

## **Challenging Joint Assets, Wills and Trusts**

It is never easy when a family believes that a will, trust, or joint bank account is invalid or does not really express a deceased loved one's true intentions. For example, what do you do when your father with Alzheimer's disease or dementia has added his second wife's name to a bank account that was always meant for the family, or your mother changed her will or trust to omit you in favor of your brother or sister? Or even worse, what happens if a caregiver or "friend" ends up receiving everything and the family gets the short end of the stick?

All of these can be successfully challenged in court under the right circumstances, with the help of an experienced probate litigation attorney, but only if the help is sought before it is too late. It is usually not too late even after the exploited senior passes away. Joint assets, including bank accounts and real estate, along with will and trust changes, and outright gifts can be set aside and undone on the basis of incompetence, undue influence, fraud and other reasons. But these legal challenges can only succeed if timely action is taken with the help of a good lawyer.

***Incompetence*** – The test for mental competency varies depending on the document challenged, but for every situation, the crucial factor in the test is whether the individual reasonably understood the nature of the document or transaction when it was signed. For someone with Alzheimer's or dementia, who has good days and bad, this is not always a bright-line test with an easy answer. Medical records are often the best way to determine if a person was considered competent at the time. Independent witnesses are also a great source of information and help. However, the law presumes

that a will, trust or asset designation is valid, and it is up to the person challenging it to convince the court otherwise.

**Undue Influence** – When a person is improperly influenced to change documents or give away assets, to the point that the change is not what the person would have freely chosen to do, then the change can be undone through a successful undue influence claim. Undue influence can occur through threats, flattery, excessive persuasion, or physical or emotional coercion. In fact, the law presumes undue influence has occurred when the beneficiary was acting as the Power-of-Attorney, or otherwise occupied a position of confidence and trust, such as a caregiver. This presumption is useful in many cases, but is not definitive and can be rebutted.

**Fraud** – Even when competent, vulnerable adults with Alzheimer’s disease or dementia can be tricked into transferring assets or changing bank accounts or estate planning documents based on material statements of fact that are false. When someone relies on a false representation, such as a false promise or another type of lie, the transaction or document can be set aside as invalid.

**Accounts of Convenience** – For joint bank accounts in particular, and sometimes other joint assets (even including real estate), a loved one with Alzheimer’s or dementia may add the name of a child or other trusted relative as a convenience to help with bill paying, financial management or as a “poor man’s will” to save costs. If the person did not intend the joint owner to keep the asset on death, but instead only added the joint name as a convenience, then courts can and do order the asset to be turned over to the estate and shared with the other beneficiaries. This also applies to

brokerage accounts, stocks, and other investments. The key is always the intent of the person who added the name at the time it was created, not afterwards.

Deciding whether or not to contest the joint nature of an asset, or an unfavorable estate planning document, is not always an easy one, and certainly should not be made lightly. Court battles seeking to set aside documents or transactions can be costly and time-consuming. They can also tear families apart.

Of course, many times the family is already broken beyond repair. Honoring the true wishes of an elderly loved one is often worth the fight. How to know when is the time to fight or not? You must set aside emotions, act with logic, and consult an experienced probate litigation attorney.

And what about those times when you decide not to challenge a will or trust? Does that mean you have no rights? No. All will and trust beneficiaries have rights. Challenging the actions of an executor or trustee is not the same as attacking the will or trust as invalid. Every decision made by a trustee or personal representative, from distributing items of personal property, to cashing in large investments and selling real estate can be questioned. Why?

The answer is simple. Every person who is charged with the responsibility of administering an estate or a trust has a fiduciary obligation to protect the rights of all beneficiaries. This means they must make decisions that are in the best interests of everyone, not themselves.

This duty includes the responsibility to share information, including what's in the estate and trust, and what has been done with the property. Every beneficiary in Michigan has a legal right to receive an inventory explaining what is in the trust or

estate, and an accounting, which documents what has been done with the trust or estate property. Beneficiaries can request and receive supporting documentation (such as checks, account statements, bills, etc.). Finally, they can also challenge, through probate court proceedings, anything that they believe is not fair, accurate or right. This can be anything from blatant self-dealing to negligence in handling investments. Not sure if something is right? It's time to talk to an experienced attorney.

### **Conclusion**

Family feuds and other legal challenges make caring for an elderly loved one much more difficult. When a loved one passes, no one wants their memories marred by a court battle. Unfortunately, legal proceedings cannot always be avoided, especially when someone takes advantage of a vulnerable senior citizen. Knowing your legal rights is the first step. Hiring an experienced and qualified attorney, like those at The Center for Probate Litigation, can make all the difference in the world.

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