The
Estate Analyst®

September 2014 — Part I

The Art and Science of Disinheriting Heirs

Part I: Practical Mechanics of Disinheritance

By Robert L. Moshman, Esq.

It has become a common refrain of late for wealthy people, such as Bill Gates or Gloria Vanderbilt, to announce that they are not leaving the bulk of their wealth to their children but instead are taking a "giving pledge."

Some celebrities, such as the late Philip Seymour Hoffman, have gone further by disparaging the corrosive influence of wealth and then "throwing shade" on trusts because they create spoiled "trust fund kids."

A significant number of ordinary estates have reasons for excluding or limiting particular heirs. Others can end up being disinherited by accident.

How should disinheritance be implemented? What legal remedies are available for disinherited heirs? What alternatives should grantors consider? Here, in Part I of this article, we examine the practical considerations in drafting disinheritance clauses.

Disinheritance By Mistake

Disinheritance is, by definition, an intentional act meant to prevent an heir from inheriting assets that would normally go to him or her. But there are a number of ways in which inheritances can be accidentally cut off.

A pretermitted heir is omitted from a will because the will was written and executed before the heir was born and the testator did not get around to revising the will.

An afterborn heir falls into the same category, but is born posthumously, when the testator no longer is able to modify his or her will.

Most states provide remedies for pretermitted or afterborn children to demonstrate that they were omitted from the testator's will by oversight and that the testator intended for them to be included.

Shortsighted planning is another source of unintentional disinheritance. Someone with children from a first marriage gets remarried and dies before his or her new spouse. The decedent has joint assets that now belong to the new spouse, and the decedent may have left a will that leaves everything to the new spouse. But the new spouse may exhaust those funds or rewrite the will and exclude the children from the deceased spouse's former marriage. Or the surviving spouse may remarry and leave all of the assets to yet another surviving spouse who has even less connection or feeling for a deceased spouse's former spouse's children.

A parent who remarries and who wants to protect the inheritance rights of children from a former marriage can (a) make lifetime gifts to the children; (b) set up contractual assets, such as retirement accounts, insurance policies, and pay-on-death accounts, that provide for those children when the parent dies without passing through the parent's will; (c) set up lifetime trusts that become permanent upon death; (d) make separate testamentary provisions in the will to provide assets by bequest or in trust to the children from the former marriage.

Partial Disinheritance

Every family is different. Just because a so-called normal family doesn't involve any children from previous marriages or divorce or bankruptcy or any documented dysfunction doesn't mean there will be a smooth relationship between a surviving spouse and all of the children.

Example: Father and Mother have reciprocal wills that leave all assets to the survivor and at the survivor's death divide all assets equally among Son, Daughter #1, and Daughter #2. After Father dies, all of the family assets are consolidated in Mother's name, but she feels slighted that Son never calls her. Son never calls her because his relationship was much stronger with Father and his calls only upset Mother. Daughter #2 says something that upsets Mother. Mother is living in an age-restricted condo and becomes fixated on writing and rewriting her will. She decides to change the percentages that each child receives to 25% to Son, 50% to Daughter #1, and 25% to Daughter #2. Then she decides to cut out Son entirely. Then she decides to reduce Daughter #2's share to 20%.

In this example, hurt feelings and too much time to tamper with a will are disrespecting Father's wishes and setting the stage for disharmonious sibling relationships in the future. Mother could easily leave assets outside of the will or make gifts and avoid issues. The attorney can point out the ramifications of unequal distributions and the wishes of Father, but ultimately it is the testator's decision how to proceed.

Testators also face the dilemma of dividing up an estate of limited resources when some of the heirs are wealthier than others or some heirs have more significant needs or some heirs received lifetime gifts. The challenge then is to present a will that is understandable, easy to administer, and clear in its explanation of how assets are distributed.

In most cases, parents forgive small loans and college costs and distribute assets to their children in equal shares, regardless of the respective wealth or income of each child. The message is one of equal fairness (and a lot of parental angst is averted by this approach).

But every family is different. Where there is one heir who is extremely wealthy and others who are struggling, the parent may decide to cut one heir out and leave everything to the others. The will can contain some diplomatic language indicating that the wealthy child is acknowledged and shall have an equal share of personal possessions and is not excluded for lack of love but because he or she has less need of material support.

Situations are trickier when the testator wants to leave unequal gifts and informs the attorney draftsman that Wealthy Son should be left $100,000 of the $600,000 estate and the remainder shall go equally to Son #2 and Son #3. This is a potential problem. Suppose the estate shrinks to $300,000 at the time of the testator's death and all three sons end up with equal amounts? Or suppose the estate shrinks to $100,000 and the wealthiest son ends up with a bequest that consumes the entire estate while the two sons with less wealth end up with nothing.

Several possible approaches can be tailored to individual circumstances.

- Leave all three heirs a percentage of the remainder, such as 20%, 40%, and 40%.

- Make the percentage for the wealthiest heir subject to a threshold. Thus, "If my net estate after payment of all debts and taxes is more than $400,000, then I leave Wealthy Son 20% and divide the remainder between Son #2 and Son #3;

however, if my net estate has fallen below $400,000, then my entire estate shall go to Son #2 and Son #3.

- Skip the generation of sons and leave the estate to all of the grandchildren in equal shares, per capita.

- Set up a special bequest in trust just for the college education or future business seed money for the children of Son #2 and Son #3, so that the remainder of the estate is given out to the three sons equally.

- Earmark some insurance policies or investment accounts to go just to Son #2 and Son #3 so that the estate can be divided up equally.

Intentional Disinheritance

All of these approaches to limit or exclude heirs diplomatically apply to faux disinheritances based on respective wealth or needs of heirs. Real disinheritance is a more serious topic. There is often enmity in families: bad blood, strong feelings. Anyone who administers estates has experienced the flare-up of open hostility between and among family members.

Where an intentional disinheritance is involved, a contested outcome must be anticipated. From the testator's perspective, several measures can be taken to discourage or defeat a will contest.

First, simply excluding any mention of persons will allow them to raise the argument that they were merely overlooked by the draftsman. Acknowledging the disinherited person by name in the will is one way to counteract such an argument. Further, there can be some mention of the reason the person is excluded. Some wills indicate that the person is excluded because of lifetime gifts that have already been transferred. Others will make a veiled reference to "reasons which they are well aware of."

Note: The latter approach of disinheritance based on "reasons they are well aware of" comes up quite frequently. For example, this phrase was included in Leona Helmsley's will that disinherited two of her grandchildren. The will provided, "I have not made any provisions in this Will for my grandson CRAIG PANZIRER or my granddaughter MEEGAN PANZIRER for reasons which are known to them."

However, Helmsley, who was worth about $2.5 billion (ranked the 369th wealthiest person in the world by *Forbes*), left $5 million in trust for each of her other two grandchildren, provided they made an annual visit to the grave of their father (Leona Helmsley's only child). She also famously left $12 million to her dog, a little Maltese named Trouble.

Articles on people who disinherit heirs speculate that these testators have experienced psychological or emotional traumas in their own lives and, by inflicting the pain of rejection on their heirs, they are forcing others to understand the pain they have experienced. When Helmsley's son, Jay Panzirer died, Helmsley evicted his widow and sued his estate for $142,000 that he had borrowed. Does that reflect a psychological component?

Or are some of these testators crazy and mean? If they are crazy enough to have their wills invalidated, their attempt to disinherit heirs will fail. If they are simply mean-spirited or angry and want to hurt their own kin, there is no legal reason to overturn their wills.

"If a man have two wives, one beloved, and another hated, and they have born him children, [both] the beloved and the hated; and [if] the firstborn son be hers that was hated:

Then it shall be, when he maketh his sons to inherit [that] which he hath, [that] he may not make the son of the beloved firstborn before the son of the hated, [which is indeed] the firstborn:

But he shall acknowledge the son of the hated [for] the firstborn, by giving him a double portion of all that he hath: for he [is] the beginning of his strength; the right of the firstborn [is] his."

—Deuteronomy 21:15–17 (King James Version)

In Terrorem Clauses: One way of insuring that a disinheritance will stand up is to provide a relatively small gift to the disinherited person and impose a penalty of forfeiture for that bequest if the will is challenged by the heir in any way. This approach won't work in a number of states, and some courts will find certain versions of that approach to be void based on public policy. The law wants to encourage challenges of wills obtained through undue influence or which are invalid due to a lack of testamentary capacity.

For the practitioner, the recommendation, use, and reliance on an *in terrorem* clause becomes problematic. The client needs to be advised if the applicable jurisdiction allows or frowns upon such clauses. It may still be a strategic decision to utilize such a clause, but, if there is a reason to feel it could be ruled invalid, a written acknowledgement by the client or written advisory to the client may be a helpful and prudent approach, so that there are no unrealistic expectations by the client.

Demonstrating testamentary capacity can take a number of forms: having additional witnesses, having witnesses who are especially objective or credible, conducting an interview with the testator contemporaneously with the execution of the will, preparing a memo at the time the will is executed, videotaping the execution of the will, having specific clauses of the will explained and specifically approved by the testator, and having similar versions of the will executed at different times to demonstrate ongoing approval.

Implementing lifetime gifts and trusts that exclude the disinherited person can have the same effect of disinheriting an heir, and those actions may substantiate the intent of the testator as well.

End Games

Disinherited children who contest wills may be able to defeat a will based on undue influence and/or lack of testamentary capacity, but, in a number of prominent cases, there has been a settlement instead.

In, *Johnson v. Johnson,* the estate of J. Seward Johnson I had been left to the testator's third wife, Barbara "Basia" Piasecka Johnson, who had been a chambermaid of Johnson's second wife. The estate's attorneys argued that Johnson felt the trust funds established for his children during his lifetime were sufficient. The children argued that Basia Johnson was abusive to their father and that he no longer understood what he was signing.

Ultimately, the six children received a settlement of $42.5 million after taxes, the Harbor Branch Foundation received $20 million, the various attorneys received $10 million, and Basia Johnson received more than $300 million. Basia went on to become the 376th wealthiest woman in the world on the *Forbes* list.

For Leona Helmsley, the two grandchildren she disinherited filed an action and received a settlement of $6 million.

Mommie Dearest

Joan Crawford adopted five children during her lifetime. One boy that she named Christopher was reclaimed by his birth mother. Crawford then adopted another boy who was also named Christopher. At the time of her death in 1977, Crawford had four adopted children.

Crawford's will left her estate to two of her children, twin girls named Cathy and Cynthia, who were each bequeathed $77,500. She also bequeathed amounts to seven other people in amounts totaling $70,000. The remainder of the estate was left to six charities. Nothing was left to Crawford's other two surviving children. The will stated:

"It is my intention to make no provision herein for my son Christopher or my daughter Christina for reasons which are well known to them."

Christina and Christopher then pursued legal action and ultimately received settlements of $27,500 apiece.

With an estate estimated to be $2 million, Crawford could have left more to her adopted children, but there would certainly have been heavy estate tax consequences. In 1977, the top estate tax rate was 70% for estates exceeding $5 million, and the estate tax unified credit was equal to an exemption of $120,667. It is also not known if lifetime trusts were established for any of the children.

Christina then wrote a book called *Mommie Dearest,* in which she alleged abuses by her late mother. Christopher waived his rights to the book for $10,000 and probably regretted it later. The book spent 42 weeks on the best-seller lists and may have netted $10 million. It was made into an infamous movie in 1981 that grossed $19 million at the box office. Christina is estimated to be worth $5 million as a result of the book.

This success might have inspired Barbara Davis "B.D." Hyman to write *My Mother's Helper* in 1985, which portrayed her mother, film star Bette Davis, in an unflattering light, i.e., self-centered, abusive, alcoholic. The comparison with *Mommie Dearest* was inevitable. Hyman reportedly received an advance of $100,000, and the book did make the best-seller list.

Of course, B.D. Hyman overlooked the fact that Bette Davis was still alive. Davis then wrote her own book, This 'N That (1987), in which she wrote:

"Dear Hyman, I am now utterly confused as to who you are or what your way of life is. Your book is a glaring lack of loyalty and thanks for the very privileged life I feel you have been given. If my memory serves me right, I've been your keeper all these many years. I am continuing to do so, as my name has made your book about me a success."

Bette Davis died in 1989 but not before she rewrote her will and disinherited B.D. Hyman and Hyman's children. She left her estate, estimated to be about $1 million, to her adopted son and her loyal assistant/friend. Her former husband, Gary Merrill, came forward and defended Davis against the allegations.

Ironically, the Palm Springs home Bette Davis once lived in sold for $4.8 million in 2008, and the condo that she owned in West Hollywood was listed for $2.45 million in 2009. B.D. Hyman was born again, started her own ministry, and became a televangelist.

Part II: Disinheritance for Higher Purposes

As opposed to ill will, some disinheritance approaches are intended to make one's heirs self-reliant and to avoid spoiling them. In Part II of this article, we will continue with Philip Seymour Hoffman's decision not to leave funds to his children. We will also consider the ramifications of The Giving Pledge on family enterprises and relations. The Giving Pledge has been endorsed by many of the world's wealthiest people and involves pledging the majority of one's wealth to charitable causes.