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FW: Draft of Safe Harbor Statute for No-Contest Clauses to Be Considered at May 10 Spring Committee Meeting

Robert Selsor <[redacted]> Thu, Apr 16, 2020 at 1:21 PM
To: "russ willis (rawillis3@plannedgiftdesign.com)" <rawillis3@plannedgiftdesign.com>

From: David English, Probate and Trust Committee Chair <[redacted]>
Sent: Monday, April 22, 2013 12:46 PM
To: Robert Selsor <[redacted]>
Subject: Draft of Safe Harbor Statute for No-Contest Clauses to Be Considered at May 10 Spring Committee Meeting

At the Spring Committee meeting on May 10, the Probate and Trust Committee will be considering a proposed safe harbor statute dealing with no-contest clauses. This proposal is attached. Following my email note is an explanation of the proposal that was written by Bob Selsor, the Chair of the Fiduciary Litigation Subcommittee, which drafted the proposal. Prior versions of this proposal have been discussed at previous Probate and Trust Committee meetings. Comments concerning the proposal can be directed to Bob Selsor, [redacted], or to me, David English at [redacted].

David English, Chair
Probate and Trust Committee

Proposed "Safe Harbor" statute for no-contest clauses

The fiduciary litigation subcommittee has drafted a "safe harbor" statute dealing with no-contest clauses in both trusts and wills to provide a limited early judicial review of such clauses to determine whether they are enforceable. The genesis for this effort is based reported instances of such clauses being drafted so broadly as to go beyond what Missouri courts and public policy have traditionally deemed to be acceptable circumstances for enforcing the forfeiture of a beneficiary's beneficial interest under an instrument.

Examples given include a clause forfeiting a beneficiary's inheritance if he or she seeks removal of a trustee for any reason--even if the trustee has engaged in malfeasance or self dealing. Another example was a clause forfeiting a beneficiary's interest for seeking an accounting. These and other examples represent instances where bedrock beneficiary rights otherwise protected under the MUTC can be chilled by even the hypothetical risk of a forfeiture on the part of a person seeking to enforce such rights.

Missouri law currently strikes a balance in the enforcement of such clauses and its courts will enforce such clauses if they are reasonable in scope and effect. Thus, a party who institutes a trust contest, for example, may well expect to lose an inheritance if his or her action is ultimately unsuccessful in the face of such a clause. But that balanced enforcement has little meaning if a draftsman can incorporate provisions that would otherwise be repugnant to the basic rights guaranteed by provisions in the MUTC such as 456.1-105 or 456.8-813. While most of the MUTC's provisions are default provisions applicable only if a trust document does not provide contrary provisions, a few rights are guaranteed regardless of a scrivener's provisions to the contrary.

But as a practical matter, few attorneys faced with even the most repugnantly overreaching no-contest clauses will be able to "guarantee" to their clients that the clause will be unenforceable since even presenting the issue to a court for

determination under current law risks the forfeiture in the first instance.

Thus a "safe harbor" process for vetting such clauses when they arise is embodied by the draft statute. This statute provides for early, limited review of such clauses based only on consideration of the language of the clause at issue in the context of a verified set of factual allegations. No other evidence may be considered except in the rare instance where a true ambiguity in the no-contest clause requires extrinsic evidence to determine its meaning. Recognizing the public policy considerations that support no-contest clauses -- preventing beneficiaries from bringing baseless challenges or claims--the statute references section 456-10-1004 which allows for an award of legal fees at the court's discretion if the circumstances warrant such an award.

Thus, the statute is designed so as to greatly limit the scope of any proceeding instituted under its terms and to guard against insubstantial or bad faith claims. But on the other hand it is felt that it will serve to allow for the enforcement of certain basic rights on the part of trust beneficiaries that would otherwise be chilled by the threat of a blanket forfeiture.

Bob Selsor

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