FPLG: CIVIL LITIGATION

Charities in the Courtroom 2.1: Inheritance Forgery

12.21.21 | Linda J. Rosenthal, JD

At long last, in a festive ceremony in April 2019, the President of Fort Hays State University was able to formally and gratefully accept the $20-million bequest from the late Nonie and Earl Field. See *Fort Hays State Announces the Largest Single Gift in University History* (April 11, 2019).

The couple had met on the campus in rural Hays, Kansas, as students in the late 1930s. They were devoted supporters and beloved members of the university community throughout their adult lives.

It was no secret that the wealthy childless duo had created a joint estate plan naming their alma mater the principal beneficiary on the death of the surviving spouse. The scholarship endowment would enable generations of future young people to attend Fort Hays State.

Mrs. Field died in 2009. When Mr. Field passed away four years later at the age of 98, no one – including his long-time lawyer or university officials – expected glitches or delays in completing the generous legacy.

But a shadowy figure with a shady past – one Wanda Oborny – threw a monkey wrench into the works that lasted several long and expensive years.

A Brazen Plan

Ms. Oborny was a middle-aged woman vaguely in the orbit of the Field couple who then maneuvered herself into position to become indispensable to the elderly widower, deeply saddened by the loss of his wife of 70 years.

Within days after Mr. Field's 2013 death from an aggressive cancer, Ms. Oborny "found" a document "dated" just weeks earlier; one that – *quelle surprise* – substituted Wanda Oborny as primary beneficiary in place of the University. It was typewritten on a single page of Earl Field's official letterhead, with a handwritten signature Wanda Oborny identified as his. There was also a witness attestation clause, signed by a casual business acquaintance and his wife.

Surely – you say – no one would take this transparently phony piece of paper seriously. Guess again.

Ms. Oborny filed the paper right away with the probate court, offering it as a legitimate codicil (amendment) to the will. Because of a peculiarity in modern American trusts and estate law, the document breezed through the clerk's office; the "filed" stamp afforded it an evidentiary "presumption of validity." The University, contesting the purported codicil, faced a costly uphill battle with the burden of proving by clear and convincing evidence that it was fake.

It was a high-dollar, high-profile lawsuit. Along the way, there was a sensational murder-suicide. On the very day that FBI agents had scheduled interviews with the "witnesses," the husband murdered his wife and then killed himself.

The bench trial lasted nine days with 30 witnesses and 300 exhibits. The judge had little trouble declaring the "codicil" a forgery and tossing it out. But in a collateral motion proceeding arising from yet another strange piece of Kansas probate law, a different judge awarded the forger $1 million in attorney fees and costs on the grounds that she had met the statutory prerequisite; that is, filing the document "in good faith."

On appeal, the three-judge panel easily upheld the lower court's ruling that Ms. Oborny had committed fraud and, just as easily, reversed the $1-million fees and costs award to her.

Inadequate Safeguards, Deterrents

In the April 2019 University news article describing the happy announcement event there was no mention at all of any of this drama. It was an occasion to celebrate "the Fields, childhood sweethearts, lifelong citizens of Hays and devoted alumni and supporters of Fort Hays State" who "made an extraordinary gift to FHSU in their estate plans" which is "unequivocally life-changing" for the students.

Later that year, in a separate venue, Wanda Oborny pled guilty to a mail fraud charge. She was sentenced to twelve months of supervised probation and ordered to pay the University $100 a month for one year.

The mild slap on the wrist is in stark contrast to the way that legal systems of long ago treated the crime of will forgery. In ancient Rome as well as in Georgian England, it was a capital offense.

Primarily to ease off such draconian excesses, the pendulum has swung dramatically in the other direction during the development of probate law in the United States. Particularly since the 1950's, that trend has accelerated. There's been a considerable loosening of rigid, no-exceptions, procedural formalities for execution of testamentary instruments. There's also been a reduction of reasonable checks and balances that could enable court personnel to screen out the most

egregiously suspicious, "don't-pass-the-smell-test," probate filings.

Charities and Courtrooms

It was exactly five years ago this week that we posted *Charities in the Courtroom: Part 1* (December 22, 2016). In the next twelve months or so, we added fifteen more stories of 501(c)(3) organizations at the nation's courthouse doors, either as plaintiffs or defendants. That's not to say that, before and since, there haven't been countless standalone tales of litigation woes.

Since "… nonprofits go to court (or are summoned there by others) on a fairly regular basis," there's no danger of running out of future content. So it's long past time to group them together as "Charities in the Courtroom, Series Two."

And what a perfect gem for the kickoff! *In the Matter Of the Estate Of Earl O. FIELD*, 55 Kan.App.2d 315, 414 P.3d 1217 (2018) is a storyline straight out of the pages of a Lifetime made-for-TV movie script. There's grief and greed, money and murder, charity and chutzpah.

Best of all, there's a pair of law professors who have taken a keen interest in this ruling. They have a lot to say about how legislatures might tweak probate law and procedure to avoid the unfair and oppressive burden faced by Fort Hays State University to complete the game-changing $20 million legacy. See *Inheritance Forgery* (February 7, 2019, updated January 2020), Reid K. Weisbord and David Horton, 69 Duke Law Journal 855 (2020), abstract and full downloadable text available at SSRN.

See also *"Inheritance Forgery" – Theft from Tigers Averted* (July 26, 2021) Jeffrey S. Galvin, Esq., *Trust Me! Podcast,* Trusts and Estates Section of the California Lawyers Association [conversation between Attorney Galvin and Professor David Horton].

Inheritance Forgery

In a nutshell, "inheritance fraud involves using deceit or misrepresentation to obtain undeserved assets or property from a decedent." *Identifying Inheritance Fraud* (September 25, 2014) Coolidge Wall LPA. It "occurs more frequently than you can imagine."

Generally included in this category are: forgery, elder abuse, and will destruction. "Typically, forgery is the most widely recognized type of inheritance fraud. An heir, bitter over his or her inheritance (or lack thereof), could forge certain terms of a will or the signature of the testator, or even fabricate an entire will." And certainly, as here, an outsider can (almost) succeed in the same type of wrongdoing.

Which of several possible terms is preferred for this type of criminal/fraudulent act? It's a bit muddy; there are a number of choices bandied about: inheritance forgery, inheritance hijacking, and even legacy theft, to name a few. Here, we'll go with the law professors' choice: inheritance forgery.

Whatever it's most correctly called, there's a widely held and mistaken belief in legal and legislative circles that it happens only rarely. But that defies common sense, the law professors explain. And they set out to dig deeper, first separately and then together, as Professor David Horton elaborates in more detail in the recent 30-minute podcast discussing this case and the scholars' law review

article.

"This Article offers a fresh look at inheritance-related forgery," they write in the Duke University Law Review. "Cutting against the conventional wisdom, it discovers that counterfeit donative instruments are a serious problem." The professors had found and reviewed "reported court cases, empirical research, grand jury investigations, and media stories." The findings reveal that "courts routinely adjudicate credible claims that wills, deeds, and life insurance beneficiary designations are illegitimate."

In a chart attached to the 2019 law review article, they detail 44 specific court cases just from the last decade or two. Of course, those plaintiffs are a far broader group than 501(c)(3)s, but the *Estate of Field* case shows how easy it can be for an unscrupulous person to hatch and very nearly carry off such an audacious plan even in the context of a major, high-profile, charitable bequest in a tight-knit town.

As for their primary policy prescriptions, they focus on the devastating effect of the burden of proof in cases where inheritance forgery is claimed. Where there is an initial "presumption of validity," a contesting party is saddled with the burden of proof, and the *level* of proof is *not* the standard "preponderance of the evidence" (that is, just over 50%, or more likely than not). Instead, the will contestant must establish by "clear and convincing evidence" that the document is fake.

And it's much too difficult in *will-forgery cases* to trigger a *shifting* of the burden of proof *back to* the alleged wrongdoer from the original named beneficiary.

By contrast, where there are allegations of undue influence, coercion, or elder abuse as grounds for invalidating a proposed "new" or "amended" will, generally as few as two "red flags" are needed to redistribute the power dynamics in the lawsuit. (While it appears that undue influence may have been an allegation in the *Field* case, this 98-year-old self-made multi-millionaire and community leader was apparently still so mentally sharp that the forgery angle was an easier path.)

By the way, one of the well-established red flags sufficient to shift the burden of proof *back* to the will/codicil proponent in an undue influence situation is if the proponent is the same person who so suddenly and conveniently "discovers" it. And if that proponent/finder also happens to be the new *beneficiary,* that's red flag two. Here, there were additional suspicious circumstances like the discovery by investigators of a shredded copy of a handwritten draft of the purported codicil – in the handwriting of the forger and not the testator! All of these extra bits and pieces added to the proof in the case (that is, whether it was clear and convincing) but apparently wasn't enough in this forgery situation to *shift the burden* of proof.

The Digital Future

As the states rapidly move toward approving new testamentary instruments (most particularly, digital wills) and more probate alternatives, the possibilities for hard-to-discover technological tinkering by fraudsters grow exponentially.

Since the nation's charitable institutions rely so heavily on planned giving and bequests, it's important for the nonprofit sector to join in this policy conversation and advocacy.

An example of a successful recent (boring and low-profile) legislative tweak to a property transfer method ripe for abuse is California's new statutory amendment this year enhancing the witness requirements for Transfers on Death Deeds (TODD). See SB-315, Revocable transfer on death deeds (2021-2022) signed into law by Governor Newsom on September 22, 2021.

Conclusion

Only considerations of blog length have foreclosed yet another exciting journey into the legal history of long-ago eras. (Who can forget our trip to the late-Elizabethan Parliament that drafted the landmark Statute of Charitable Uses of 1601? Or the voyage farther back to the Senate of the Roman Republic which created an unprecedented system of mandatory "shared leadership" laws? Ah….good times.)

But Professors Weisbord and Horton rely on it heavily to explain how and why we went (correctly) from the death penalty for inheritance forgery down to the light felony or sometimes misdemeanor charges and penalties that may be ineffective to deter this wrongdoing.

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