TRUST CONTESTS

by Curtis E. Shirley

It is the rare circumstance where a plaintiff files a will contest because he or she received what would otherwise be an intestate share. Children who inherit equally rarely force the high attorney fees or emotional cost of litigation. When a testator signs a will or trust which treats heirs differently, watch out. Although no person deserves to inherit, history, feelings, and emotions say otherwise. The reasons for a diminished inheritance might be apparent. But reasons sometimes do not help resolve the family turmoil left behind.

In recent years will contests and trust contests have increased for several reasons. Starting in 1960s society changed its standards resulting in many more step parents, step children, and blended families. Baby boomers are passing away. Which set of kids inherit usually depends on which parent survives the longest. The elderly have more choices in a nursing home or in home care. With kids not handling day to day responsibility, care takers are inheriting more than ever. The ethical standards of fiduciaries also appears on the decline. Witnesses to wills inherit. Powers of attorney control too much. Even attorneys are drafting documents benefitting themselves or members of the attorney's family.

STANDING

To have standing to complain about an inheritance, the petitioner or plaintiff must be an interested person.

> "´Interested persons´ means heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved." *I.C. 29-1-1-3(a) (13).*

This includes a family member who would inherit under the laws of intestacy if there was no will or trust, and a beneficiary under a prior or later document. *See Rayle v. Bolin, 782 N.E.2d 1063 (Ind.App. 2003).* A beneficiary under the probated will or trust, and a named fiduciary in a document other than the probated Will might be able to file a complaint to start the case; but they must in the end have something to gain for the complaint to survive. *See Estate of Yeley, 959 N.E.2d 888 (Ind.App. 2011); cf., Simon v. Simon, 957 N.E.2d 980 (Ind.App. 2011).*

TIPS FOR TRUST CONTESTS

The Probate Code provisions involving a Will Contest are rather lengthy when compared to the provisions in the Trust Code involving a Trust Contest.

1. The initial difference between Will and Trust Contests is that the Will Contest must be filed within three months of the order admitting the Will to probate. The Trust Contest must be filed within 90 days, not three months, after the beneficiary receives a qualified notice letter. Indiana Code Section 30-4-6-14 is the starting point:

"(a) A person must commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of the following:

(1) Ninety (90) days after the person receives from the trustee a copy of the trust certification and a notice informing the person of: (A) the trust's existence; (B) the trustee's name and address; and (C) the time allowed for commencing the proceeding. [OR]

(2) Three (3) years after the settlor's death.

"(b) More than one hundred twenty (120) days after the death of the settlor of a trust that was revocable at the settlor's death, the trustee may distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for the distribution unless: (1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or (2) a potential contestant notifies the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced not later than sixty (60) days after the contestant sends the trustee the notification.

"(c) A beneficiary of a trust that is determined to be invalid shall return any distribution received."

The trust "certification" is a term of art and refers to Indiana Code Section 30-4-4-5:

"(a) A trustee may furnish to a person other than a beneficiary a certification of trust instead of a copy of the trust instrument. The certification of trust must contain the following information: (1) That the trust exists and the date the trust instrument was executed. (2) The identity of the settlor. (3) The identity and address of the currently acting trustee. (4) The powers of the trustee. (5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust. (6) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all the cotrustees are required in order to exercise the powers of the trustee. (7) The manner of taking title to trust property.

"(b) A certification of trust may be signed or authenticated by any trustee.

"(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

"(d) A certification of trust may contain the dispositive terms of a trust.

"(e) A recipient of a certification of trust may require the trustee to furnish copies of excerpts from the original trust instrument and later amendments that: (1) designate the trustee; and (2) confer on the trustee the power to act in a pending transaction in which the recipient has an interest.

"(f) A person who acts in reliance on a certification of trust without knowledge that the representations contained in the certification of trust are incorrect: (1) is not liable to any person for acting in reliance on the certification of trust; and (2) may assume without inquiry the existence of the facts contained in the certification of trust. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the certification.

"(g) A person who in good faith enters into a transaction in reliance on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

"(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts from the original trust instrument is liable for damages if the court determines that a person did not act in good faith in demanding the trust instrument.

"(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust."

These Statutes were originally enacted in 2005 and to date there have been no Indiana published decisions concerning them.

2. Similar to a Will Contest, the Trust Contest is filed by summons and complaint. *See I.C. 30-4-6-6*. Venue is the County involving the principal place of trust administration. *See I.C. 30-4-6-3*. There is no requirement the plaintiff post a bond, and no requirement the complaint be verified. There is no statutory requirement the plaintiff name all beneficiaries listed in the contested document; but that is the better practice.

3. Although Indiana case law has a history of citing different standards of mental capacity to sign a Trust (whether viewed as a gift or contract), the legislature enacted a new section in 2005 which now views Wills and Trusts much the same:

"(a) If a trust is created by a will, the settlor's capacity that is required to create the trust is determined by the applicable probate law.

"(b) The capacity of a settlor that is required to create, amend, revoke, or add property to a revocable trust is the same as the capacity of a testator that is required to make a will.

"(c) To create or add property to an irrevocable trust, the settlor or transferor must be of sound mind and have a reasonable understanding of the nature and effect of the act and the terms of the trust.

"(d) To direct the actions of the trustee of a trust, the settlor or other person must: (1) have the capacity to hold and deal with property for the settlor's or

person's own benefit; (2) be at least eighteen (18) years of age; and (3) be of sound mind." *I.C. 30-4-2-10*.

4. As compared to the Probate Code, the Adjudicative Compromise Statute in the Trust Code is more detailed. Both require a writing signed by all interested persons and trial court approval that the litigation was in good faith and the settlement just and reasonable. *See I.C. 30-4-7-6, and 30-4-7-9*. However, the Trust Code includes language which binds parties represented by guardians and guardians ad litem, *30-4-7-2,* and allows the trial court to appoint guardians or guardians ad litem to represent: "(1) A minor. (2) A person who is without legal capacity to personally act. (3) A person whose present existence or whereabouts cannot be ascertained. (4) A person who is not yet born or adopted. (5) An inalienable estate. (6) A future contingent interest." *I.C. 30-4-7-4*.

5. At first blush plaintiffs may believe they only need to set aside a trust or trust amendment to obtain relief. However, such plaintiffs would be wise to file a will contest as well. For example, if the Will is a pour over Will which names the trust as the residuary beneficiary, setting aside the trust alone (whether funded or not) may not be sufficient.

> "Except as provided in subsection (m), if a testator in the testator's will refers to a writing of any kind, such writing, whether subsequently amended or revoked, as it existed at the time of execution of the will, shall be given the same effect as if set forth at length in the will, if such writing is clearly identified in the will and is in existence both at the time of the execution of the will and at the testator's death." *I.C. 29-1-6-1(h).*

If the trust is mentioned as the residuary beneficiary in the Will, and the trust existed at the time the decedent signed the Will, then the trust is incorporated into the Will by reference. Setting aside the Trust may bring the property back into the Estate, only to be distributed according to the Trust named in the Will because the Will was not contested.

6. Although the Probate Code in many instances awards attorney fees to even unsuccessful plaintiffs, the Trust Code has no comparable provision. The trustee is entitled to reasonable attorney fees from the trust estate for acting as trustee and defending the litigation. *See I.C. 30-4-5-16*. Unless the plaintiff is a named trustee in a prior trust or prior trust amendment, it is doubtful attorney fees will be awarded to the unsuccessful plaintiff. The successful plaintiff may receive attorney fees on the basis of having provided a benefit to the beneficiaries.

7. It is open to debate whether or not there is a right to a Jury trial in a trust contest. Rescinding documents is historically a function of equity tried to the bench. However, trust contests are so similar to will contests the courts may allow a Jury to determine the facts of the case.

8. Where the estate is embroiled in a Will Contest, the personal representative rarely distributes property. Trustees, however, sometimes make partial distributions rather quickly after the settlor passes away. Any plaintiff who has received a benefit under a document may have to restore the property to the Estate or Trust if he or she attacks the document. *See Hight v. Carr, 112 N.E. 881 (Ind. 1916).*

9. After a successful Will Contest, the doctrine of dependent relative revocation may revive a prior Will. In a successful Trust Contest the doctrine may or may not apply. If a trust amendment is set aside, it seems reasonable to assume the trust and any non-contested amendments remain in force. However, if an entire Trust is set aside, it is more difficult to imagine how a prior Trust might take its place in the same way a prior Will might be revived. No Indiana case discusses the doctrine in the context of a Trust Contest.

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