OAST & HOOK

ELDER LAW NEWS

Legal power for seniors.

August 31, 2007
Volume 14 Issue 35

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TRUST REVOCATION BY WILL

A recent Newport News Circuit Court opinion addresses the issue of modifying or revoking a trust by will. In *McCall v. Elver* (No. 01638-TF, May 8, 2007), the plaintiff was the conservator of the decedent's daughter, and the defendant was the decedent's son, in his capacity as executor of the decedent's estate. On July 2, 1997, the decedent executed a will and a trust agreement, and transferred funds into a trust account at Wachovia Bank pursuant to the trust agreement. On November 18, 2003, the decedent executed a "holographic document," and on December 8, 2003, the decedent executed another will that was admitted to probate. Plaintiff also submitted an account statement from the trust for 2005, and both parties agreed that no changes to the trust account from the trust's establishment on July 2, 1997, through the decedent's date of death. However, the plaintiff claimed that the November 18, 2003, document terminated the trust, or alternatively, that the probated will dated December 8, 2003, modified or terminated the trust. The plaintiff asserted that the provisions of the Virginia Uniform Trust Act dictate this result.

The court first reviewed the Virginia Uniform Trust Act, specifically Virginia Code Section 55-564.02, which states that a settlor may revoke or amend a revocable trust by substantial compliance with the method provided in the terms of the trust, or by any method manifesting clear and convincing evidence of the settlor's intent. The trust agreement in question stated that the grantor retained the power to cancel, terminate or amend the agreement by written instrument delivered to the trustee. The court stated that nothing in this code section changed the decision in *Cohn v. Central Nat'l Bank of Richmond* (191 Va. 12 (1950)). In the *Cohn* decision, the Supreme Court of Virginia stated that "if the settlor reserves the power to revoke the trust only by notice in writing delivered to the trustee, he can revoke it only by delivering such notice to the trustee." The Supreme Court of Virginia also said in the *Cohn* opinion that "If the settlor reserves a power to revoke the trust only by a transaction inter vivos, he cannot revoke the trust by his will."

The Newport News Circuit Court stated that the November 18, 2003, document and the December 8, 2003, document did not refer to canceling, terminating or amending the trust; further, neither document referred to the trust. Each document identified itself as a "Last Will and Testament," and as such, could not have any inter vivos effect. The plaintiff had asserted that the November 18, 2003, document was a "notice in writing delivered to the trustee," because the decedent was the trustee, he wrote the document, and delivered it to himself when he wrote it. The court stated that there is no such "typical testator" exception to settled trust law or compliance with the terms of a trust. If the decedent's intention was to terminate the trust without the expense of legal advice, then the decedent could have withdrawn the funds from the account at Wachovia Bank, or he could have retitled this account. Both sides agreed that the decedent took no action after the November 18, 2003, and December 8, 2003, documents were written that was inconsistent with the continuation of the trust.

In summary, the court stated that "the November 18, 2003, document did not reference the trust nor direct that the trust be cancelled, amended or terminated," and therefore it did not comply with the terms of the trust necessary to "cancel, amend or terminate" the trust. Further, the trust was not terminated by the December 8, 2003, will that was admitted to probate. The court therefore held that the trust was still in existence at the testator's death.

The attorneys at Oast & Hook can help clients establish their estate and financial plans and keep them current in order to avoid misunderstandings at incapacity or death.

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