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Where There Is a Will, Is There a Way? Getting the Last Word on Your Estate Plan

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Famed musician James Brown, who ironically sang "*You Can't Take It With You*," died in December 2006, having taken all the necessary steps to leave his estate in order.[1] He employed financial planners and attorneys, prepared an elaborate estate plan, and even went so far as to record a tape stating his intent to direct a significant portion of his wealth to fund a charitable trust for children. His will even contained a no-contest clause stating that any beneficiary who challenged the will would be disinherited. Nevertheless, more than 10 years after his death, nothing has been distributed according to Brown's estate plan, and his family has endured several years of messy litigation in the South Carolina courts.[2]

Admittedly, Brown's family and his financial situation all but invited disputes over his estate — he had accumulated significant wealth, fathered many children (only six of whom he actually acknowledged), and disinherited the woman who claimed to be his wife. There were multiple challenges to Brown's will by his children and his alleged wife, several personal representatives were removed and replaced, and the South Carolina attorney general even stepped in and seized control over Brown's estate for a period of time.[3] Undoubtedly, Brown worked hard throughout his life to accumulate his assets and wealth — shouldn't he have been able to definitively control what happened to it upon his death?

Disputes over wills, trusts, and beneficiary designations have become commonplace, resulting in the loss of control over one's post-death distribution of assets. Why the loss of control? When a dispute is raised over the validity of a will, trust, or beneficiary designation and the dispute makes it past a motion to dismiss, the parties and the fiduciary are left with two difficult options — litigate through appeals or settle. Litigation is time-consuming and costly. Settlement means compromise and will necessarily involve a change to the decedent's estate plan. While robust estate planning documents are helpful in resisting a challenge, they do not always ensure that a person's estate plan will remain intact.

This article will examine whether a person can actually control what happens to their assets upon their death and study legal mechanisms for getting the last word. To do so, we will review useful estate planning techniques and more creative strategies for rebutting challenges in hopes of answering the question, where there is a will, is there a way?

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[1] Jay Reeves, *Nobody Feels Good About James Brown's Estate*, Lawyers Mutual Byte of Prevention Blog (Mar. 25, 2015), available at http://www.lawyersmutualnc.com/blog/nobody-feels-good-about-james-browns-estate; Larry Rohter and Steve Knopper, *Downbeat Legacy for James Brown, Godfather of Soul: A Will in Dispute*, N.Y. Times (Dec. 13, 2014), https://www.nytimes.com/2014/12/14/us/downbeat-legacy-for-james-brown-godfather-of-soul-a-will-in-deep-dispute.html.

[2] *Id.*

[3] *Id.*

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TRADITIONAL ESTATE PLANNING TOOLS TO REBUT CHALLENGES

Standard estate planning techniques, including the use of wills and trusts, involve methods to stave off challenges to estate planning documents. Many planners start with mechanisms to add face-value validity to the document, including attestation clauses and self-proving affidavits. An attestation clause, while not always a technical requirement for valid wills and trusts, is the declaration by the witnesses that the document was signed in the presence of the witnesses according to certain formalities.[4] A self-proving affidavit is a form added to a will in which the testator and the witnesses to the will swear under oath that they have signed and witnessed the will according to applicable law, generally acknowledged by a notary public.[5] These tools, while useful in supporting the validity of the document, do not prevent an ousted beneficiary from claiming forgery, fraud, undue influence, or asserting any other basis for challenging a will.

In Terrorem Clauses

One way estate planners try to actually prevent challenges is by using *in terrorem* clauses in wills and trusts. These ''no-contest'' clauses are meant to act as a disincentive to would-be challengers by reducing or eliminating the share of any beneficiary who contests the terms of the will or trust. In theory, if a beneficiary contests the will, the *in terrorem* clause is invoked and the challenger loses his or her share of the fiduciary estate. While this may sound like an effective tool, *in terrorem* clauses are often misused, misunderstood, and do not preclude an expensive and time-consuming challenge.

Some states do not recognize *in terrorem* clauses.[6] Some states enforce *in terrorem* clauses, unless the challenge is based on probable cause.[7] One state, Delaware, will recognize an *in terrorem* clause, unless the beneficiary is determined to have ''prevailed substantially.''[8] However, if part of the goal of the decedent is to prevent his or her estate or trust from being depleted by litigation costs, an *in terrorem* clause will likely be ineffective. This is because, no matter what the outcome, the litigation costs associated with the challenge will be borne by the fiduciary estate. Although the clause can be drafted to make clear that any costs associated with the challenge will be paid out of the challenging party's share, the problem of the fiduciary estate being depleted persists.

In terrorem clauses also do not ensure that the decedent's wishes remain intact because in the midst of a challenge, the parties could decide to settle. At that point, even if the clause would be legally enforceable, so long as all of the necessary parties agree, the clause could be ignored, the terms of the will or trust set aside, and a new distribution plan chosen by the settling parties put in place.[9]

In an effort to carry out the wishes of the decedent, some practitioners have turned to technology. With smart phones in virtually every home in America, creating video-taped signings to prove the validity of a will or trust is no longer cumbersome.[10] A video-taped signing serves as evidence of the circumstances in which the testator signed his will and can answer questions about the testator/settlor's cognition at the time of the execution. Video-taped signings, however, are not always the helpful evidence the maker of the video intends them to be. While a positive video-taped signing could be useful to refute arguments that the will or trust was signed under duress or that the testator or settlor lacked capacity at the time of the signing, they can also create fodder for would-be challengers and savvy lawyers. For example, if the alleged influencer is present or the video-taped signing is rehearsed or stopped and started, the challenger could use it to demonstrate that there was undue influence. Moreover, once you have the video (good or bad) it cannot be undone. If the video does not come out well and is destroyed, the evidence will likely be considered spoliated and the challenging party can request an adverse inference that the video would have been unfavorable to the proponent. As James Brown's estate saga demonstrates, even recording the testator's wishes does not ensure that those wishes will ultimately be carried out.

Antemortem Probate

A less available creative option is antemortem probate. Antemortem probate is a court proceeding in which an interested person petitions the court seeking

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[4] *Attestation Clause*, Black's Law Dictionary (10th ed. 2014).

[5] *Affidavit*, Black's Law Dictionary (10th ed. 2014).

[6] Fla. Stat. Ann. §732.517 (2017); Ind. Code Ann. §29-1-6-2 (2017).

[7] *See, e.g.,* Md. Code Ann., Est. & Trusts, §4-413 (West 2017). The Maryland statute is consistent with Uniform Probate Code §2-517, which provides that ''a provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.''

[8] Del. Code Ann. tit. 12, §3329(b)(2) (2017).

[9] While the Uniform Trust Code (UTC) requires that a nonjudicial settlement agreement (NJSA) not alter a material purpose of the trust, this provision does not necessarily preclude a modification to the trust's distributive terms. *See* UTC §111(c).

[10] While easy to make, there certainly could be challenges to authenticity.

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a declaratory judgment that the testator's will is valid, *while the testator is alive*. In one jurisdiction, the proceeding is also available to the settlor or trustee of a trust.[11] In addition to the testator, the necessary parties to the proceeding include those persons who would be interested persons in a traditional probate proceeding, including the testator's spouse, children, heirs, personal representatives nominated in the will, and the legatees.[12] Virtual representation (which is the ability of a known person to represent and bind others such as minors and unborn heirs) is available in some jurisdictions.[13]

In these proceedings, after a full evidentiary hearing in which witnesses may be called, including the testator, the court declares that the planning document is valid and binding on all parties to the proceeding. Upon the testator's death, the will must be admitted to probate and is conclusively deemed proved (except to the extent modified or revoked after the date of the court's declaration).[14]

Only six jurisdictions — Alaska, Arkansas, New Hampshire, North Carolina, North Dakota, and Ohio — have enacted antemortem probate statutes, and each is somewhat different from the other.[15] In Alaska, Arkansas, and New Hampshire, for instance, a declaration of validity does not prevent the testator's subsequent revocation or modification of the will.[16] However, a later will is subject to challenge to the extent the modification of the will is inconsistent with the will having gone through antemortem probate. Conversely, in Ohio, North Dakota, and in some instances, North Carolina, the validated will cannot be revoked and no subsequent will or codicil is valid unless the revocation or modification is declared valid in a subsequent antemortem probate proceeding.[17]

Proponents of antemortem probate cite three significant benefits that are not available in traditional, postmortem probate. First, an antemortem probate prevents the filing of spurious will contests.[18] A challenge to the will would be faced with a promptly filed motion to dismiss based on the court's ruling in the antemortem probate proceeding. Second, antemortem probate resolves evidentiary problems relating to capacity, undue influence, and testamentary intent.[19] The best witness, the testator, is available to testify that the document is their will and reflects their testamentary desires, that they understand what the will says, and they signed it in the presence of the witnesses. Finally, antemortem probate ensures that the testator's plan remains intact.[20] This is perhaps the most important benefit to using antemortem probate — the testator can achieve certainty of testamentary disposition.

While at first glance, this may seem like a solution to the problem of controlling the post-death disposition of assets, there are some disadvantages. First, the testator must sacrifice privacy of his estate plan and make the details of his estate plan known to his family before his death.[21] Many clients like to keep their estate plans private until they die out of fear that their wishes could create or exacerbate existing tensions and upset family dynamics. Indeed, a desire to keep things ''secret'' is what causes much of the litigation over trusts and estates. However, in order to obtain a judgment, the testator must disclose the details of his will to each person interested in the proceeding.

Second, antemortem probate creates costly litigation that could ultimately be unnecessary.[22] Indeed, while there may be concerns by the testator that his or her estate plan will be challenged, that challenge may never actually occur. In that instance, acting preemptively would be a waste of time and money.

Third, people's desires regarding the disposition of their assets change over time. Part of the benefit of a will (as opposed to an irrevocable trust) is that the will can be changed. But, to have the same effect as the validated will, any subsequent changes to the will must go through an antemortem probate proceeding. Not only does this increase the costs associated with antemortem probate, but the need for a subsequent proceeding could act as a deterrent and result in the testator's true desires not being reflected in his or her will.

Finally, this is not a generally available remedy.[23] If you are not domiciled in, or do not own property in, one of the six jurisdictions that have enacted antemortem probate legislation, you are simply out of

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[11] Alaska Stat. Ann. §13.12.535 (2017).

[12] *See, e.g., id.* at §13.12.565.

[13] *See, e.g.,* Alaska Stat. Ann. §13.06.120; N.C. Gen. Stat. Ann. §28A-2-7 (2017).

[14] *See, e.g.,* Alaska Stat. Ann. §13.12.555; N.H. Rev. Stat. Ann. §552:18 (2017).

[15] Alaska Stat. Ann. §13.12.530, *et seq.*; Ark. Code Ann. §28-40-201, *et seq.* (2017); N.H. Rev. Stat. Ann. §552:18; N.C. Gen. Stat. Ann. §28A-2B-1, *et seq.*; N.D. Cent. Code §30.1-08.1-01, *et seq.* (2017); Ohio Rev. Code Ann. §2107.081, *et seq.* (2017).

[16] Alaska Stat. Ann. §13.12.530; Ark. Code Ann. §28-40-203; N.H. Rev. Stat. Ann. §552:18(VIII).

[17] Ohio Rev. Code Ann. §2107.084; N.D. Cent. Code §30.1-08.1-03 (2017); N.C. Gen. Stat. Ann. §28A-2B-4.

[18] Gerry W. Beyer, *Ante-Mortem Probate — The Definitive Will Contest Prevention Technique*, 23 ACTEC Notes 83 (1997).

[19] *Id.*

[20] *Id.*

[21] Katherine M. Arango, *Trial and Heirs: Antemortem Probate for the Changing American Family*, 81 Brook. L. Rev. 779 (2016).

[22] *Id.*

[23] *Id.*

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luck.[24] However, some states offer a viable alternative to antemortem probate through the state's declaratory judgment act. A declaratory judgment can be used to settle a justiciable controversy by affording relief from uncertainty regarding the rights, status, and other legal relations of the parties to the proceeding.[25] Like antemortem probate, when declaratory relief is sought, any person who has an interest that would be affected by the declaration must be a party to the proceeding.[26] Some courts have permitted the use of declaratory judgment statutes to determine the validity of a testator's will, before death, where there is a justiciable conflict,[27] while other courts, finding that no justiciable conflict exists, have declined to do so.[28]

While declaratory relief, where available, is a useful tool to prevent post-death disputes, there may be another technique available to clients who want to avoid the expense and adversarial nature of a contested court proceeding. With so many clients exploring the use of trusts as the principal vehicle of their estate plan, a better and more widely available option for clients wanting to get the last word on their estate plan could be using an NJSA *before death* to establish the validity of their trust agreement and reduce the risk of postmortem challenges.

The Antemortem NJSA?

Most states have enacted the UTC or another form of statutory trust law, and 38 states have enacted a statute permitting the use of NJSAs.[29] An NJSA is a binding agreement between interested persons with respect to a trust.[30] NJSAs must be consistent with the material purposes of the trust and may include only those terms and conditions that could be properly approved by the court. The UTC does not recite an exhaustive list of all the matters that can be resolved by an NJSA, but examples include: (1) interpretation or construction of the terms of the trust, (2) approval of a trustee's report or accounting, (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power, (4) resignation or appointment of a trustee and the determination of a trustee's compensation, (5) transfer of a trust's principal place of administration, and (6) liability of a trustee for an action relating to the trust.[31]

Virtual representation applies to an NJSA, so that the interests of an interested person who is a minor, or who is unborn, unknown, or incapacitated can be adequately represented.[32] While the UTC certainly recognizes that a court may intervene in the administration of a trust if the court's jurisdiction is invoked, it also encourages resolution of disputes by nonjudicial means.[33] Indeed, the purpose of UTC §111 is to facilitate the making of NJSAs by giving the agreements the same effect as if approved by a court.[34] This raises the question — if an NJSA has the same effect as an agreement approved by the court, can an NJSA be used to bind the parties to the agreement in the same manner as a declaratory judgment in an antemortem probate proceeding?

While the answer to this question is not entirely clear, using an NJSA to establish the validity of a trust agreement prior to the settlor's death is certainly more innocuous than other permissible NJSA uses. For example, in some cases, an NJSA is used to modify the terms of a trust to provide for a different distribution than the settlor intended, grant a beneficiary a power of appointment, or transfer the situs of a trust.[35] Given that a court could certainly determine whether or not a trust agreement is a valid document, an NJSA that makes the same determination by agreement would not overstep the court's authority.

Furthermore, an agreement between interested parties that the trust is valid cannot possibly violate a ma-

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[24] *See* Ark. Code Ann. §28-40-202(a) (''Any person who executes a will disposing of all or part of an estate *located in Arkansas* may institute an action. . .''); N.H. Rev. Stat. Ann. §552:18 (''. . . the individual must be domiciled in this state or own real property located in this state.''); N.C. Gen. Stat. Ann. §28A-2B-1(a) (''Any petitioner who is a resident of North Carolina and who has executed a will or codicil. . .''); N.D. Cent. Code §30.1-08.1-01 (''Any person who executes a will disposing of the person's estate in accordance with this title. . .''); Ohio Rev. Code Ann. §2107.081 (''A person who executes a will allegedly in conformity with the laws of this state may file a complaint in the probate court of the county in which the person is domiciled if the person is domiciled in this state or in the probate court of the county in which any of the person's real property is located if the person is not domiciled in this state. . .''). *But see* Alaska Stat. §13.12.540, which does not explicitly require a nexus to the jurisdiction through domicile or property ownership, and permits venue for a petition of a testator not domiciled in the state in any judicial district.

[25] *See, e.g.,* Md. Code Ann., Cts. & Jud. Proc. §3-402; Uniform Declaratory Judgments Act, Section 1 (amended 1922).

[26] *See, e.g.,* Md. Code Ann., Cts. & Jud. Proc. §3-405.

[27] *See, e.g., In re Mampe*, 932 A.2d 954 (Pa. 2007).

[28] *See, e.g., Burcham v. Burcham*, 1 P.3d 756 (Colo. 2000).

[29] Linda Kotis, *Nonjudicial Settlement Agreements: Your Irrevocable Trust is Not Set in Stone*, 31 Prob. & Prop. No. 2 (Mar./Apr. 2017).

[30] UTC §111 (amended 2010).

[31] *Id.*

[32] *See, e.g.,* Md. Code Ann., Est. & Trusts §14.5-301, *et seq.* If there are concerns regarding the scope of the agreement or the virtual representation, an interested person may request the court to approve an NJSA to resolve such concerns. Md. Code Ann., Est. & Trusts §14.5-111(e).

[33] UTC §111, comment.

[34] *Id.*

[35] *See, e.g.,* Md. Code Ann., Est. & Trusts §14.5-111(e).

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terial purpose of the trust. Quite the opposite, an agreement by the interested parties of a trust stating that the trust is valid only furthers the material purposes of the trust.

Even better, an antemortem NJSA has the same advantages as antemortem probate. So long as all of the necessary parties were included in the pre-death NJSA, it would serve as a basis to dismiss an action by a signatory to the NJSA challenging the validity of the trust agreement. Accordingly, establishing the trust's validity prior to death by agreement closes the door to a challenge to the trust in the same way antemortem probate shuts down a will caveat after the testator's death.

An antemortem NJSA can resolve evidentiary problems relating to the settlor's capacity, whether there was any undue influence surrounding the execution of the trust, and issues relating to the settlor's intent. Here, as is the case in an antemortem probate proceeding, the best witness — the settlor — is available to state that the document is their trust agreement, that they know what it says, that it reflects their desires, and that they signed it according to law.[36]

Like antemortem probate, so long as the anticipated challenger(s) has entered into the agreement, an antemortem NJSA ensures that the settlor's estate plan remains intact. If the settlor knows in advance that a particular beneficiary could upset his or her testamentary goals, binding that beneficiary to the estate plan through an antemortem NJSA could stop a challenge before it has an opportunity to ripen.

Finally, an additional benefit of an antemortem NJSA is that it can be done without the involvement of the court, yet has the same effect as if the issues determined in the agreement were decided by the court. This makes the antemortem NJSA a potentially less expensive alternative to antemortem probate.

Nevertheless, use of an antemortem NJSA presents some of the same challenges as antemortem probate, along with some new challenges. While entering into an NJSA is less adversarial than a court proceeding, it could still be perceived as adversarial in nature. Having the family weigh in on the settlor's plans may cause turmoil in the settlor's family and resentment between the settlor and his relatives. Importantly, an antemortem NJSA would only resolve disputes related to the trust agreement and any amendments in existence at the time of the NJSA. Subsequent changes to the trust agreement would not be covered by the prior NJSA, unless an amendment to the NJSA is executed as well.

Getting the needed signatures to make the NJSA effective could present problems. Unlike a declaratory judgment proceeding, where you can bring parties into the action through service of process, you cannot force parties to enter into a contract. Consequently, difficult family members who are would-be challengers may simply refuse to sign. Additionally, the settlor would have to disclose the terms of his trust agreement (something that many settlors seek to avoid) in order to achieve a binding determination of validity.

Still, for a settlor who is concerned that the terms of his trust agreement could become subject to challenge, an antemortem NJSA could be a powerful tool.

CONCLUSION

What is the best option for getting the last word on your estate plan? Like all good legal questions, the answer is — it depends. The family dynamics and factual circumstances of each case differ, so there likely is no universal solution. However, experience and conventional wisdom gives us some techniques to reduce the risk of challenges and mitigate postmortem disputes.

First, work with a sophisticated estate planning attorney to prepare estate planning documents. Experienced practitioners know the requirements for valid documents, and will ensure that documents are signed with the requisite formalities. Second, try to anticipate challenges. Oftentimes the prospective challenger makes his or her intentions known long before the testator's death, and intra-family conflict exists and can be identified during the planning stages. Third, be forthcoming with family members about the distribution plan. This will allow the testator/settlor to gauge whether any beneficiary would challenge the will/trust and give ample notice to the family of their intent. Additionally, give some serious thought to the selected fiduciary. Choosing a disinterested person who understands the intent behind the estate plan and who does not stand to benefit will help ensure that the plan is carried out. Lastly, consider using a pre-death mechanism, like antemortem probate, a declaratory judgment, or an antemortem NJSA to affirm the validity of the estate planning documents while you are alive. As the law presently stands, these techniques may be the only way to preventing postmortem disputes altogether.

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[36] Of course, the NJSA itself could become subject to challenge if an allegation is made that a party lacked capacity to contract, or that the contract was the result of fraud or undue influence.

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