



LITIGATION

While most estates and trust are administered without a challenge or dispute, circumstances often rise to a level requiring the involvement of litigation counsel. Whether it involves the challenge to the validity of a Will, the removal of an executor or trustee, the modification or termination of a trust, or the disputed claim to an elective share of the augmented estate by a surviving spouse, an issue which cannot be resolved by negotiation must be addressed by the judicial process. We believe that our practice emphasis on the planning and administration of estates and trusts, combined with our collective experience in litigation, renders our attorneys uniquely suited to represent fiduciaries and beneficiaries alike when litigation is the only alternative.

WILL CONTESTS

Given that estate planning is, by its very nature, a private expression of one's intentions regarding the disposition of his or her estate, it stands to reason that certain potential heirs will make assumptions and hold expectations which are not met when the testator dies. In some instances, the will may direct a bequest to be made, but the asset passes, not under the will, but to someone named in a separate beneficiary or "payable-on-death" designation. For a multitude of legal and practical reasons, there will always be inheritances that are anticipated but not received. This disappointment can result in disputes among family members, in-laws, and other beneficiaries which escalate into lawsuits to declare the will or trust to be invalid based upon one of several legal grounds.

REMOVAL OF EXECUTORS AND TRUSTEES

Executors and trustees, whether they are individuals, professionals, trust companies or banks, are held to the highest standard of conduct in the law in the administration of the estate or trust. Accordingly, the breach of fiduciary duties by an executor or trustee, such as failure to manage trust property or to invest according to minimum legal standards, is subject to removal and the imposition of penalties, including forfeiture of fiduciary commissions. Since executors are appointed by the courts, one

must resort to the courts to present evidence which justifies removal. In the case of wayward trustees, modern trust instruments contain mechanisms for the orderly removal of a trustee, most involving a vote by the beneficiaries and provisions for successor trustees. If the trust is silent, there are statutory provisions in the new Virginia Uniform Trust Code which give aggrieved beneficiaries an avenue of relief from a failed fiduciary.

REPRESENTATION OF ESTATE / TRUST BENEFICIARIES

Executors and trustees must act in compliance with a high fiduciary standard of conduct towards their beneficiaries, and they have specific duties imposed upon them. These duties include the requirements to act impartially with respect to all beneficiaries, to keep estate and trust beneficiaries informed, to avoid all self-dealing, and to act in the best interests of the beneficiaries. Aside from the ultimate remedy and sanction of removal, the beneficiaries may simply require an experienced, legal voice in dealing with certain fiduciaries. It may be that the representation is limited to ensuring that the fiduciary complies with accounting and reporting requirements and makes the proper distributions from the estate or trust. This is especially true of a successor trustee of the typical revocable “living” trust upon the incapacity or death of the grantor, since there is no court supervision of such trusts (short of litigation).

SPOUSAL CLAIMS AGAINST AUGMENTED ESTATES

Virginia law provides certain rights to a surviving spouse upon the death of an individual domiciled in Virginia at the time of death, including the right to claim an elective share of the augmented estate of the decedent spouse. The identification and calculation of the value of assets in the augmented estate is a complex process, particularly where transfers were made by the decedent during his or her lifetime. The most common circumstance leading to such claims is the death of a parent in a second or later marriage, pitting the decedent’s adult children against the step-mother who has received less than one-third of the augmented estate. If the claim made by the surviving spouse for the elective share is litigated, our experience in these matters is that the costly and laborious process of discovery leads to the documentary evidence which either supports or defeats the claim. This, in turn, leads to negotiation and settlement of the elective share claim; however, it does not lead to reconciliation of the family.

CONTESTED APPOINTMENTS AS GUARDIAN / CONSERVATOR

The appointment of a guardian or conservator becomes a contested matter when two individuals compete for the nomination, when one person seeks to remove and replace another already appointed, or when one person seeks to “trump” the person named as attorney-in-fact and who is behaving badly now that the principal is incapacitated. Needless to say, these proceedings can be highly emotional events, since they often resurrect histories of tension and ill will among family members. There are also situations in which the person alleged to be incapacitated refuses to accept the need for assistance (or actually does not require a court-appointed fiduciary) and challenges the petition for appointment. The blending of our capabilities in litigation and elder law makes our attorneys uniquely qualified to represent family members with confidence and compassion.