

CONTESTING THE PLAN AND PLANNING

THE CONTEST:

DISCOVERY IN PROBATE LITIGATION

SCOTT D. WEBER

CALLOWAY, NORRIS, BURDETTE,

WEBER & BAXTER-THOMPSON, PLLC

AND

JAMES J. HARTNETT, JR.

THE HARTNETT LAW FIRM

DALLAS BAR ASSOCIATION

PROBATE, TRUSTS & ESTATES SECTION

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TOPICS

- Primer on Discovery Methods
- Some Rules on Discovery
- What Not to Do
- Concepts for Discovery
- Sources of Discovery
- Words of Wisdom

DISCOVERY METHODS

- Request for Disclosure – TRCP 194.2
- Interrogatories
- Requests for Production
- Requests for Admissions
- Rule 202 Petition
 - *In Re Meeker*, 497 S.W.3d 551 (Tex. App. – Fort Worth 2016, orig. proceeding).

DISCOVERY RULES

(Frequently Violated)

- Discovery is not limited to what is relevant – it is limited to what is likely to lead to the discovery of admissible evidence.
- Must be specific.
 - TRCP 196.1(b). “The request must specify the items to be produced . . . either by individual item or category, and describe with reasonable particularity each item and category.”

DISCOVERY RULES

(Frequently Violated)

- TRCP 195.1 provides that: “A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194. . . .”
- Comments to TRCP 197 provide that: “. . . interrogatories that ask a party to state all legal and factual assertions are improper.”

WHAT NOT TO DO

(Actual Discovery Requests)

- Copies of all documents that mention, memorialize or reflect in any way the decision to release, alienate, transfer, distribute and/or spend any of the TRUST funds at any time to anyone during the history of the TRUST.
- Any and all documents, memoranda, or writing related to any interest you may have in real estate, whether as owner, co-owner, fiduciary, trust beneficiary (vested or contingent), partner, limited partner shareholder, joint venture, mortgage, developer, manager, or otherwise.

WHAT NOT TO DO

(Actual Discovery Requests)

- Copies of all documents showing any property in any form in which the TRUST currently owns.
- Documents containing information about Decedent's mental ability to pay her bills.
- Documents containing information about any bill the Decedent paid or failed to pay.
- All documents relating to compensation received by you, or any of your family members, from the _____ Corporation, or any of its Subsidiaries or Affiliates from 1990 to the present.

WHAT NOT TO DO

(Actual Discovery Requests)

- All documents reflecting any financial transactions at any time and of any nature involving the Trusts.
- Copies of all documents evidencing any joint tenancy with survivor agreements, payable on death accounts, or trust account between Decedent and any other person, including the terms of any such agreement, signature cards on bank accounts, or other documents or agreements evidencing such arrangement at any time.

WHAT NOT TO DO

(Actual Discovery Requests)

- Documents containing information about the payment of money you made for or on behalf of Decedent to any attorney who prepared estate-planning Documents for the Decedent in the last eight years of the Decedent's life.
- Documents containing information about Real Property that was owned by Decedent on the Decedent's Date of death.
- All records or other documentary evidence you have regarding your place(s) or residence(s) since January 1, 1997.

WHAT NOT TO DO

(Actual Discovery Requests)

- Documents containing information about Personal Property that was owned by Decedent on the Decedent's Date of death.
- Documents created or authored within the six months before and after Decedent allegedly executed the purported Will that demonstrate, generally and basically, that Decedent had or lacked sufficient mental ability to enter contracts for services.

WHAT NOT TO DO

(Actual Discovery Requests)

- Please produce Documents containing information about gifts or assets You received in the last eight years from Decedent.
- Documents containing information about the quality and/or nature of the Decedent's relationship with _____.
- For each expert discoverable under Texas Rule of Civil Procedure Rule 192.3, produce documents that have been provided to, reviewed by, or prepared by or for that expert.

WILL CONTEST CONCEPTS (WHAT IS REASONABLY CALCULATED)

- Participation by a beneficiary in the preparation of documents.
- The circumstances surrounding the drafting and execution.
- The words and acts of all attending parties.
- The motive, character, and conduct of those benefited by the instrument.
- The relationships between the testator/settlor and the beneficiaries and heirs.

WILL CONTEST CONCEPTS (WHAT IS REASONABLY CALCULATED)

- The physical and mental condition of the testator/settlor (e.g., weakness or infirmity).
- Dependency on or submission to another person.
- The improvidence of the transaction.

RED FLAGS OF UNDUE INFLUENCE

1. The testator's heavy dependence on one of the intended beneficiaries for care, transportation, or communication.
2. The beneficiary sets up the meetings.
3. The beneficiary or his or her spouse attends the meetings with the testator.
4. The testator asks few or no questions.
5. The beneficiary or spouse does most of the talking in the meetings.
6. The beneficiary calls you to discuss the dispositive terms or the changes.
7. The beneficiary and/or spouse attend the execution of the documents.
8. The testator's regular lawyers have been bypassed.

SOURCES OF DISCOVERY

- Doctors, nurses, and other health care providers;
- Lawyer, CPA, broker, banker, and other professionals;
- Housekeeper, yard man, handyman, etc.
- Trainer, dry cleaners, bartenders, waiters, etc.
- Barber, hair dresser, manicurist, personal shopper, etc.

SCRIVENER'S FILE

- In general, communications between attorneys and their clients are privileged. T.R.E. 503(b)(1).
- “There is no privilege under this rule ... [a]s to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions....” T.R.E. 503(d).

SCRIVENER'S FILE

- *In re Texas A&M-Corpus Christi Foundation, Inc.*, 84 S.W.3d 358 (Tex. App. – Corpus Christi, 2002, orig. proceeding).
- *In re Durbin*, 2017 WL 2628069 (Tex. App. – Austin 2017, orig. proceeding).

WORDS OF WISDOM

- Prepare, Deliver, and Retain a Summary of the Dispositive Terms.
- Keep Your Notes.
- Be Careful What You Add to the Document.

THE END