

When Parents ... and Grandparents ... Fail to Plan

Janet L. Lowder, CELA
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Common Problems

- Parents simply don't plan and die intestate or with their 40 year-old will
- Parents plan with someone who doesn't know benefit law
- Grandparents set up trusts when grandchildren were small which didn't anticipate benefit eligibility
- Relative names disabled child as beneficiary on account and dies

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Two Areas of Focus

- Beneficiary with a disability is receiving funds or other property outright, as a named beneficiary or intestate heir
- Beneficiary is now entitled to distribution from an irrevocable trust which counts as a resource or income to the individual, causing them to lose benefits

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The Law

- Focusing on Uniform Trust Code
- Some common law as expressed in the *Restatement (Third) of Trusts*
- Know your state law
- Benefit law
- Tax consequences

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Outright Distribution of Property

- Know how SSI treats availability of an inheritance in your region
 - Income in the month it is considered available
 - Becomes a resource the following month
- Presumption if no regional guidance is earlier of:
 - The date the inheritance was received, or
 - The date the estate is closed

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SNT or Pooled Trust

- Use of a (D)(4)(a) or (c) trust is probably the simplest solution
- If Probate estate, can petition the court to order the trust and that the inheritance be paid into trust
- If non-probate, have the individual, parent or grandparent establish the trust or, if none are living or competent, you may need to go into probate court for authority

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Use an ABLE Account

- ABLE account is also a useful place to park cash, but is limited by the cap on annual contributions
- If funds are coming from a Probate estate and your state does not consider the funds immediately available, you might stretch out the estate administration over 2 or 3 years to allow \$30,000 or \$45,000 to be contributed to the ABLE account

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Disclaimer

- Disclaimer is considered an improper transfer for SSI and institutional Medicaid
- Beneficiary on SSDI, who is on MAGI Medicaid, or another program which doesn't penalize transfers, may be a good candidate for disclaimer
- Disclaimed property is distributed as though the disclaimant predeceased the decedent

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Reformation of the Will

- Until fairly recently, no extrinsic evidence of the testator's intent could be admitted unless the will was ambiguous
- UPC 2008 introduced reformation of a will, even if unambiguous, to conform to testator's intent
- Testator's intention must be proved by clear and convincing evidence and the will was affected by a mistake of fact or law

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Reformation of Will – Texas

- Many states have adopted the UPC approach, but Texas took it a step farther
- §255.451 of Texas Estates Code – the personal representative of the decedent can petition the court to modify or reform the will if the order is necessary or appropriate to qualify a distribute for governmental benefits and is not contrary to the testator’s intent.

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Countable Trust

- Decanting – Do you want to avoid going to court? Is decanting available in your jurisdiction?
- Modification – Do the terms of the trust need to be changed going forward?
- Reformation – Is the original intent being frustrated? Was there a mistake at time of drafting?
- Merger and Division
- Invoking the Spendthrift Clause
- Irrevocable Assignment of Beneficiary’s Interest

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Decanting

- Trustee creates a new trust and pours the existing trust assets into the new trust
- Trustee is exercising discretion to make distribution of principal for a beneficiary by making a distribution in further trust
- No court involvement required
- May just need to amend or restate the existing trust

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Decanting - Law

- 29 states now have decanting statutes – see Steve Oshins Decanting State Rankings Chart
- Trustee must have some discretion or absolute discretion to invade trust principal
- HEMS trust to purely discretionary trust? No in some states
- If no discretion over income – can't reduce income to beneficiary
- Requires notice to all beneficiaries

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Decanting – Law

- Uniform Trust Decanting Code - § 13 provides for decanting for a special needs beneficiary
 - Reasonable belief will qualify for benefits
 - Trustee need not have discretion over principal
 - Can change the interest of the special needs beneficiary
 - Cannot change the interests of other beneficiaries
 - Must further the purposes of the trust

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Decanting – Law

- Some tenuous common law support for decanting, using trustee's non-general power of appointment
- Better to move the situs to another state with a liberal statute, decant, and move the trust back if need be

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Modification by Consent

- If the settlor and all beneficiaries agree, the trust can be modified or terminated, even if it defeats a material purpose
- Settlor can consent through agent if specifically addressed in POA, or through guardian
- Minor or incapacitated beneficiaries can consent through representation or appointed reps
- Trustee need not consent but has standing to object

Virtual Representation

- UTC provides default representation, but settlor may specify his own methods
- Parents – unborn or minor children
- Fiduciaries – those to whom they owe fiduciary duties
- Person with substantially identical interest – minor, incapacitated, absent, or unborn

Court Modification or Reformation

- Settlor may not limit the power of the court to modify or terminate a trust
- Action can be brought by beneficiary or trustee (settlor can file to get court approval of an agreed settlement)

Judicial Modification

- Modification - based on unanticipated circumstances or inability to administer the trust effectively. UTC § 412(a)
- Modification to prevent impairment of administration UTC § 412(b)
- Beneficiary consent not required for either

Judicial Modification

- Court must find:
 - Furthers the purpose of the trust and to the extent practical, made in accordance with Settlor's intent, or
 - Continuing trust on existing terms is impractical, wasteful or will impair the trust's administration
- Use to add special needs provision to trust
- Texas statute

Judicial Modification

- If all beneficiaries do not consent, court can still grant if the court finds
 - If all beneficiaries had consented, the trust could have been modified and
 - The interests of a non-consenting beneficiary are adequately protected
- Even if all consent, any party can request a court to approve the non-judicial settlement and determine if representation adequate and if the agreement contains terms and conditions the court could have properly approved

Merger and Division of Trusts

- Trustee can merge 2 or more trusts, or divide a trust as long as it doesn't impair rights of a beneficiary or adversely affect the purposes of the trust
- Merging two trusts – 1 with HEMS standard & 1 discretionary under terms of the discretionary trust
- Merge with a trust to add a trust advisor or trust protector

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Merger and Division

- Court need not approve a merger or division.
- Beneficiaries need not consent
- If terms of the 2 trusts are substantially different, get court approval or obtain consent of beneficiaries
- Divide a trust when more than one beneficiary to protect the non-disabled beneficiaries' shares
- Settlor can modify the requirements

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Invoking the Spendthrift Clause

- Trust with ascertainable standard, but with spendthrift clause which provides a beneficiary's share will be administered as a purely discretionary trust if the beneficiary attempts to assign his interest, or if a creditor or another entity attempts to reach the interest
- Trustee invokes the clause in writing and administers using sole discretion

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Irrevocable Assignment of Interest to First-Party Trust

- Works with support or discretionary trust
- Spendthrift clause must allow assignment, usually with prior written approval of the trustee
- Trustee must be on board
- Check state law for prohibition of assignment of a beneficial interest in a trust

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Irrevocable Assignment

- Beneficiary disclaimer is improper transfer
- Transfer to a self-settled (D)(4)(a) or (D)(4)(c) trust is not an improper transfer
- Only the beneficiary's interest is transferred. If entitled to income, the trustee must pay the income to the SNT
- Defined, mandatory distributions of principal must be made to the SNT

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Irrevocable Assignment

- Assignment of discretionary interest - The SNT becomes entitled to receive any distributions the trustee makes or is required to make in the exercise of discretion, looking at the assigning beneficiary and his needs
- Check your state law for any prohibitions
- Trustee can refuse or limit distribution as it would if beneficiary had not assigned

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Drafting to Avoid Future Issues

- Include provision in wills to allow distribution to appropriate trust if recipient is disabled
- Give someone the power to amend the trust
- Include a power to change the situs of the trust
- Include a good spendthrift provision which allows assignment with prior written consent of trustee
- Include merger and decanting as express powers

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**Hickman
& Lowder**
Co. L.P.A.
Attorneys at Law

Hickman-Lowder.com

216-861-0360 Cleveland and Mentor
440-323-1111 Sheffield Village

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