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MODIFICATION, REFORMATION AND TERMINATION
OF TRUSTS UNDER EXISTING LAW AND THE ANTICIPATED
COLORADO TRUST CODE

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A.

1. Your client has a history of making charitable gifts to the American Cancer Research Institute, Denver, Colorado. In preparing the client's will, the client gave you a list of charitable beneficiaries including this cancer organization (does it make any difference whether the list was provided verbally or in writing?).

When the will was drafted, the bequest was, instead, made to the American Cancer Society, Rocky Mountain Division (which is an accurate and unambiguous designation of that organization). Your client did not catch the drafting error when he reviewed the will draft, and the will was signed with the mistaken description of the charity.

The will has been admitted to probate, and the family and the American Cancer Research Institute, Denver, Colorado have discovered the "mistake" and have asked what can be done about it.

Are the issues and result any different if you are dealing with a provision in a trust agreement rather than a will at common law? What would the result be under the Uniform Trust Code? Is there a difference between the result under the Uniform Probate Code (as to wills) and the Trust Code?

2. You draft a set of fairly standard estate planning documents for a husband and wife. Each of their wills has a Family Trust and a Marital Trust. In the Marital Trust, the surviving spouse is given a general testamentary power of appointment, and the standard for trustee invasion of corpus includes health, education, support, maintenance, comfort, and welfare. These same provisions are drafted into the Family Trust.

What are the problems? What is the potential solution?

3. You are doing estate planning for a well-to-do widow. She has three children: a son and two daughters. On account of some prior gifts and business transactions, the client does not wish to provide for her son since he has been previously provided for under some gifts and business arrangements. You prepare a will which leaves the residue of the estate to the two daughters and does not make provision for the son. Your residuary clause contains standard

language which does not exercise powers of appointment. Following your client's death you learn that she had been given a special power of appointment in a trust established by her previously deceased husband under which she had a life income interest. In default of her exercise of the power, the husband's trust assets go in equal shares to the three children, including the son. You know that this result is contrary to her intention that the family estate go to the two daughters. What can be done?

B.

1. Assume the decedent's will #1 leaves his entire estate to his son and names the son as personal representative. Assume that a subsequent will #2 leaves his entire estate to his daughter and names the daughter as personal representative. The son contests will #2 and a settlement is reached by which the estate is distributed one-half to the son and one-half to the daughter with the son and daughter named as co-personal representatives. Any problems or issues in connection with this settlement?
2. Assume that will #1 leaves the decedent's entire estate to his daughter with the son as personal representative and will #2 also leaves the entire estate to the daughter with the daughter as personal representative. The son contests will #2 and the parties reach a settlement under which one-half of the estate goes to each with the son acting as personal representative. Any problems or issues here?
3. The decedent's will #1 leaves half of his estate to his son and the other one-half in trust to his daughter for life; remainder to the daughter's children. Will #2 leaves the entire estate in trust to the daughter for life; remainder to her children. The son contests will #2. The parties reach a settlement by which the estate is distributed one-quarter outright to the son and three-quarters to the daughter. Any problems here?

C.

1. Assume that the decedent, who is a substantial farmer and rancher, left his estate in trust for the benefit of his children with the trust to terminate on the death of the survivor of the children. A local bank is trustee of the trust. The trust contains a direction that the farm and ranch land is not to be sold during the period of administration of the trust.

Neither the son nor daughter are interested in actively managing the land as a farming and ranching operation. They have leased out the land for cash rentals. The land is in the "path of development."

The property is now clearly worth more as development land, although the farm lease income is presently covering the increased property taxes.

The co-personal representatives (who are also the life beneficiaries) come to you for advice as to whether the language in the trust instrument directing the trustees to keep the farmland

can be disregarded. The family comes to you for advice. What is your advice? See *Will of Killin*, 703 P.2d 1323 (Colo.App. 1985). What should the role of the trustee be? Should the trustee be neutral or should the bank act to advance and protect the intention of the settlor? Is the result any different under § 412 of the Trust Code?

2. A trust agreement provides for co-trusteeship, one family member and a bank. There is provision for succession on the family trustee side. On the corporate trustee side is a provision that there must always be a corporate trustee and provides for the criteria for qualification as a successor corporate trustee. The trust contains some commercial real estate and some raw land. The family co-trustee and the beneficiaries are concerned that the corporate trustee is being too conservative in connection with monitoring the commercial real estate and in overly worrying about the environmental aspects of the raw land. The corporate co-trustee charges additional fees in connection with the real estate.

The family members, including the individual co-trustee, come to you for advice as to how they can eliminate the office of the corporate co-trustee or the participation of the corporate co-trustee in connection with the real estate assets. Your response?

3. You are dealing with a trust agreement which designates a bank as trustee. The bank is serving. The document contains successor trusteeship provisions, always providing for a corporate trustee.

The family beneficiaries have induced the present bank/trustee to resign and they want to get a family member appointed as successor trustee. The family trustee would be obligated to hire (1) a professional investment advisor; and (2) a bank, or other appropriate institution, as a custodian to keep the books and do the taxes.

A court order would be required to change this governance arrangement. What are the problems? What are the prospects of success?

D.

1. Assume that A sets up a trust with income to the surviving spouse for life and remainder to the settlor's two children C1 and C2. The children's children are the contingent remainder beneficiaries. The trust contains a spendthrift clause.

The children want to terminate the trust so that the children can obtain more funds in order to provide for their children's educations and to provide on-going care for a disabled grandchild. The time for shifting interests by disclaimer has passed.

Assuming that the consent of all beneficiaries is necessary to terminate the trust, how can this consent be obtained?

In connection with the interests of the contingent remainder beneficiaries, how can these be dealt with and protected:

- a. Under the doctrine of virtual representation, can the parents act on behalf of and in the interests of their children? Is there an inherent conflict of interest?
- b. Can a guardian ad litem be appointed to consent to what is, in effect, a destruction of the contingent remainder interest?
- c. Can a court or guardian ad litem take into account broader family interests or purposes in approving the arrangement?

Assume also that terminating the trust cannot be accomplished if contrary to a material purpose of the trust.

- a. Is the provision of the spendthrift clause which prohibits any beneficiary from voluntarily or involuntarily assigning his or her interests a material purpose?
- b. Would it help if the settlor of the trust were still living and would join in the transaction?

REFERENCES

1. *Estate of Gross*, 646 P.2d 396 (Colo.App. 1981)
2. *Will of Killin*, 703 P.2d 1323 (Colo.App. 1985)
3. Uniform Trust Code
 - § 303 - Representation by Fiduciaries and Parents
 - § 304 - Representation by Person Having Substantially Identical Interest
 - § 305 - Appointment of Representative
 - § 410 - Modification or Termination of Trust; Proceedings for Approval or Disapproval
 - § 411 - Modification or Termination of Noncharitable Irrevocable Trust by Consent
 - § 412 - Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively
 - § 414 - Termination of Uneconomic Trust
 - § 415 - Reformation to Correct Mistakes
 - § 416 - Modification to Achieve Settlor's Tax Objectives
 - § 706 - Removal of Trustee
4. Proposed Uniform Trust Code - Colorado Draft § 306 (Judicially Approved Settlement)
5. James R. Wade, "Trust Termination and Modification," March 1986 *Colorado Lawyer*, p. 389.
6. Wade/Parks, *Colorado Law of Wills, Trusts and Fiduciary Administration* (CLE in Colorado, July 2001 Supplement); § 46.10, § 46.11.
7. Clifton B. Kruse, Jr., "Reformation of Wills = The Implication of Restatement (Third) of Property (Donative Transfers) on Flawed but Unambiguous Testaments," 25 ACTEC Notes 277, 299 (2000) (Discussion of Tentative Draft No. 1, March 28, 1995, § 12.1, p.115).