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Mistakes in a Will or Trust May Be Corrected by the Court in Narrow Circumstances

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The importance of carefully drafting a will or a trust with competent counsel is underscored by the narrow circumstances in which a court will correct mistakes that may exist in a will or a trust. Various types of mistakes are treated differently by the courts, and the court's treatment varies widely across different jurisdictions.

Mistake in the Inducement

A mistake in the inducement occurs when the person making a will (the Testatrix or Testator) misunderstands a relevant fact or law, leading them to make a bequest they would not have made if they knew the truth. Some states hold that a mistake in the inducement is not a sufficient ground for modifying or invalidating a will, while other states allow correction of mistakes in the inducement regarding wills only in limited circumstances, such as where the will itself states the mistake and what the Testator would have done had he not been mistaken. For example, if the Testatrix believes incorrectly and states in her will that her late husband left the bulk of his estate to one child, and on that basis she elected to leave the bulk of her estate to another child, instead of leaving equal shares to both children, some courts would likely enforce the will as written, notwithstanding the mistake that appears on the face of the document. While in other states, because the mistake is reflected in the will itself, the courts may allow it to be modified.

Statutory Exceptions

Understanding the law of the state governing interpretation of the will or trust is vital. For example, in certain states, statutes make provisions for a child omitted from a will because of the Testator's mistaken belief that the child predeceased him. Other states provide statutory relief for mistakes in the inducement when the will is executed under a mistake of fact as to the existence or conduct of an heir at law by allowing the heir to receive an intestate share of the decedent's property.

Mistakes About Legal Effect of Will or Trust

A mistake about the legal effect of a provision in a will generally does not establish a basis for the will to be modified or set aside, even if caused by incorrect legal advice. So, for example, if the Testator did not realize a certain bequest would have an adverse tax consequence – or if he mistakenly thought a certain bequest would obtain a tax benefit – the will most likely would not be changed or invalidated by the courts. This again underscores how crucial it is to select competent counsel to prepare a will or trust.

Distinguishing Capacity and Undue Influence from Mistakes

If a mistake is actually caused by a lack of competence of the Testator or if the Testator is under the undue influence of someone else, then courts may apply a different test to determine if the will or bequest should be set aside. For example, if a Testator is convinced by his fourth wife that his children from a prior marriage have stolen his money, a court may well set aside his will because of the wife's undue influence. Or, if the Testator has an insane delusion that his children have stolen from him and he disinherits them on that basis, he may have lacked the necessary mental capacity to make a will, and a court could set aside his will on that basis. But in these examples, the legal basis for invalidating the will would be lack of capacity or undue influence, and not merely because of a mistake.

It is not unusual for the concepts of undue influence, fraud, and mistake to be fused together, creating a good deal of confusion. Indeed, many jurisdictions require some sort of misrepresentation, fraud, or active encouragement of the mistake of fact/mistake in the inducement to invalidate a will or bequest, which intersects with undue influence arguments. Some states even go so far as to require a "mistake of fact [to be] the product of undue influence."

Mistakes of Expression

A mistake of expression occurs when the will or trust includes a term that misstates the Testator's intention, fails to include a term that was intended to be included, or includes a term that was not intended to be included. Mistakes of expression are frequently caused by drafting errors. Reformation of the will to correct a mistake in drafting may be available if the drafting error can be established by clear and convincing evidence. By way of illustration, if the Testatrix intended to make a trust revocable and so instructed her attorney, but the attorney drafting the trust mistakenly failed to include the revocation clause, the court may reform the trust if it is proved with clear and convincing evidence that the intent of the Testatrix was to make the trust revocable, and the irrevocable language was mistakenly included by counsel.

Of course, mistakes of expression allegedly resulting from attorney errors may give rise to lawsuits against the drafting attorney.

Mistakes in Execution of a Will

The law of strict compliance requires that a will be executed in accordance with statutory formalities or the will cannot be admitted to probate. The common law doctrine of substantial compliance and the statutory rule of harmless error provide exceptions to the rule of strict compliance. Most states, if not all, recognize some form of the doctrine of substantial compliance. Under the doctrine of substantial compliance, a court will validate a will that does not meet all the statutory requirements for execution if the will meets some of those requirements. Currently, 12 states (California, Colorado, Hawaii, Michigan, Minnesota, Montana, New Jersey, Ohio, Oregon, South Dakota, Utah, and Virginia) have adopted some permanent form of a statutory harmless error rule and one state (Mississippi) has adopted the rule for wills executed during a certain limited time period. Some states apply the harmless error rule more liberally than others. Generally, under the harmless error rule, if one can establish by clear and convincing evidence that the decedent intended the wrongly executed will to be the decedent's will, the erroneously executed document will be treated as such.

South Carolina Law

In South Carolina, the law in the area of mistakes in wills is not well developed or clear, but the courts have held that a will would not be set aside based upon a mistake of either law or fact unless a mistake is about the identity of the instrument or is a fundamental error, as where, for example, two wills are drafted for different persons and one party signs that intended for another. Further, if the Testatrix is mistaken as to the contents of her will, the will may be invalidated in part. Evidence that the will was read to the Testatrix, however, creates a rebuttable presumption that the Testatrix knew and approved of its contents.

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