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WHEN IS IT TOO LATE TO CHALLENGE AN INTER VIVOS TRUST TRANSFER?

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EXECUTIVE SUMMARY:

An undue influence challenge to a deceased individual's estate planning documents is no longer a rare occurrence. Probate and trust litigation has become the avenue of choice for disgruntled and/or disinherited heirs. Their claim may arise from a decedent's promise of an inheritance which never materializes or an individual's exertion of undue influence over the decedent during his or her lifetime. In other instances the litigation may be necessitated by a family member, attorney or trusted advisor misusing a fiduciary power (trustee, trust protector, power-of-attorney, etc.) bestowed upon them.

To combat these types of situations, Section 825.103 Exploitation of an elderly person or disabled adult; penalties, of the Florida Statutes, was enacted to prosecute those who prey on an "elderly person" or "disabled adult." A felony charge awaits those who utilize deception or intimidation to obtain or use an elderly person or disabled adult's funds, assets, or property with the intent to deprive them (temporarily or permanently) of the "use, benefit, or possession of the funds, assets, or property," or to benefit someone else. Warning signs include: significant withdrawals from the elder's accounts, sudden changes in the elder's financial condition, suspicious changes in wills, power of attorney, titles, and policies, and the addition of names to the senior's signature card.

The time to act is during the individual being exploited lifetime, otherwise the efforts may be thwarted by Section 737.2065, Florida Statutes (2000). Section 737.2065 provides that "[a]n action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable." Florida law further provides that an individual (beneficiary, successor trustee, fiduciary, or otherwise) may not challenge a trust settlor's revocation and/or transfer of assets, during the settlor's lifetime or at death, on the basis of undue influence. A trust document may be challenged after the settlor's death when

the testamentary documents have been amended or revised inconsistent with state law. As the Florida Supreme Court has emphasized in prior decisions, when a settlor creates a trust they provide a means to save themselves from their own incompetence and the court should adhere to this protection. In the case of Helen M. Wedrall, the fact her family (other than her exploiting sister) and friends failed to recognize her “incapacity,” the exertion of undue influence during her lifetime, and intervene will preclude attempts to invalidate the transfers she made prior to death.

FACTS:

During her lifetime Helen M. Wedrall established and transferred her assets to the Helen M. Wedrall Revocable Trust (the “Trust”). The terms of the Trust provided that upon Ms. Wedrall’s death, the residue was to be equally divided among three of her sisters (Agnes Wedell, Dorothy Ziegler, and Liz MacIntyre). Prior to her death, Ms. Wedrall removed her assets from the Trust and transferred them into an account jointly titled only with her sister, Agnes Wedell.

Following Ms. Wedrall’s death, Ms. MacIntyre, the successor Trustee of the Helen M. Wedrall Trust, filed suit against Ms. Wedell alleging that the transfer of assets and effective termination of the Trust was made at a time when Ms. Wedrall was suffering from physical and mental ailments and were the product of undue influence. In reliance on *Florida National Bank of Palm Beach County v. Genova*, 460 So. 2d 895 (Fla. 1984), the district court dismissed the case with prejudice.

In *Genova*, the Florida Supreme Court had addressed the issue of whether the concept of undue influence could be resorted to in order to deprive a “settlor, who is the sole beneficiary of the trust during her lifetime . . . , prior to her death, of her right to revoke the trust in the absence of a judicial determination or medical certification of her physical or mental incapacity.” In rendering its ruling, the Florida Supreme Court explained that a revocable trust is “a unique type of transfer” and “[b]y definition, . . . , when a settlor sets up a revocable trust, he or she has the right to recall or end the trust at any time, and thereby regain absolute ownership of the trust property.” The court found that a “settlor’s retention of control distinguishes a revocable trust from the other types of conveyances in which the principle of undue influence is applied, i.e., gifts, deeds, wills, contracts, etc.”

The *Genova* court further explained that “courts have no place in trying to save persons such as Mrs. Genova, the otherwise competent settlor of a revocable trust, from what may or may not be her own imprudence with her own assets. When she created this trust, she provided a means to save herself from her own incompetence, and the courts can and should zealously protect her from her own mental incapacity. However, when she created this trust, she also reserved the absolute right to revoke if she were not incompetent. In order for this to remain a desirable feature of a trust instrument, the right to revoke should also be absolute.” As a result, the court in *Genova* held “that a co-trustee could not seek to preclude the settlor from revoking her trust on the grounds of undue influence,

but suggested that the settlor could be precluded from revoking the trust if she were incompetent.”

On appeal, Ms. MacIntyre argued that a trustee may challenge the settlor’s revocation of an inter vivos revocable trust, on undue influence grounds, after the settlor’s death. Florida’s Third District Court of Appeals disagreed and affirmed the dismissal with prejudice. The Third DCA held as a result of *Genova*, that “even after the settlor’s death, the settlor’s revocation of her revocable trust during her lifetime is not subject to challenge on the ground that the revocation was the product of undue influence.”

CONCLUSION:

With limited exceptions, the time to address exploitation issues is during the “alleged” incapacitated or “exploited” individual’s lifetime. Options range from an “exploitation of the elderly” investigation (which can lead to a felony conviction in Florida) or through a guardianship proceeding (resulting in a guardian being appointed to protect the individuals assets). The former will involve a police investigation, while the later requires an individual to file a petition with the circuit court requesting court intervention and the alleged incapacity of the individual. While not always possible, especially since in Ms. Wedrall’s case she was exploited by her own sister, it is important to remain involved in a family member or friend’s life to insure his or her physical and/or mental condition does not become “an easy prey.”

CITATIONS:

Section 737.2065, Florida Statutes (2000)

Section 825.103, Florida Statutes (2009)

MacIntyre v. Wedell, 12 So. 3d 273 (Fla. 4th DCA 2009)

Florida Nat’l Bank of Palm Beach Co. v. Genova, 460 So. 2d 895 (Fla. 1984)

Paananen v. Kruse, 581 So. 2d 186 (Fla. 2d DCA 1991)

Hoffman v. Kohns, 385 So. 2d 1064

Paananen v. Kruse, 581 So. 2d 186 (Fla. 2d DCA 1991)

Conrady Charitable Trust, Allegheny County Orphans’ Court (April 2007)