ETHICAL CONSIDERATIONS RELATED TO WILLS, TRUSTS, AND THE ADMINISTRATION OF ESTATES AND TRUSTS

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Testamentary Capacity

"A person who is eighteen years of age or older and who is of sound mind may make a will." A.R.S. § 14-2501. The test for capacity to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is probably the same as that required to make a will. Section 601 of the Uniform Trust Code expressly so provides, but that section of the Uniform Act was

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not adopted in Arizona. *See* A.R.S. § 14-10601, which is blank. As indicated by the Official Comments to the Uniform Trust Code, a revocable trust is in effect a will substitute, and is often executed in conjunction with a pourover will that leaves substantially all of the testator's probate estate to the trust, and there is no reason why the capacity of the testator-settlor should not be judged by the same standard.

"The elements of testamentary capacity are: ability to know the nature and extent of one's property, ability to know the natural objects of one's bounty, and ability to understand the nature of the testamentary act." *In re Walker's Estate*, 77 Ariz. 122, 129, 267 P.2d 896, 901 (1954). The test for capacity with respect to a gift (e.g. the creation and funding of an irrevocable trust) is higher, in that it is also necessary to show that the donor or settlor understood the consequences of his or her act. *See Amado v. Aguirre*, 63 Ariz. 213, 161 P.2d 117 (1945).

Does a lawyer who is asked to prepare a will or a trust have a duty to determine that the client has capacity? Stated another way, does a lawyer have an affirmative duty to decline to prepare a will or a trust unless the lawyer is satisfied that the client has the requisite degree of capacity? There are at least two views on the subject.

> Once the issue [capacity, fraud, or undue influence] is raised in the attorney's mind, it must be resolved. The attorney should schedule an extended interview with the client without any interested person present

> and keep a detailed and complete record of that interview. If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship.

Ethics Op. 1990-3, San Diego County Bar Association (internal citation omitted) (emphasis supplied).

On the other hand:

> [If] the attorney arrogate[s] to himself the power and responsibility of determining the capacity of the testator, decide[s] he [is] incapacitated, and depart[s], he would indeed [be subject] to severe criticism when, after the testator's death, it [is] discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted.

Vignes v. Weiskopf, 42 So. 2d 84, 86 (Fla. 1949). The Florida court also observed that, in such circumstances, the lawyer should comply, as nearly as he can, with the client's request, should make the facts known to the court, and then leave the matter to the court to decide whether the instrument is valid. *See id.* Of course, the lawyer should keep a detailed record of his efforts and observations so that he will be better able to follow the course of action suggested in the Florida case.

The Florida position appears to be the better-reasoned approach, because it is more consistent with the legal and ethical duties imposed on Arizona lawyers by

Arizona case law and the Arizona Rules of Professional Conduct. A lawyer is ordinarily required to abide by the client's decisions with respect to the lawful objectives of the representation. ER 1.2(a). A lawyer has no duty to a non-client whose interests are directly adverse to the interests or objectives of the client, such as an intestate heir or a devisee under a prior will whom the client wishes to disinherit. *See Wetherill v. Basham*, 197 Ariz. 198, 3 P.3d 1118 (Ct. App. Div. 2 2000). Under certain circumstances, a lawyer may have a duty to non-clients, but such a duty is not imposed unless the client intends a benefit to the non-client, a circumstance which clearly does not exist with respect to an heir or devisee under a prior will whom the client wishes to disinherit. *See Paradigm Ins. Co. v. Langerman Law Office, P.A.*, 200 Ariz. 146, 24 P.3d 593 (2001).

A lawyer who concludes that the testator or settlor lacks capacity, and declines to prepare the will or trust, should consider whether he or she has any duty or liability to the persons that the client intended to benefit. *See Osornio v. Weingarten*, 124 Cal. App. 4th 304, 21 Cal. Rptr. 3d 246 (6th Dist. 2004).

See also ER 1.14 (representing the client with diminished capacity) and the options available to the lawyer under that rule. Should a lawyer require (or at least suggest that) the client submit to an independent mental evaluation? Should the

signing of the will or revocable trust be videotaped?

If a lawyer suspects that the client is or may be the victim of fraud or undue influence, different considerations are present and various courses of action should be considered.

Fraudulent Transfers

A lawyer must take care not to assist a client with respect to a transaction that is, or which may be, a fraudulent transfer, as the lawyer may thereby acquire civil liability as a conspirator. *Pearce v. Stone*, 149 Ariz. 567, 720 P.2d 542 (Ct. App. Div. 2 1986), *rev. denied*. In any such action, the attorney-client privilege is not applicable. *Id.* at 573, 720 P.2d at 548. Arizona's version of the Uniform Fraudulent Transfer Act is set forth in A.R.S. §§ 44-1001 *et seq*.

A transfer made or an obligation incurred is fraudulent as to a present creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation. A.R.S. § 44-1005. A debtor is "insolvent" if the sum of the debtor's debts is greater than the debtor's non-exempt assets at a fair valuation, A.R.S. § 44-1002(A), § 44-1001(1)(b), and a debtor who is generally not paying his debts as they

become due is presumed to be insolvent. A.R.S. § 44-1002(B). A "creditor" is a person who has a "claim" against the debtor, A.R.S. § 44-1001(3), and a "claim" is "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." A.R.S. § 44-1001(2).

A transfer made or an obligation incurred is fraudulent as to present and future creditors if the debtor made the transfer or incurred the obligation (a) with actual intent to hinder, delay or defraud any creditor of the debtor or (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor either (1) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or (2) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they came due. A.R.S. § 44-1004(A). In determining actual intent of the debtor, the court may consider, among other things, the so-called "badges of fraud," which are set forth in A.R.S. § 44-1004(B), as follows:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after

the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Bankruptcy Considerations

Pursuant to Section 548(a)(2) of the United States Bankruptcy Code, a transfer

of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a [fraudulent transfer recoverable by the bankruptcy trustee] in any case in which the amount of that contribution does not exceed 15% of the gross annual income of the debtor for the year in which the transfer of the contribution is made, or the contribution made by a debtor exceeded that percentage, but the transfer was consistent with the practices of the debtor in making charitable contributions.

Will or Trust Drafting Tip

Percentages versus fixed dollar amounts to charitable organizations.

The Role of the Lawyer

A lawyer who advises the settlor with respect to the need for, the drafting, the funding, the execution, and the administration of a trust owes a duty of confidentiality to the settlor, and that duty continues after the death of the settlor. *See* ER 1.6 (Rule 42, R. Ariz. Sup. Ct.). Bear in mind that the duty of confidentiality under ER 1.6 is broader than the evidentiary privilege set forth in A.R.S. § 12-2234. Although a lawyer may reveal information otherwise protected by ER 1.6 pursuant to a court order, ER 1.6(d), the lawyer may not do so voluntarily, even in response to a subpoena. Instead, the lawyer should object to the subpoena and allow the court to

resolve the matter. *See* Ariz. Ethics Opinion 00-11.

With respect to a lawyer who is acting as counsel to the trustee, there does not appear to be any Arizona precedent specifically construing the privilege as it may apply to the trustee of a trust, but two recent California decisions, relating to the trustee of a trust, should be considered and may be helpful in resolving any questions that may arise here.

Communications between a trustee and the trustee's attorneys, relating to advice on the trustee's duties in connection with trust administration, are privileged from disclosure. *Wells Fargo Bank, N.A. v. Superior Court*, 22 Cal. 4th 201, 990 P.2d 591 (2000). Merely because the beneficiaries are entitled to be kept reasonably informed about the administration of the trust does not entitle them to examine confidential communications between trustee and the trustee's attorneys. On the other hand, a "defensive" communication, unrelated to the administration of the trust, and "sought for the trustee's own protection," is not privileged from disclosure. *Moeller v. Superior Court*, 16 Cal. 4th 1124, 947 P.2d 279 (1997). The privilege, where it applies, pertains to the office of trustee, and a successor trustee may compel the disclosure of confidential communications between a predecessor trustee and the predecessor trustee's attorneys. *Id.* In any litigation between the trustee and the

beneficiaries, moreover, the trustee may be examined as to facts within his or her knowledge, whether or not those facts have been communicated to an attorney. *See also, Restatement (Second) of Trusts* § 196 (the powers conferred upon a trustee can properly be exercised by his successors, unless it is otherwise provided by the terms of the trust).

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