WANT TO CHALLENGE A WILL? HERE'S WHAT YOU SHOULD KNOW

If you are upset or disagree with the provisions of a will, you may be wondering if you should challenge it. In this article, we discuss a few grounds for challenging a will and what may happen if your challenge is successful.

A will may be challenged for several reasons. However, being upset or disagreeing with the provisions of a will is not enough. Instead, here are a few grounds for challenging a will:

- Lack of Formalities: The will wasn't executed pursuant to the formalities required under Wisconsin law. For example, the will was not signed by the testator (the person making the will) or witnessed by two non-relative and disinterested witnesses.
- Lack of Capacity: The testator lacked the requisite level of mental capacity to execute the will. For example, the testator suffered from dementia or a mental illness that prevented the testator from fully understanding his or her assets and the effect of the document.
- Undue Influence: The testator was unduly influenced by a relative, friend, care giver, or other third party to execute the will. Undue influence includes fraud, force, and coercion. To read more about undue influence, click here.

Upon a successful challenge, the will may be reformed or set aside completely depending on the circumstances.

Sometimes a will may contain a "no contest" provision that prescribes a penalty against an interested person for contesting the will. In these circumstances, a court may find that the no contest provision is unenforceable if the court determines that the interested person had probable cause for instituting the proceedings. *See* Wis. Stat. § 854.19.

The attorneys in the inheritance litigation team at O'Neil Cannon have extensive experience with will contests and other disputes relating to inheritance litigation. Because the rules for will contests are complex, we encourage you to reach out to the authors of this article or any other attorney in our inheritance litigation team with any questions or concerns you may have related to a will contest.

WHAT HAPPENS IF MY BUSINESS CAN'T

PERFORM ITS CONTRACT DUE TO THE CORONAVIRUS?

Many businesses are experiencing interruptions in their operations due to the coronavirus outbreak. These interruptions can be caused by business closures, quarantines, and restrictions on travel and large gatherings. In response to these interruptions, businesses may find themselves unable to perform their contractual obligations or have a vendor or customer that is no longer fulfilling its contractual obligations. Either way, it is important to determine whether nonperformance is excusable given the global pandemic.

Businesses concerned about meeting their contractual obligations due to the coronavirus should review their contracts to determine their options. For instance, many contracts contain a *force majeure* or "Act of God" clause, which may excuse a party's nonperformance when extraordinary events outside of the party's control prevent a party from fulfilling its contractual obligations. Each situation is unique and such a clause may apply for some businesses and not for others. It is important to note that the occurrence of an extraordinary event alone does not excuse performance. Rather, a party seeking to invoke a *force majeure* clause must also show its mitigation efforts and that the event made performance truly impossible. Because the coronavirus pandemic is an uncontrollable and extraordinary event that may prevent a party from performing under a contact, the coronavirus could be considered a *force majeure* event.

A party seeking to excuse its nonperformance based on the coronavirus should review the relevant contract's *force majeure* clause. After all, whether an event qualifies as a *force majeure* event depends on the specific language included in the *force majeure* clause itself. Many contracts will specifically define what constitutes a *force majeure* event. If the parties have defined a *force majeure* event as any event outside the parties' control, then courts may be more inclined to find that the clause encompasses the coronavirus pandemic. Further, courts may apply a *force majeure* clause that specifically lists "acts of government," "pandemics," or "quarantines."

It is important to note that a drop in a customer base alone may not result in the application of a *force majeure* clause. For example, in 2018, one federal district court concluded an egg buyer was not relieved of its obligation to purchase eggs because of a drop in demand under Iowa law, but acknowledged a drop in supply due to an outbreak of avian flu might have constituted a *force majeure* event. *Rexing Quality Eggs v. Rembrandt Enterprises, Inc*., 360 F. Supp. 3d 817 (S.D. Ind. 2018).

To reach this conclusion, the court applied the Restatement on Contracts, which is used by Wisconsin courts. Specifically, the court looked to the following guiding principal:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Id. at 841 (quoting Restatement (Second) of Contracts § 261 (1979)). The court held that "a change in purchaser demand—even a substantial change—is a foreseeable part of doing business." *Id.*

Given the size and changing impact of the ongoing coronavirus outbreak, it is hard to predict how courts will apply this fact-specific analysis to the present situation. Ultimately, whether a viral outbreak like the coronavirus qualifies as a *force majeure* event will depend on how the contract is drafted and the particular facts of the situation. A party seeking to invoke a *force majeure* clause to excuse its nonperformance must be prepared to show its mitigation efforts. Therefore, documenting efforts to overcome the impacts of the coronavirus is key.

Contracts with *force majeure* clauses usually provide what remedies are available to the parties when the clause is invoked. Often, contracts allow for either party to terminate the agreement when one party seeks to invoke the *force majeure* clause. However, contracts may instead permit a party to delay performance until the *force majeure* event is resolved.

Common law remedies may also be available to parties whose contracts lack a *force majeure* clause. Specifically, parties seeking to excuse nonperformance may find relief under the doctrines of impossibility, impracticability, and frustration of purpose. However, whether and under what circumstances these doctrines apply depends on the applicable law in the relevant jurisdiction and the specific facts and circumstances causing the nonperformance.

Overall, businesses impacted by the coronavirus should review their contracts to assess what rights and remedies are available to them in the wake of the coronavirus outbreak. The attorneys at O'Neil Cannon have experience in contract disputes and would be happy to discuss your options with you.

A TRUSTEE'S DUTY OF LOYALTY IN WISCONSIN

In Wisconsin, anyone who agrees to become a trustee is agreeing to become a "fiduciary." A fiduciary is a person or corporation that has legal obligations to a trust's "beneficiaries," those who will benefit from a trust. In our state, a trustee owes the utmost duty of loyalty to

the trust beneficiaries.

A trustee's duty of loyalty requires him or her to administer the trust solely in the interests of the beneficiaries. A trustee violates the duty of loyalty if he or she puts personal interests above the trust beneficiaries' interests.

The trustee is not allowed to profit or make deals for his or her own benefit in the administration of a trust. The duty of loyalty requires that the trustee not be motivated in his or her actions by self-interest or the interests of third parties. A trustee assumes a duty to protect the interests of the trust estate when he or she accepts an appointment as trustee. This means that a trustee cannot allow his or her personal interests to conflict with that duty in any way. This rule is intended to prevent any possible selfish interest of the trustee that can interfere with the trustee's duty to the trust's beneficiaries. Wisconsin courts have held that acting in good faith alone is not enough to satisfy the trustee's duty of loyalty to the beneficiaries.

A trustee must proceed with the utmost caution if he or she engages in a transaction between himself or herself and the trust. For example, if a trustee buys a property owned by the trust, the trustee must be able to show that he or she acted prudently and in a business-like manner with a view to obtain the same fair market value price as he or she might have anticipated with proper due diligence. In general, it is required that trust beneficiaries approve a sale between the trust and a trustee.

If you have any question, please contact Greg Lyons at Greg.Lyons@wilaw.com or 414-276-5000.

MENTAL CAPACITY ISSUES IN ESTATE PLANNING LITIGATION

The United States Census Bureau projects that by 2050, the 65 and older population will nearly double that of 2012. Along with this increasing older population comes an increase in the potential for estate litigation based on mental capacity issues.

These types of claims often arise where the testator suffers from a mental or physical condition, such as Alzheimer's disease or Parkinson's disease, that could compromise a testator's ability to have an understanding necessary to execute a valid will or trust or which may make him or her susceptible to being influenced by another person while making decisions about his or her estate. Advanced age, an inability to handle financial affairs, and

the testator's personality may be other relevant factors when a challenge to a person's mental capacity arises.

In Wisconsin, any person 18 years or older and of sound mind may make, amend, or revoke a will or trust. Testamentary capacity is presumed, but interested parties, including disinherited heirs, may assert that a will or trust does not reflect the true wishes of the testator. The two main ways to challenge testamentary capacity are through claims that the testator lacked legal capacity or that someone exercised "undue influence" over the testator.

The test for legal capacity in Wisconsin is quite specific and requires that a testator have the mental ability to understand the nature and extent of his or her property and his or her relationship to the beneficiaries. A testator must also be able to appreciate the scope and general effect of the provisions of his or her will or trust in relation to the beneficiaries. The testator needs to be able to contemplate these elements together for a sufficient period of time, without prompting, to form a rational judgment in relation to them, the result of which is expressed in the will or trust.

Generally, the testator must have a reasonable understanding of the terms of the will or trust, though a complete understanding of legal terms is not necessary.

A claim of undue influence is essentially one of diminished testamentary capacity, and a person challenging a will or trust may prove it by satisfying the following elements:

1. Susceptibility of the testator to undue influence;
2. Opportunity to influence the testator;
3. Disposition to influence the testator; and
4. Coveted or desired result.

As you can see, estate and probate cases involving mental capacity issues are highly fact specific. A precise application of these factors will depend on the circumstances of each case. Court decisions will depend largely on particular circumstances, which makes choosing an experienced estate planning litigation attorney to develop your case crucial.

If you have any question, please contact Greg Lyons at Greg.Lyons@wilaw.com or 414-276-5000.

FACTORS TO CONSIDER BEFORE YOU AGREE TO

SUBMIT YOUR COMPANY TO ARBITRATION

Arbitration is a procedure used in the resolution of legal disputes outside of the traditional court system. In arbitration, the parties agree to submit their disputes to one or more persons, known as "arbitrators" or an "arbitration panel." An arbitrator is someone, usually a former judge or a lawyer with significant experience in an area of law related to the dispute, who hears and decides motions, rules on evidentiary matters, and ultimately decides the disputed case. The arbitrator's decision, known as the arbitration "award," is generally binding on the parties.

Before you agree to subject your business to arbitration in a commercial agreement, you should carefully consider the nature of any future dispute that may arise over that agreement and whether arbitration of any such dispute will be beneficial. Whether you anticipate that your company will be the plaintiff or the defendant may greatly impact your decision.

The following are some of the factors to consider when deciding whether to agree to arbitration:

- **Input into the selection of the decision maker**. In an arbitration proceeding, the parties typically have input into the choice of the arbitrator. The parties can agree on an arbitrator, or choose an arbitration company to select an arbitrator. A party does not have this luxury with respect to choosing a judge, who is randomly assigned to preside over a lawsuit. In addition, the parties to an arbitration are not subject to the same geographic limitations that exist with a judge. The parties can agree to select an arbitrator from anywhere in the world.
- **A firm date for the hearing**. Parties can generally better control the date of the arbitration hearing than the date of a traditional court proceeding. An arbitrator will likely provide more flexibility scheduling the hearing than a judge will provide.
- **Less formality.** Arbitration proceedings are not generally subject to all of the same rules of evidence or pretrial procedures found in a traditional court case.
- **Lack of full discovery**. Since arbitration is less formal than the traditional court case, the ability to conduct full discovery, especially third-party discovery, is potentially more difficult in an arbitration. In addition, non-parties are not subject to the arbitration agreement and, therefore, may have a greater ability to resist discovery efforts.
- **More costly filing fees**. The fees associated with initiating an arbitration proceeding are typically far more costly than the filing fees associated with a court case. In addition, arbitrators typically charge an hourly rate for the time spent working on the arbitration, including review of documents, attendance at hearings, and preparing decisions. In a court case, the judge presides over your case with no costs beyond the initial filing fee.
- **Takes less time**. The typical arbitration proceeding is resolved faster than the typical

court case. Although there are exceptions to this, arbitration does not suffer from the same back-log of cases found in the traditional court system.

- **No jury**. Arbitration requires that the parties waive their right to a jury trial. The parties present their evidence and witnesses to the arbitrator, who decides the dispute.
- **Greater finality**. In arbitration, there generally is only a very limited right to appeal. As a result, most arbitrations will end with the arbitrator's decision and the parties are generally stuck with the decision, whether good or bad.
- **Greater ability to keep the dispute private**. Unlike a lawsuit filed with the court, parties to an arbitration have the ability to keep the proceedings, and the result, confidential. A court proceeding is almost always public.

If you have any questions regarding this article, please contact Greg Lyons at O'Neil Cannon at 414-276-5000.