What Utah Trial Judges Have to Say About Trust and Estate Litigation – Survey Results

by John A. Adams

INTRODUCTION

Many trust and estate lawsuits carry on far too long because clients either have difficulty objectively viewing the facts of their case or they do not understand the law that will govern the outcome. In addition, many clients start with unrealistic expectations of what they think they should recover from an estate or trust. Clients often set their expectations based on their own perspective of what they think is fair and how they think assets should be divided. What many tend to forget is that the assets are not theirs. The assets belong to someone else – a parent, grandparent, sibling, or other family member. The person who sets up the trust (the trustor) or the person whose will it is (the testator) decides who gets what. It is that simple: the person whose money it is gets to decide. The distribution decisions do not have to be fair, logical, or consistent with the person's prior oral statements. The court's role is to give effect to a validly executed will or trust agreement.

Recurring advice voiced by multiple Utah district court judges in a recent survey on the topic of trust and estate litigation is to talk frankly to clients and help them set realistic expectations of likely outcomes in contested will or trust disputes. Trust and estate assets can be – no, almost certainly will be – greatly diminished in protracted litigation. When that happens, clients are deeply upset and disappointed. They are upset with other family members, perhaps upset with the benefactor who created the trust or will, and disappointed with the lawyers and our legal system.

This past summer, all current Utah district court judges and many retired district court judges were invited to participate in a survey on trust and estate litigation. Twenty-five judges responded – twelve sitting judges and thirteen retired judges. Two of the retired judges either only handled a criminal calendar or had no recollection of having handled any trust or estate cases. Therefore, the responses of those two judges were not included in the analyzed data. The twenty-three surveys analyzed included responses from at least one judge from six of the seven judicial districts in the state (nine from the Third District, six from the Second District, five from the Fourth District, and one each from the First District, Fifth District, and Seventh District). For the most part, the survey questions focused on disputed trust and estate cases that either went to trial or were decided on summary judgment, rather than on the uncontested run-of-the-mill cases that begin on the law and motion probate calendar, guardianships, or conservatorships. A primary goal of the survey was to get a better read on how frequently oft-asserted claims in contested will or trust cases actually prevail.

A challenge to collecting the desired data was that neither district judges nor their clerks track rulings on specific issues in trust and estate cases. As a result, judges' responses were based on their best recollection and estimates. More specifically, the survey asked (1) how many trust and probate estate trials the judges had presided over and (2) the number of trust and probate estate cases they had decided on summary judgment. A number of responses contained an estimate with a range of the number of cases tried or decided on summary judgment. The net result is that even though it is difficult to state precisely an accurate percentage of how frequently certain rulings were

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made, the combined data for all judges yield percentages that do not vary by more than one percentage point between the high and low estimates in each category.

The eleven retired judges had a combined 191 years of service on the bench – an average of 17.4 years per judge. Together the retired judges estimated they had presided over eighty-one to eighty-three trials involving contested estate or trust matters. They also had decided from sixty-nine to seventy-nine such cases on summary judgment. Interestingly, the twelve sitting judges had a combined 183 years of service – an average of 15.25 years per judge. This group of sitting judges estimated they had presided over eighty-three to ninety trials involving contested estate or trust matters. In addition, they had decided ninety-six other such cases on summary judgment. For the percentages used in this article, the total number of cases that went to trial or were decided on summary judgment were aggregated for both the retired and sitting judges and used as the divisor for the specific number of occurrences reported (the dividend) to come up with the quotient that was then translated into a percentage, rounding up or down.

The survey questions included how often judges (1) found the existence of undue influence, (2) determined that a testator or trustor was incompetent, (3) concluded a no-contest provision was valid and enforceable, (4) imposed a constructive trust, (5) declined to approve or appoint the nominated personal representative, or (6) found a breach of fiduciary duty that warranted discharge of the fiduciary. The short answer is that these types of claims succeed occasionally and some only rarely.

The survey also included more general questions about what percentage of cases are being resolved through the alternative dispute resolution (ADR) process, the range of the hourly rate approved for individuals serving as a non-professional trustee or personal representative, any guide used as to the maximum amount of attorney fees to be awarded in relation to the size of the trust/probate estate, evidentiary issues that tend to trip up lawyers trying trust or probate estate cases, common mistakes made by probate lawyers, and recommendations on how to help resolve disputes.

LIKELIHOOD OF SUCCESS ON COMMON CLAIMS

Undue influence is routinely alleged and seldom established. One experienced judge observed that undue influence seems to be alleged in almost all contested cases. The survey results show that undue influence is seldom found. Based on the data gathered, a contestant has a 15 to 16% chance of prevailing on an undue influence claim.

In Utah, a court will invalidate a will or trust that is the product of undue influence rather than the volition of the testator or trustor. Utah Code Ann. §§ 75-3-407, 75-7-406. To prove undue influence, a will contestant must establish, by a preponderance of the evidence, *In re Estate of Kesler*, 702 P.2d 86, 88 (Utah 1985),

> "an overpowering of the testator's volition at the time the will was made, to the extent he is impelled to do that which he would not have done had he been free from such controlling influence, so that the will represents the desire of the person exercising

the influence rather than that of the testator."

In re Estate of Ioupe, 878 P.2d 1168, 1174 (Utah Ct. App. 1994) (*quoting In re LaVelle's Estate*, 248 P.2d 372, 375-76 (1952)).

Undue influence is typically proven through circumstantial evidence, rather than direct evidence, e.g., eyewitness accounts of someone exerting pressure on the testator. Factors typically considered are the opportunity to influence the testator; what interest the undue influencer receives in the estate; whether the testator was in a weakened physical, emotional, or mental condition at the time the will was signed; and whether a confidential relationship existed between the testator and the undue influencer.

One judge pointed out that claims of undue influence are often asserted by family members who live far away from the testator and who have not regularly assisted the testator or provided care to her. The claims can ring hollow, especially when other heirs or beneficiaries have been present for long periods of time and rendered substantial care or service to the testator. The testimony and descriptive detail of those who provided the service can be very powerful in undercutting claims of undue influence.

Proving incompetence requires overcoming the presumption of testamentary capacity.

The survey results show that in very few cases does a will or trust contestant succeed in proving the incompetence of a testator or trustor. Again, these cases do not include guardianships and conservatorships. Based on the data gathered, the likelihood of success is only 5–6%. Under Utah law, a testator "is presumed competent to make a will, and the burden of proof of testamentary incapacity is on the contestant of a will." *Id.* at 1172 (citation and quotation marks omitted). Thus, to prevail, the contestant has the burden to "show by a preponderance of the evidence that [the testator] was incompetent to make the contested will and trust." *Kesler*, 702 P.2d at 88; *see also* Utah Code Ann. § 75-3-407(1) (explaining that contestants of a will have burden of establishing lack of testamentary capacity).

Under Utah law, a three-part test determines testamentary capacity: "one must be able to (1) identify the natural objects of one's bounty and recognize one's relationship to them, (2) recall the nature and extent of one's property, and (3) dispose of one's property understandingly, according to a plan formed in one's mind." *Ioupe*, 878 P.2d at 1173 (citation and quotation marks omitted). "[T]he law does not require that a person be particularly alert, nor need he have any special acumen in order to execute a will." *Id.* (citations and quotation marks omitted).

No-contest provisions are sometimes enforceable.

The term "no-contest clause" is used here interchangeably with *in terrorem* or penalty clauses in the narrow sense that it signifies a prohibition against contesting a will or trust. There seems to be a widespread belief among Utah estate planners that no-contest clauses are unenforceable. That perception likely exists because most estate planning lawyers have never participated in a proceeding where a no-contest provision has been upheld. However, such cases exist. While two judges in the survey reported having enforced no-contest provisions, the likelihood of prevailing on a no-contest clause claim at trial or on summary judgment based on the data gathered is less than 1% – in fact, it is a meager 0.6%.

The two cases that involved enforcement of a no-contest clause

had to comply with Utah statutory law the language of which is derived from the Uniform Probate Code. Utah Code sections 75-2-515 and 75-3-905 contain nearly identical language and state: "A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." Utah Code Ann. § 75-3-905; *see also id.* § 75-2-515 (providing same language but substituting "any interested person" for "an interested person"). The statute does not define probable cause in this context. However, Black's Law Dictionary defines probable cause in a civil or tort context to mean: "A reasonable belief in the existence of facts on which a claim is based and in the legal validity of the claim itself. In this sense, probable cause is usu[ally] assessed as of the time when the claimant brings the claim (as by filing suit)." Black's Law Dictionary pg 1395 (10th ed. 2014).

There is an understandable reluctance to enforce such provisions when harsh consequences of either disinheriting or otherwise penalizing a will or trust contestant could occur. Nevertheless, the purpose of a will and trust is to determine the testator's or trustor's intent and give effect to it. So long as the testator was competent, it matters little whether others agree with the testator's decisions or think the distribution is fair. One judge observed that a no-contest provision is more likely to be enforced if it is a custom-drafted provision containing details or specific concerns rather than a standard boiler-plate provision. In other words, if the testator or trustor has reason to foresee the real likelihood of a groundless challenge being asserted by a disgruntled heir or beneficiary and explains those reasons in the document, then a judge is more likely to give full effect to the provision. The same judge stated that the testator or trustor might even go so far as to identify the heir(s) or beneficiary(ies) who are the cause for concern.

Constructive trusts are rarely imposed.

In Utah, undue influence is presumed where a confidential relationship exists between the testator and the beneficiary of the will. *In re Estate of Jones*, 759 P.2d 345, 347 (Utah Ct. App. 1988), *rev'd on other grounds*, 858 P.2d 983 (Utah 1993). "A confidential relationship arises when one party, after having gained the trust and confidence of another, exercises

extraordinary influence over the other party." *Id*. However, the presumption of undue influence in a confidential relationship is rebuttable. *In re Swan's Estate*, 4 Utah 2d 277, 293 P.2d 682, 689 (Utah 1956). In the data collected, the responding judges had only imposed a constructive trust on summary judgment nineteen to twenty-one times – only 6% of the cases.

Judges seldom decline to appoint nominated fiduciaries.

It is not uncommon for a will or trust contestant to challenge the appointment of the person nominated as personal representative of a will or as successor trustee of a trust. There is some prospect of succeeding in efforts to block such an appointment, but the odds are not high. The data collected showed that in 53 to 55 instances, judges declined to appoint the nominated personal representative or trustee. That translates into a 16% chance of success.

Technical breaches of fiduciary duty don't carry the day.

Judges understand that non-professional personal representatives or trustees are usually unfamiliar with probate and trust code requirements and will often make technical mistakes. Sometimes adversaries will try to make much of the fact that certain formalities were overlooked or that technical violations occurred. What catches most judges' attention and raises their ire is when persons who have fiduciary obligations knowingly and repeatedly refuse to comply with their responsibilities. Examples include self-dealing, failure to keep heirs or beneficiaries informed of the fiduciary's actions, or blatant violation of ethical rules or fiduciary duties. The data collected showed that in thirty-nine to forty-two cases (12% of the time), the judges found a breach of fiduciary duty that was determined to be sufficiently serious that the court discharged the personal representative or trustee.

OTHER GOOD THINGS TO KNOW

Number of estate/trust cases being resolved through ADR

The general sense among the responding judges was that the use of ADR in estate and trust cases results in a large number of cases being resolved. Responses to the number of cases resolved by the use of ADR included: "approximately half," "greater than half," "a lot," "a high percentage," "most," "the vast majority," "80%," and "90%." Interestingly, there were a handful of judges whose experience was at the other end of the spectrum. Those responses were "zero," "a few," "at most 5%," "20%–25%," and "one of three."

Currently, only the Third District has adopted an ADR rule specific to its probate cases. This rule requires parties to either engage in ADR or opt out after the client has watched a video about the process and affirmatively elects to opt out. However, the general mandatory mediation rule that applies in all districts also applies to probate cases. *See* Utah Code Jud. Admin. R. 4-510.05 and R. 4-510.06.

Some data was provided by the Third Judicial District Court's Team Manager Clerk who oversees the probate calendar. As of July of 2015, of the 126 cases referred to mediation in 2014, forty-one cases (33%) went directly to the assigned civil judge, nothing had been done in twenty-nine cases (23%), nineteen cases (15%) settled without mediation, fourteen cases (11%) had been dismissed, ten cases (8%) settled as a result of mediation, six cases (5%) were mediated with no agreement reached, in five cases (4%) the objecting parties withdrew their objections, and there were miscellaneous outcomes in the other two cases. These numbers suggest that in the Third District, a significant percentage of cases either bypass ADR or fail to resolve in ADR, and therefore proceed with the assigned civil judge.

Non-professional trustee rates

The hourly rate allowed by courts for services provided by professionals – e.g., trust officers, attorneys or CPAs – serving in the fiduciary roles of trustee or personal representative tend not to be too controversial because they charge established rates, and information about prevailing rates for such services in the community is usually readily available. That is not the case with non-professional trustees or professional representatives. At times those serving in such roles can be professionals in their own right, *e.g.*, a doctor, engineer, or business executive, who spend valuable time at some expense to fulfill fiduciary duties. The survey asked judges what the range is on the hourly rate they have approved for individuals serving as a non-professional trustee or personal representative. The responses provided no uniform scale. Two judges said $20 per hour. Others answered $25 to $30 per hour, under $50 per hour, $50 to $60 per hour, $30 to $75 per hour, and $75 per hour. One former judge believed he allowed up to one-half of an attorney's hourly rate.

Attorney fee awards depend on circumstances of case. Lawyers may at times wonder whether there is an unspoken rule or "smell test" about a limit on the award of attorney fees in hotly contested trust and estate litigation. When asked in the survey whether the judges had a "rule of thumb" or other guide as to the maximum amount of attorney fees they would award in relation to the size of the trust/probate estate, the overwhelming response (sixteen out of twenty-five responses) was no. Most of the judges said they look at the circumstances of each case and decide what is appropriate. *See* Utah R. Civ. P. 73(b). However, one judge observed that he "would be troubled by any case where fees exceed 20%." Another judge answered if attorney fees were greater than one-half the size of the estate, "it seemed excessive."

SOME WORDS OF ADVICE FROM THE JUDGES

Evidentiary issues

In response to the question as to what are the evidentiary issues they see that sometimes trip up lawyers trying trust or probate estate cases, six judges cited hearsay and five mentioned foundation/authentication issues. Other responses included "financial expert qualification," "capacity," "parol evidence," "accounting proof," and "forgery without experts."

One judge with significant experience presiding over probate cases concisely identified four potential problem areas: "First, inability to understand and meet clear and convincing standards when applicable. Second, hearsay issues. Third, great difficulty tying evidence of incompetence or duress/undue influence to the critical time period. Fourth, difficulty documenting financial transactions with any precision."

Common mistakes

Another survey question was, "What are some of the most common mistakes you see made by probate lawyers?" An initial observation from one judge was that "[i]t is usually people who aren't probate lawyers who make the mistakes." Common mistakes identified were "late inventory/accounting," "not producing original testamentary or trust documents," "not getting notice to all parties," not obtaining complete lists of "interested parties," "not arranging for representation of

incapacitated individuals," and "failing to include property descriptions in a court order obviously intended for recording." One judge identified as a common mistake the decision of a probate lawyer to take on contested litigation if he or she lacks the requisite trial experience: "Estate planning lawyers rarely have the litigation skills needed to try a difficult probate case. At a minimum they should associate a litigator with business litigation skills." Another mistake noted was "[g]oing to trial based on interested parties' perceptions but without supporting third-party or documentary evidence in support."

Know the rules and know how to present the evidence in contested cases.

A number of judges commented that too many lawyers take on probate and trust matters without having sufficient knowledge and experience with the trust and probate laws. There are both procedural rules and substantive law issues relating to estate and trust practice that one must understand to competently practice in those areas. For example, parties alleging undue influence and incompetency carry the burden of proof and also must deal with certain presumptions. To meet that burden and prevail, a contestant must come forward with evidence that bears on the critical issues of whether the testator or trustor was competent or unduly influenced at the time of execution of the document in question. The further in time the evidence is from the time of actual execution, the less relevant and material the evidence is. The requirement that the undue influence or incompetence be in effect *at the time of execution* is often overlooked, causing an unnecessary expenditure of time and resources on those claims. As one judge aptly stated: "Suspicion that money or property has gone missing from the estate is not a substitute for proof."

Recommendations on helping resolve disputes

The final survey question asked of the judges whether, given the challenging family dynamics and extraneous factors that often come into play in trust and probate estate disputes, they had recommendations for practitioners as to how practitioners might be more effective in helping resolve such disputes. Three judges identified the importance of lawyers telling their clients frankly about likely outcomes. Their statements were: (1) "Create realistic expectations about outcomes"; (2) "Be really honest with clients about likely outcomes. Identify disputes not worth fighting over"; and (3) "Be honest with clients about what is real."

One judge offered this thoughtful insight about the advantages of a voluntary resolution the parties reach themselves over a court's ruling:

> Spend as much time in efforts to settle the case as in litigation. A case settled through attorneys' efforts or through mediation will bring more peace to the family than a judge's decision. I may make a rational, well-thought-out decision that makes no one happy, while the parties' own compromised settlement will let every family member believe that they were, at least, somewhat victorious and were fairly treated.

CONCLUSION

What conclusions can fairly be drawn from the collected data? First, not many contested cases are decided on summary judgment or make it to trial. That is good news for all concerned. Voluntary resolutions conserve judicial resources and provide the best opportunity to preserve what have likely become strained family relationships. Judges, by and large, strongly prefer and encourage litigants in estate and trust cases to work out their differences themselves, if possible. Second, those litigants who are unwilling or unable to reach resolution on their own and carry the burden of proof to establish their claims face low probabilities of succeeding – none greater than 16%. Third, the burdens to prove undue influence, incompetence, lack of qualification or fitness to serve as a fiduciary, or breach of fiduciary duty rest upon the party asserting the claim.

Concrete evidence, both testimonial and documentary, from the critical time period (usually the date of execution of the will or trust) and from both disinterested and knowledgeable sources with first-hand information is needed to prevail. The final take-away is that good lawyers make sure their clients – from the outset – understand the likelihood of success, the law that will govern, the costs that will be incurred and the emotional strain that is inevitable in protracted litigation. Good lawyers help their clients see the whole picture and set realistic expectations – and then give them the best representation they can on whatever path the client chooses.