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A SHORTCUT TO PROBATE – DO IT WHILE YOU ARE ALIVE

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A New York trust company once reported one of the shortest wills on record – "All to Mother." While it may have succeeded in passing the deceased's estate to his mother, the problem was that he called both his mother and his wife, "mother." Thus, a court had to get involved. Wouldn't it have been great if the deceased could have explained what he meant?

For those of us who get involved with contesting wills and other dispositive instruments, we often wish we could just ask the deceased what was meant by one phrase or another, or why a key provision or name was somehow omitted. Instead we are typically faced with long, drawn-out and expensive battles accompanied by a desperate search for supporting evidence and a knowledgeable expert to prove our case. If only we could offer the will for probate while the testator was alive. Actually, there are eight states at the moment that make this possible. Alaska, Alabama, Delaware, Nevada, New Hampshire, North Carolina, North Dakota, and Ohio all have statutes that offer a procedure for the pre-mortem probate of a will. Although the specific procedure may vary somewhat from state to state, the procedure typically involves a court petition to "prove the will." All interested parties (beneficiaries, heirs, intestate heirs) must receive notice and have the opportunity to respond. Once the will is ruled valid by the court, it may not be later challenged on the testator's death, unless, of course, the testator substantially

modified it in the meantime, although some states, such as Arkansas and New Hampshire, allow the modified will to be considered validated. Generally, in other states a minimal modification, such as a change in the named personal representative, would not re-open the opportunity to challenge, except perhaps for the suitability of the new representative.

The advantages of such a procedure are obvious. A party may be far less inclined to challenge a will while the testator is alive, as opposed to after his death for fear of obvious angry or surprised reaction by the testator. A parent whose competency is challenged can defend her competency and is not likely to look kindly on the child who raised the issue. The disadvantages are that in some jurisdictions, such as North Dakota and Ohio, the contents of the will are made public, as with any will contest. Nevertheless, this procedure may be far more effective than an "in terrorem" clause, causing a beneficiary to lose his share if a contest is made. Of course, an in terrorem clause may still be included in a will offered for pre-mortem approval, provided it is enforceable in the particular state.

But aside from being good cocktail conversation (among lawyers anyway), this does not help Massachusetts testators, as the procedure is only available to wills made by a domiciliary of the respective state, and Massachusetts law does not contain provisions for pre-mortem probate. Nevertheless, there may be a viable alternative. Four of the above states, allow a trust to be validated even though there may be no issues or disputes at the time, and the settlor of the trust need not be a domiciliary of the state. So long as the trust is governed by the law of the state, the pre-mortem validation will apply. The problem with Alaska, New Hampshire, and Nevada procedure in this regard is that they require a formal petition to the court and a subsequent adversarial hearing on the matter, involving time, expense, and publicity. Always at the cutting edge of planning, however, Delaware alone has sidestepped entirely the requirement of a court

petition and hearing, and requires only written notice from the trustee to all interested parties. If a person wishes to contest the validity of the trust, whether revocable or irrevocable, the person must petition the court within 120 days after receiving such written notice from the trustee. Failure of the person to do so forever waives any right they have to contest the validity of the trust, but only those who receive notice are bound by the 120 day window. According to attorney Peter Gordon of Gordon, Fournaris and Mammarella in Wilmington, Delaware, the procedure works well and is used more and more in Delaware trusts.

For purposes of Massachusetts planning, the Delaware pre-mortem validity of trusts law may offer a unique opportunity even though Massachusetts does not offer a pre-mortem probate. And although section 201 of the Massachusetts Uniform Trust Code provides that a proceeding may be brought on any "matter relating to the administration of a trust," it is totally unclear whether this would apply to establish a trust's validity in a way that would preclude a future contest, as opposed to the Delaware statute which is expressly for the purpose. Nevertheless, it should be quite possible for a Massachusetts domiciliary to take advantage of Delaware law.

For openers, the modern estate plan rarely includes an estate that is disposed of by a detailed will. Instead, the will typically "pours over" into a living trust. If the living trust is governed by Delaware law and proper notice was given to the beneficiaries and the other interested parties, the trust could not be contested by them. But, you may ask, why couldn't the pour-over from the Massachusetts decedent's will be blocked in the Massachusetts court? Possibly it could, but on much more limited grounds, for one, and for another, that plan of probate attack could be rendered near useless if the trust was funded during lifetime, leaving few or no assets subject to probate.

There are as yet a few unanswered questions about the Delaware law, but not enough to discourage its use. For example, will an amendment to the trust require a new notice? Probably, if it is a substantial amendment that affects the interest of the interested parties. Then there is the question of real estate, in this case, situated in Massachusetts. The logical approach would seem to be to hold the real estate in an LLC (Delaware) and have the Delaware trust hold the membership interest. If nothing else, it will give the contestants a long, hard, and expensive run for their money, which is what they will have to use to challenge the trust.