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III. Minimising trust disputes through thoughtful execution

Most of the attention in minimising trust disputes concentrates on the design phase as well as administration – and with good reason. The majority of disputes arise from actions taken (or omitted) during those two important periods. But the execution of the trust also deserves attention. Here, we briefly examine two elements of the execution process that can impact successful dispute avoidance:

- family dynamics; and
- witnessing the execution itself.

1. Family dynamics redux

Earlier, we discussed one of the red flags that can manifest as early as the initial meetings with a prospective settlor: signs of family dysfunction. But those signs may take some time to become apparent, as people are often reticent about openly airing their family's dirty laundry. A drafter or planner who remains vigilant in looking for signs of potential family strife throughout the entire evolution of the drafting process – from initial interview through to execution of the trust – stands the best chance of being able to implement additional measures and diligence to avoid disputes regarding such critical issues as capacity and intent.[70]

Particularly with high-net-worth individuals and trusts involving assets

of emotional or familial significance, practitioners should maintain the same level of careful attention to family dynamics at execution as they do throughout the drafting phase. Start with the basics, then think expansively. Who attended your initial meeting with the settlor? Did someone attempt to insert themselves into your subsequent communications with the settlor? Where the settlor is older, someone may attempt to insert themselves into the drafting and execution process under the apparent guise of helping to facilitate logistics. Sometimes, the claim is innocuous and the assistance helpful; other times, that person is attempting to insert themselves into the process for some personal aim or gain. When someone attempts to insert themselves into the execution process, do you fully understand their relationship to the settlor?

Case history: the family 'friend'

In a recent matter involving one of the co-authors, a woman described by the settlor as his 'friend' attempted to insert herself into every communication he had with his counsel. In fact, she was the settlor's mistress of over 20 years. The settlor was married and had relocated his wife into an older community development overseas, in their home country.

The settlor's counsel missed obvious signs of undue influence, by failing to meaningfully inquire into the woman's background and connection to the settlor and his family.

Make certain your final meeting with the settlor prior to execution is free of any potential outside influence before the trust is executed.

2. Witnesses

During the apex of the early COVID-19 pandemic shutdowns, there was heightened discussion and concern as to how to move forward with two key elements of trust execution: notarisation and witnessing. Planners were concerned that a failure to abide by the strict language of the rules governing both could compromise the validity of a trust instrument and expose it to litigation.[71] In the United States, for example, this concern helped drive federal and state governmental enactments allowing remote online notarisation.[72] Certainly, there is potential for fraud should the rules be eliminated. But as pandemic restrictions taper and more people are engaging in person once again, it has become generally clear that there is significant interest in retaining the ability to execute documents remotely. Do the public policy concerns underlying the notarisation and witness requirements persist? If so, can they be better served in the digital era?

The subject is ripe for modern, creative thinking. While the purpose behind the notarisation requirement remains vital, the witness rule is a

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bit of a relic. As a practical matter, witnesses are rarely a focal point in litigation or even called to offer evidence, unless an issue such as forgery emerges. Even then, witnesses are often individuals with no connection to the settlor or the trust who are enlisted (often at the last minute) to enter a room, exchange pleasantries and sign a trust instrument, acknowledging that they were present in the room when the document was signed. Even when the witness does have a personal connection to the person signing the document, the value of their having witnessed the document is often minimal. Litigation can take so long to be initiated that memories fade to the point of irrelevance to supporting a party's underlying cause or defence.[73] All of which presumes, of course, that you can locate the witness in the first place and compel them to testify.

Fuelled by the pandemic, e-signature options have magnified in utility and volume. Remote execution of documents has been made substantially easier – it can be done on one's phone using any number of apps, for example. There remain relatively few judicial decisions addressing the validity of electronic signatures, as of the writing of this book; but in the United States, the evidentiary burden attendant on authenticating evidence – for example, that an e-signature is that of the signatory – is low. Where the e-signature is backed by a digital audit trail,[74] the bar appears to be even more easily cleared in court.[75]

All of which casts upon doubt whether the witness requirement still serves the underlying public policy or whether better means exist to protect that interest.

The point here is not to encourage practitioners to summarily dispense with jurisdictional mandates.[76] But perhaps the better approach is to make the witness role more meaningful. Consider using technology to enhance the role of the witness. At times, practitioners have utilised video to capture not only the execution event, but the dialogue leading up to the moment of execution – dialogue with a settlor about key facts supporting and confirming capacity, for example. Technology can help preserve information that may not only prove useful in addressing potential disputes before litigation commences, but can be presented in court, if needed.

3. Presence of individuals other than the settlor and witnesses

When an individual other than the settlor, the drafting lawyer, or any witnesses attends the signing of the trust instrument, there may be an elevated risk that this individual is unduly influencing, or could be perceived as unduly influencing, the settlor. Neither is good. Of course, much depends on who the settlor is, and who the other individual is.

If the trustee is a bank or trust company, the presence of the institution's representative is likely fine, because there is little likelihood that the bank or trust company is unduly influencing the settlor. For that reason, their presence potentially would be advantageous. If the trustee is an individual, the individual's presence may be questionable. Is the individual a professional trustee? Is the individual the settlor's friend and business partner? Is the individual the settlor's spouse? Or is the individual a family member other than the settlor's spouse? The settlor and their advisers should carefully consider the potential for even creating the appearance of undue influence.

These same considerations apply to other trust officials and whether they or, in the case of entities acting as trust officials, their representatives should be present.

4. Self-imposed formalities

In connection with the execution of a trust instrument (or other estate planning document), some drafting lawyers include certain formalities in addition to the jurisdictional mandates. For example, the drafter may require the settlor to initial each page of the trust instrument. In such a case, the drafter typically includes a statement about initialling in the paragraph immediately preceding the settlor's signature. Although it should be self-evident, the drafter should ensure that the settlor complies with any of these self-imposed formalities. When a

trust instrument states that the settlor has initialled every page – or perhaps every page other than the page bearing the settlor's signature – and the settlor has not initialled those pages, it invites questions and potentially provides a source of fuel for disputes. In those instances, the presumption is often that the omission is intentional. If it is inadvertent, the next question often becomes … what else was missed?

5. Lifetime approval of trusts

In some jurisdictions, a settlor can commence a judicial proceeding for purposes of determining the validity of a trust that they created.[77] In effect, the settlor asks the court to declare the trust to be valid. This may be advantageous if the settlor believes that someone might contest the trust. First, it might help to discourage meritless claims concerning the trust's validity. While the settlor is living, family members and others may be less inclined to challenge the settlor's actions. As such, the request for a court declaration may proceed unopposed. Second, and more importantly, the settlor – who is the best witness about their own capacity and intent – is living and able to testify. Often, trust disputes arise after the settlor's death, and the court is left trying to discern the settlor's capacity and intent from other forms of evidence, which may be less helpful. By litigating a trust's validity during the settlor's life, the settlor may avert more protracted and expensive litigation after the settlor's death.

Naturally, there are disadvantages to commencing a judicial proceeding for purposes of determining the validity of a trust. First, it is litigation. Thus, it necessarily entails a degree of uncertainty as well as cost. Things may not turn out as planned. The hope, of course, is that it would be a better, faster and less costly result than what may happen after the settlor's death. Secondly, as a judicial proceeding it may be public. The degree to which those proceedings (and the associated filings) can remain private varies from jurisdiction to jurisdiction.

Two key considerations in preparing for the judicial proceeding are:

- Who needs to be a party to the proceeding?
- If there are persons who are not beneficiaries but who might be inclined to contest the trust in the future, how to include them as parties?

This may require some strategic thinking and may affect the design of the trust. The objective, of course, is to ensure that the court's declaration of validity binds anyone who might otherwise be inclined to contest the trust.

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