

Points of Law

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NOTE TO READERS

We consider poor drafting of testamentary instruments in this issue. Nothing can destroy an estate plan more effectively than the use of inept gifting language or failure to express the testator's intent.

CURRENT CASE

Every state has appellate cases that reflect what can happen when a trust or will clause is drafted in ambiguous terms. A current New Mexico case involves the estate of Harry Deupree and is pending before the New Mexico Supreme Court. Mr. Deupree's Trust provided that Mrs. Deupree would have a life estate in their home, or if she no longer wanted to live there, it would be sold and the proceeds would be used for her health and maintenance.

After Mr. Deupree's death children from a prior marriage came with a moving van and began removing property from the home. A settlement agreement was reached and Mrs. Deupree continued to live in the home until her death a year after Mr. Deupree had died. During that year, the Trustee borrowed money against the home to finance nursing care for Mrs. Deupree. The Deupree children then challenged the Trustee's right to borrow money against the property and wanted to offset the amount borrowed against other money due to Mrs. Deupree's estate. The Court of Appeals ruled that the language of the Trust was ambiguous because it did not clearly provide if Mrs. Deupree could continue to reside in the home and borrow funds against it for her health and support. The court allowed extrinsic evidence in the form of testimony from the attorney who drafted the Trust.

That attorney testified that Mr. Deupree intended that Mrs. Deupree pay her own expenses until she moved out of the home. In apparent reliance on the attorney's testimony the court ruled that the amount borrowed against the home should be offset against the sums otherwise due to Mrs. Deupree's estate. In the face of language that would have allowed the entire sale proceeds of the home to be devoted to Mrs. Deupree's care, the opinion is disturbing. See In the Matter of the Estate of Harry L. Deupree, NMCA Opinion No. 2002-NMCA-2002. Certiorari Granted No. 27,636.

AMBIGUOUS LANGUAGE

A recent New Mexico will offered for probate gifted the testator's Astocks, bonds and other securities to a beneficiary. That language has been known to be troublesome at least since the case of Lyons v Safe Deposit & T. Co., 120 Md 514, 87 A 1089 (1913). Several cases in other states consider whether savings accounts, promissory notes, uncashed checks, money market accounts, and mutual funds are other securities. The results among the states are inconsistent and apparently arbitrary. How New Mexico courts will interpret such language is unknown.

Wills that leave a residence and its contents, described by its legal description, to a beneficiary are common. The testators usually state that they have left their home and its contents to the named beneficiary. Often their current residence is not the one described. In one case the beneficiary was very disappointed to learn that because the legal description was used, she had no rights to the new home and its contents. Particularly so as the testator had told her just before death that the home would be hers.

SUGGESTIONS

Ambiguous language may result from failure to use language common in the craft of drafting testamentary instruments and failure to adapt form language to accomplish what the testator wanted to accomplish. The attorney doing the drafting needs to be experienced, exercise care in drafting, and communicate thoroughly with testators. Testamentary documents should:

- Avoid language with conflicting court interpretations;
- Reflect the testator's intent not the attorney's;
- Be reviewed with the testator to be sure they will do what the testator intends;
- Be reviewed often to see that they continue to be compatible with testator's intentions; and

- Be created while the testator is mentally alert and able to participate fully.