

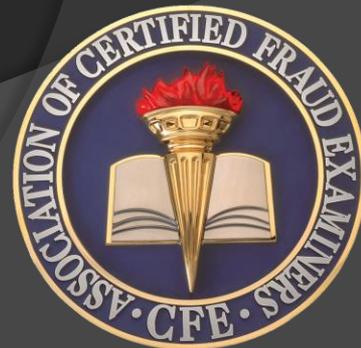
MOM LOVED YOU BEST...

AND OTHER REASONS FOR ESTATE AND TRUST LITIGATION

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TERMINOLOGY

People In Charge

- ⦿ Fiduciary
- ⦿ Trustee
- ⦿ Personal Representative, Executor or Executrix
- ⦿ Administrator
- ⦿ Attorney-in-Fact
- ⦿ Guardian or Conservator

Documents

- ⦿ Will
- ⦿ Revocable Trust
- ⦿ Power of Attorney
- ⦿ Advanced Healthcare Directive

Processes

- ⦿ Probate

FIDUCIARY

- ◎ A fiduciary is a person or corporate entity (such as a bank with a trust department) who is legally responsible for acting in the best interest of another person. A fiduciary can be appointed by a legal document (will, trust, power of attorney) or by the Court when one is needed and no legal document exists.

TRUSTEE

- ⦿ A trustee is the fiduciary named in a trust document to manage the trust property. As fiduciary, the trustee makes sure that the trust property is distributed to the persons and/or charities named in the trust and at the times and in the manners described in the trust document.

PERSONAL REPRESENTATIVE

- ⦿ The Personal Representative (also known as the Executor [male] or Executrix [female]) is the fiduciary who is named in the Will and is in charge of an estate that is subject to Probate.

ADMINISTRATOR

- ⦿ The Administrator is the fiduciary appointed by the Court to be in charge of the estate of a person who died without a will (intestate). The duties of an Administrator and a Personal Representative are identical and many times the terms are used interchangeably.

ATTORNEY-IN-FACT

- ⦿ An attorney-in-fact is the fiduciary appointed by the Principal (creator of the power) in a Power of Attorney document to act on the Principal's behalf. This appointment can last for a definite or indefinite period of time and the powers granted to the attorney-in-fact can be unlimited.

GUARDIAN OR CONSERVATOR

- ⦿ A Guardian or Conservator is a fiduciary appointed by the Court to manage the property and personal interests of an individual called the Ward. A Ward is a minor or an incapacitated or disabled person unable to care for him/her self.

WILL

- ⦿ A will is a letter of instruction which directs how a decedent's assets will be given away at death. However, a will only controls those assets that are payable to the decedent's estate or that are titled only in the decedent's name.
- ⦿ Even if the will mentions specific property, it may not be controlled by the will. All property that is titled jointly "with right of survivorship" such as a home owned by the decedent and his/her spouse is not controlled by the will. Also, property made payable to someone on your death (i.e., life insurance) is not controlled by the will.
- ⦿ The will has no legal force until a court order has been issued accepting it as the final will. The process is often friendly, but can take time and expense.

REVOCABLE TRUST

- ◎ This is a trust that can be revoked (stopped at any time). When a person creates this for himself (the Grantor) it generally includes language stating that the Grantor can do anything he/she wants with the trust property while he/she is alive and not incapacitated. When the person dies or becomes incompetent, a successor trustee (named in the trust document) takes over and follows the directions of the trust document.

POWER OF ATTORNEY

- ⦿ A Power of Attorney is a document that gives one person (the Attorney-in-Fact) decision-making power over another person's (the Principal) property. The document only governs while the Principal is still alive. As soon as the Principal passes away or revokes the document, the power and the document are void. Generally, the Attorney-in-Fact only has the powers that are described in the Power of Attorney and if the power of attorney is expected to be used even when the Principal is incompetent, the document must say so.

ADVANCE HEALTHCARE DIRECTIVE

- ⦿ An Advance Healthcare Directive is Oklahoma's version of a living will. It allows you to give direction on how your body will be managed with regard to machines and tubes if two doctors have diagnosed you as terminally ill or in a vegetative state. Terminally ill means that there is very little chance you will recover or get well, ever. Vegetative state means that you have no brain function that allows you to think, participate in your life, or communicate with anyone.
- ⦿ This document is free through the OU College of Medicine.

PROBATE

- Probate is the Court process required in Oklahoma if a person dies (decedent) and has assets that are titled only in the decedent's name or are payable to the decedent's estate.
- A petition must be filed with the Court to name a person to be in charge (Personal Representative or Administrator) and all interested parties must be notified. The interested parties are determined by law and sometimes are not individuals who will inherit from the decedent.
- The probate process can take several months to several years to complete. The time depends on the complexity of the decedent's estate, how efficiently the Personal Representative and the lawyer approach the process and whether there are any conflicts associated with the decedent's estate.
- A probate makes sure that all the debts, taxes and expenses of a decedent's estate are paid and the remaining property is then distributed to the beneficiary(ies) (person who is to inherit the property). Hearings and Court orders are required to pay expenses from the estate and to make distributions to the beneficiaries.
- For most people the Probate Court process is not desired. Avoiding the process is a significant goal of most well done estate planning, if for no other reason than to protect the privacy of the decedent and his or her beneficiary.

WHAT HAPPENS AT DEATH IF YOU HAVE....

No Will (Intestate) or A Will (Testate)

- ⦿ Open a Probate
- ⦿ Appoint a Personal Representative
- ⦿ Administer the Estate
- ⦿ Distribute the assets according to Statute or Will.

A Revocable Trust (Living Trust)

- ⦿ Appoint Successor Trustee
- ⦿ Distribute the assets according to the Trust

EVERYONE WANTS A PIECE...

- ◎ There is something about Wills which brings out the worst side of human nature. People who under ordinary circumstances are perfectly upright and amiable, go as curly as corkscrews and foam at the mouth whenever they hear the words, “I devise and bequeath.”

- Dorothy L. Sayers, “Strong Poison”

CORE ALLEGATIONS IN LITIGATION

- ⦿ Lack of Proper Accounting
- ⦿ Breach of Trust
- ⦿ Breach of Fiduciary Duty
- ⦿ Undue Influence

TRADITIONAL DIFFERENCES BETWEEN ESTATES AND TRUSTS

- ⊙ Estates regulated by the courts:
 - The statutes govern how they are to be administered.
 - Generally, nothing can occur without court supervision.
 - Statutes actually require the fiduciary to account.
- ⊙ Trusts mostly self-governed:
 - The terms of the trust typically replace statutory authority and the trustee often is the only one with a copy of the trust.
 - Trustee can act at will.
 - Unless the trust requires it, no duty to account.

LACK OF PROPER ACCOUNTING

- ⦿ Lack of Appropriate Records
- ⦿ Misallocation of Funds
- ⦿ Misappropriation of Funds

KEY ELEMENTS OF FRAUD

⦿ **Motivation:**

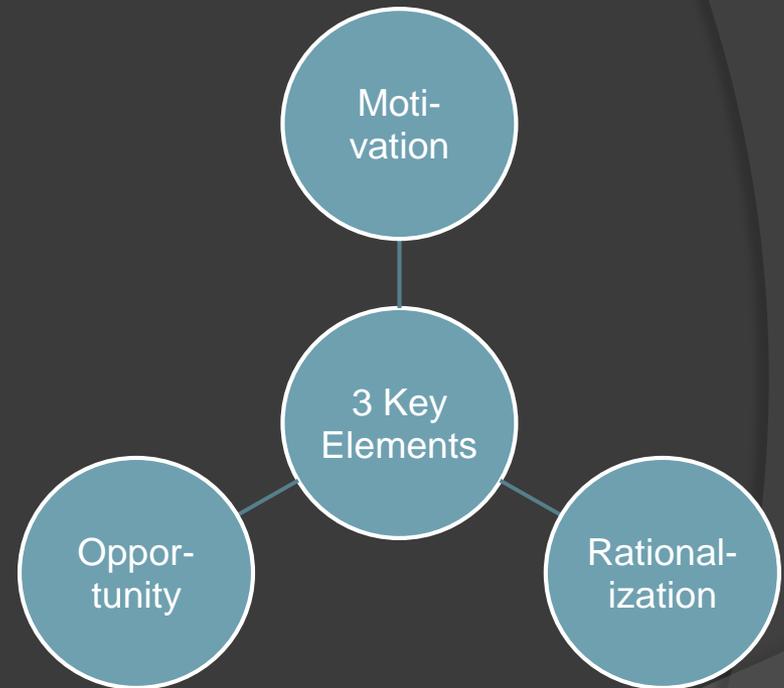
- Need or perceived need

⦿ **Opportunity:**

- Access to assets, information, computers, people

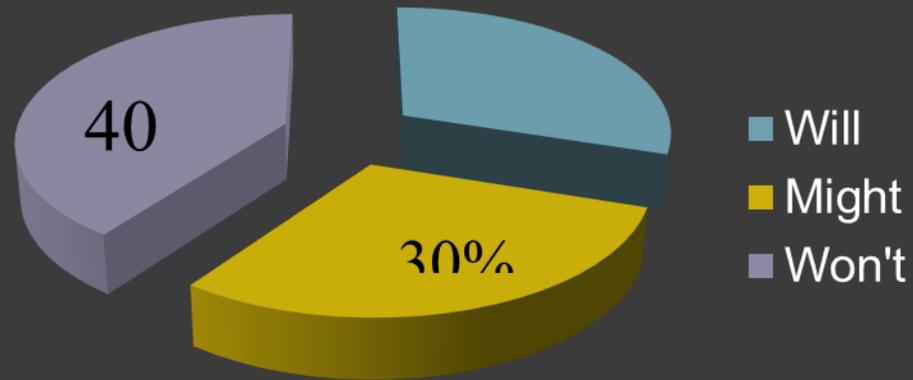
⦿ **Rationalization:**

- Justification for action



WHO WILL STEAL?

Percentage



BREACH OF TRUST/FIDUCIARY DUTY

A failure by a trustee to discharge the duties imposed on him/her by the terms of the trust or by the general law in relation to the trust property or the beneficiaries.

- ⦿ Not necessarily an intentional act*
- ⦿ Didn't administer the trust according to the terms or attempted to use powers that weren't included in the trust
- ⦿ Didn't follow the statutory requirements under the trust code

BREACH OF TRUST/FIDUCIARY DUTY

- ⦿ Self-dealing
- ⦿ Misappropriation of funds
- ⦿ Neglect (includes failure to administer the trust properly)
- ⦿ Failure to act in the best interests of the estate and/or trust beneficiaries
- ⦿ Failure to disclose
- ⦿ Misuse of superior or influential position (refusal to distribute funds, refusal to release an interest, wrongful exercise of payment clauses)

UNDUE INFLUENCE

- ⊙ Through a “Friend”/Family Member
 - Changes in bank accounts
 - Changes in authority over/ownership of assets
 - Changes in estate planning documents
- ⊙ Through Financial Power of Attorney
 - Self-dealing
 - Transfers of assets
 - Changes in authority over/ownership of assets
- ⊙ Through Guardianships - money not used to care for the ward
- ⊙ When the elder reports a problem

REQUESTS FOR ADMISSIONS

- ⦿ Confirm the protocols being followed, if any
- ⦿ Confirm timing of events
- ⦿ Confirm actions taken
- ⦿ Confirm known transactions

INTERROGATORIES

- ◎ Gain additional information regarding assets
- ◎ Identify information regarding procedures and protocols
- ◎ Identify location of documents
- ◎ Identify other individuals involved in transactions

REQUESTS FOR PRODUCTION

- ⦿ Back up of accounting software in native format
- ⦿ Tax Returns
- ⦿ Credit Card Account Information/Debt Information
- ⦿ Deeds
- ⦿ Bank Statements – may include fiduciary's personal account
- ⦿ Business Information – financial statements and business documentation

BACKUP OF ACCOUNTING SOFTWARE

- ⦿ Ask for native format that you can open in on your own version of the software
 - ⦿ Audit Trail Reports
 - Available in most over the counter accounting software programs
 - Track every transaction in program – even deletions
 - ⦿ General Ledger Detail – important tool to track transactions. Each one has a debit and credit. You don't have a clear picture if you can't see both sides.

TAX RETURNS

◎ Tax Returns

- Do not show all assets
- For businesses, provide a listing of assets
- Can provide historic information (2-year summary)
- Show sources of income
- Estate Tax Return (Form 706) shows all assets at death

CREDIT CARD/DEBT INFORMATION

- ① Loan documents provide sources of income which ties back to existing assets
- ① Provides evidence of assets exchanged for debt

BANK STATEMENTS

- ◎ Follow the cash
- ◎ Show increases and decreases in funds
- ◎ History can be obtained for past seven years
- ◎ Provide examples of handwriting on deposit slips and checks

BUSINESS INFORMATION

- ◎ Balance Sheets show accounts as of a certain date
 - Especially useful to track loans to shareholders
 - Used for valuation of a business entity
 - Accounts are not closed out at the end of each year
- ◎ Income Statements
 - Show the amount of activity over a period of time
 - Used for valuation
 - Helpful in determining the uses of cash
 - Accounts are closed out at the end of each year

REMEDIES SOUGHT

- ⦿ Accounting – make sure to include a definition of an accounting sought in the petition and the order granting the accounting
- ⦿ Surcharge
- ⦿ Denial of Fees – either trustee fees or personal representative fees
- ⦿ Removal – be cautious
- ⦿ Attorney Fees and Punitive Damages

EXAMPLE OF FALSE IDENTITY

- ⦿ Attorney prepared a disputed will. Based on the testimony of the attorney, the deceased came to his office on her own to execute the will.
- ⦿ Described the woman as being in full possession of her mental faculties and was a determined and forceful lady.

EXAMPLES OF FRAUD

- ⦿ Estate liabilities include substantial credit card debt. The deceased was in her eighties when she died and lived a modest lifestyle.
- ⦿ End of the year 1099 from the bank account reveals an extremely large interest earned amount even though the account had only a modest amount in it at the date of death.
- ⦿ Disinherited brother destroys deceased parent's will to force the estate into intestate succession where he will receive an equal share.

CAUTIONARY WORDS

- ◎ Nefarious activity is not present in every case you will deal with.
 - Sometimes, there are rational explanation for the oddest behaviors.
 - Sometimes, changes in estate planning decisions can be accounted for by nothing more dramatic than the “general cussedness of human nature.”
- ◎ Even if nefarious activity is discovered in an estate and/or trust matter, a cost benefit analysis should always be completed.