, include trusts, wills, deeds, ownership designations involving a right of survivorship, transfer-on-death arrangements, and beneficiary designations.

B.2 Significant Changes. A document is more likely to be challenged if it contains significant changes or truly aberrational planning.

(a) When a person updates his or her estate plan to make significant or unexpected changes to their beneficiaries or fiduciaries[2], there is a natural tendency to think that the person is not thinking clearly or has been inappropriately coerced or influenced to make such changes. Though it may represent the person's sincere desires, such changes provide an excuse to those adversely affected to commence legal proceedings to invalidate those changes.

(b) If a person makes a radical change to his or her estate plan by disinheriting loved ones for no apparent reason or by giving significant gifts to persons with whom he or she has only recently become acquainted, there is a natural presumption that something is wrong. This is particularly problematic if a person who is being favored in new documents is a paid caregiver or a family member who is receiving more than he or she would receive under intestate succession.[3]

B.3 Oral Promises. Some challenges to documents are raised when the documents are inconsistent with oral statements given to potential beneficiaries. Oral promises are not legally binding unless part of an enforceable contract, and it is common for false promises to be made just to placate potential beneficiaries. Even so, persons who have been told that they would be receiving distributions that do not occur will feel cheated, and they may have an incentive to take legal action to enforce what they think they were promised.

B.4 Documents Signed in a Care Facility. Documents that are signed in a hospital, long-term care facility, or other health-care facility are frequently challenged on the basis that the person signing was subject to the effects of medication, illness, debilitating pain, or diminished capacity.

C. FACTORS FACILITATING CHALLENGES TO ESTATE-PLANNING DOCUMENTS

C.1 Presumed Validity; Possible Challenges. In Nevada and in most other states, signed documents are assumed to be valid. To challenge the validity of a document, one must prove (1) that the document was not properly executed, (2) that the person signing the document was not mentally capable of understanding the document and the consequences of signing it, or (3) that the person signing the document was coerced or acting under "undue influence".

(a) *Document Formalities*. Wills, trusts, and other estate-planning documents, such as deeds and beneficiary-designation forms, must be signed in compliance with state law. In Nevada, a will is valid if it is completely handwritten, dated, and signed by the testator (will maker). If it is not handwritten, it requires two

[2] "Fiduciaries" includes those acting on behalf of another or on behalf of an estate or trust. More specifically, "fiduciary" includes a personal representative (i.e., executor or administrator), trustee, agent under a power of attorney, and a guardian or conservator of a person or of an estate.

[3] Nevada's "intestate succession" laws are found in NRS Chapter 134, which defines the "heirs" of a person dying without a will. Generally, the law favors a surviving spouse and posterity, and all those in the same generation are treated equally.

disinterested (non-beneficiary) witnesses who must be present and in the same room when the will is signed. A trust should be signed. Other documents have their own requirements. Documents that are improperly signed can be challenged and set aside.

(b) *Testamentary Capacity*. To make a will, one must have "testamentary capacity", meaning that the person (1) knows the natural objects of his or her bounty (i.e., family and close friends), (2) knows the nature and extent of his or her assets, and (3) understands how he or she wishes to dispose of his or her assets. A person who cannot meet those requirements cannot make a legally binding will. Testamentary capacity is a low standard, and the Nevada Supreme Court has ruled that one can have sufficient capacity to make a will despite old age, blindness, senility, physical weakness, infirmity, disease, and even hallucinations with "horses flying".[4]

(c) *Contractual Capacity*. To make a contract, one must have "contractual capacity", which means that the person understands the subject matter of the contract and the terms of the contract. This is typically understood to be a higher standard than testamentary capacity. Lack of understanding can be grounds for challenging a contract.

(d) *Capacity to Make A Trust*. To make a trust, some courts have required contractual capacity, and others have required testamentary capacity. The Nevada Supreme Court has not made a definite distinction between testamentary capacity and contractual capacity, and the cases that discuss them seem to apply a similar rule to wills and trusts. Trusts are frequently challenged because the settlor (trust maker) lacked the ability to understand the trust and the basic provisions.[5]

(e) *Undue Influence*. "Undue influence" or "coercion" is more than the mere request or suggestion that someone make a provision in a will or trust. "Undue influence" occurs when a person is influenced by another with enough pressure to make the influenced person give up his or her own free will in favor of the influencer's desires. If the person being influenced is physically or mentally weak, undue influence may be legally presumed.[6]

(f) *Nevada Legal Presumption*. In Nevada, if a person assists in the preparation of a transfer document — including will, trust, deed, or other document affecting property interests — and the transfer document benefits that person, it is assumed that the document is void.[7]

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[4] *In re Peterson's Estate*, 77 Nev. 87 at 102 and 109, 360 P.2d 259 at 267 and 270 (1961).

[5] It is not required that the person signing a document completely understand every provision of the document; it is only required that the person have the mental capacity to understand the general meaning of the document.

[6] "It must appear, either directly or by justifiable inference from the facts proved, that the influence was exercised, so as to destroy the free agency of the testator and control the disposition of the property under the will." *In re Peterson's Estate*, 77 Nev. 87 at 111, 360 P.2d 259 at 271 (1961).

[7] NRS 155.097(2).

C.2 Burden of Proof. Because the law assumes that a person signing a document has sufficient mental capacity to understand the document and that the person signs without "undue influence", anyone asserting otherwise has the burden to prove their assertion. If a legal presumption applies to invalidate a specific document, the burden of proof shifts to the person asserting that the document is valid. If such legal presumption is rebutted or negated, the burden of proof reverts to the party challenging the document.

D. PREVENTING CHALLENGES.

D.1 Professional Planning. The first step to reducing the chance and effectiveness of a challenge is to make sure that estate-planning documents are prepared by an attorney experienced in estate planning. Self-prepared documents, documents prepared online or using software, and documents prepared by inexperienced attorneys are more likely to be challenged. The validity of documents is reinforced if the documents are signed in the office of the attorney with a notary and witnesses provided by the attorney.

D.2 Statement of Intent. If a will, trust, or other document provides for a transfer to a person or entity that seems inappropriate or inconsistent with prior intent, such as favoring one child over others, leaving assets to charity instead of family, or leaving assets to recent acquaintances or non-relatives, one can bolster the validity of those documents by signing a notarized affidavit of intent that provides details as to (1) the signer's knowledge about his or her family and friends, (i.e., "the natural objects of his or her bounty"), (2) the nature and extent of his or her assets, and, if appropriate, (3) why the beneficiaries named were selected instead of others or why some beneficiaries were treated more favorably than others.[8] A video recording of the client making a statement of intent can provide additional evidence of capacity and understanding.[9]

(a) As mentioned in subsection B.3, individuals are more likely to initiate a dispute when they have an expectation of an inheritance and are surprised to learn that their expectations have been frustrated. Sharing the statement of intent before death can serve to negate oral promises and can avoid the element of surprise.

(b) If a disgruntled individual becomes litigious when a statement of intent is shared or when he or she is advised that his or her share has been modified, reduced, or eliminated, seeking a pre-death court order (as discussed in paragraph D.3(b), below) may be better than a court battle after death.

D.3 Overcoming Presumptions. If there are circumstances which could lead to a legal or a natural presumption that a document was the product of undue influence or prepared when the signer had limited mental capacity, steps should be taken to overcome the presumptions.

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[8] Generally, we discourage clients from explaining the reason why a person is disinherited or treated adversely in a document. There is nothing in Nevada law that requires justification for how property is allocated and distributed in a will or trust. There are some cases where the reasons are incontrovertible and justified and can appropriately be explained.

[9] If a video recording is made, we recommend an interview involving unscripted, natural responses rather than a reading of a written statement or prepared responses.

There are several things that can be done to reduce the chance that anyone will successfully challenge the validity of estate-planning documents because of insufficient mental capacity, coercion, or undue influence.

(a) *Certificate of Independent Review*. If the Nevada statutory presumption that a document is void applies (as mentioned in paragraph C.1(f)), an independent attorney can meet with the person signing the document, review the document, and sign a "Certificate of Independent Review".[10] This does not all eliminate challenges to the document, but it reverses the presumption of invalidity and shifts the burden of proof back to the person challenging the document. A "Certificate of Independent Review" can also be used to confirm a person's intent to refute challenges based on age or aberrational planning.

(b) *Psychological Evaluation*. To overcome challenges relating to mental capacity and susceptibility to undue influence, it is important to have the person signing the documents submit to examination by a qualified psychologist or psychiatrist and get a notarized statement from the doctor stating that there is no lack of mental capacity or susceptibility to undue influence. This is particularly important for people who have had strokes or who are in the initial stages of Alzheimer's Disease or any other type of dementia. At a minimum, one should have a Mini-Mental Exam (MMSE) and a Mini-Cog test, though a complete diagnostic workup is recommended. To be more thorough and to better prepare for — and hopefully avoid — litigation, the examination should be performed by a board-certified forensic psychiatrist or by a board-certified forensic psychologist.

(c) *Pre-Death Court Ruling*. Nevada law allows a court to issue a ruling declaring that a document is valid.[11] For wills, this is sometimes referred to as a pre-death probate. This allows the maker of a will or trust to be the primary witness and advocate for the validity of the documents. Those who would be quick to oppose documents when the signer is dead are less likely to dispute those documents in court when the signer is still living and can convince the court that he or she is not acting under undue influence and is not suffering from a lack of legal capacity.

E. OTHER OPTIONS. Consider these other options:

E.1 Plan Early. Establishing an estate plan early in life will avoid the problems that are inherent in death-bed planning. If a person has suffered a stroke or is in the early stages of dementia, the earlier the planning is done, the more likely it is to succeed.

E.2 No-Contest Clause. A "no-contest clause" in a will or trust is a provision that reduces or eliminates a beneficiary's share if that beneficiary contests the validity of the document or engages in any other undesirable conduct. To be effective, the beneficiary must stand to lose a significant gift. For example, a beneficiary who is to receive a dollar is not going to be discouraged from filing a contest.

[10] NRS 155.0975(4).

[11] NRS 30.040(2); 137.007; 164.015.

F. RLK POLICIES.

F.1 Generally. It is the policy of Rushforth Lee & Kiefer LLP ("RLK") to prepare documents that are legally enforceable. RLK will not knowingly participate in the preparation of documents that could be easily challenged. To that end:

(a) *Client Contact Required*. When RLK is acting as the primary estate-planning attorney, we will not prepare documents for a person with whom we have not had a one-on-one conversation. Well-meaning children and others may want to facilitate the process by speaking for our client, but we must be sure that the person really wants the documents prepared as directed. While we can follow instructions from a person who has been designated as an authorized spokesperson, we must be convinced that the client is acting of his or her own free will.

(b) *House Calls*. A telephone conversation is not enough. If a person is unable to come into the office, we can make a "house call", but we bill by the hour for house calls, including round-trip travel time. We do not make house calls to hospitals, nursing homes, or other medical-care facilities.

(c) *Primary Attorney*. When we are working with or under the direction of a client's primary attorney, we will rely on the primary attorney's representations that the document is not the product of undue influence or executed while the client lacks sufficient mental capacity to sign a legal document.

F.2 Favoring a Caregiver or Excluding a Child. If a client intends to favor one or more children to the exclusion of one or more others, intends to favor a caregiver or friend to the exclusion of family, or intends to make radical changes to his or her estate plan, we urge the client to hire an independent attorney for a certificate of independent review, as mentioned in paragraph D.3(a). If the client is elderly, ill, is a stroke victim, suffers from dementia, or is otherwise infirm, the client must be willing to submit to a thorough examination by a qualified psychologist or psychiatrist, as described in paragraph D.3(b).

F.3 Remote Document Execution. We do not require that all documents be signed in our office, but we highly recommend it. Our attorneys and other employees cannot testify as to the proper execution of the documents unless the documents are signed in our presence. We especially discourage the execution of documents in a hospital, nursing home, or other health-care facility unless there is a qualified doctor present who is willing to serve as a witness as to mental capacity and the absence of medications that might impair judgment.

G. CONCLUSION.

G.1 Nothing is Bulletproof. Nothing can be done to completely prevent legal challenges. Defending the validity of documents can be expensive, even when the documents are clearly valid. Because of that, there is an increasing number of inappropriate challenges to wills and trusts that are initiated to create a nuisance just to obtain a settlement. The goal is to take sufficient steps to discourage litigation by creating additional hurdles that make a successful challenge less likely.

G.2 Multiple Options. This memo discusses multiple ways of reducing the chances of a successful challenge to a document's validity. Any one of these methods can bolster the arguments favoring the validity of documents, and the case becomes stronger with each additional method used. Some of the suggested methods will trigger additional expenses, but thousands of dollars in preventative measures can save tens — and often hundreds — of thousands of dollars in legal fees that can be triggered in trust-and-estate litigation.

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