

Speaker 1: [\(00:03\)](#)

Welcome to the VanEck Weaver legal visionaries podcast brought to you by interactive legal here's your host Mary VanEck.

Speaker 2: [\(00:12\)](#)

Welcome to today's episode of VanEck Weaver, Trien law visionaries, a weekly podcast discussing updated legal name news, as well as evolving methods of providing legal service. My name is Mary Vanek, founder, CEO, and managing partner at Vanek Weaver, LLC. I will be your host. As we talk to experts from around the country about closely held businesses, tax trust, and estates, legal technology, law, firm leadership and wellbeing for lawyers. Before we start today's episode, I want to thank our sponsor. Here's a message from interactive legal.

Speaker 3: [\(00:52\)](#)

There's always a resistance to change, particularly with attorneys, attorneys like to look back at what's worked in the past, and that makes a lot of sense. But when you realize that with a good automated drafting system, you can do a better job for your clients. Deliver documents on a more timely fashion in a more consistent and in a more costly manner. If you are not a subscriber to interactive legal, I urge you to go to interactivelegal.com and click on request demo, and you'll be contacted about having a demo of interactive legal for you, which can be done right over the internet. Don't have to leave your office. No salesperson will call. We can arrange it at a timing convenient for you. So please go to interactivelegal.com and click on request and

Speaker 2: [\(01:41\)](#)

Demo. On today episode, I am joined by Monte Shotz, a co-member at my firm, he's my guest, and we are gonna discuss common trust and estate litigation and how to avoid it when it is possible. Mon sort of really loves. And I love the fact that he loves litigation, because I really like being on the planning end when it gets into the litigation. It's a lot of family fist fights or beneficiary fist fights and Monte does a really nice job sorting that out. So, Monte, how does a non-existent or poorly done estate plan contribute to trust in estate litigation?

Speaker 4: [\(02:17\)](#)

Well, there's several ways that that can happen. Um, and, and probably, uh, one of the predominant ones is where I'll start with. A lot of people will try to create their own estate plan. They might download the online wills. Yeah, the online wills, the downloading, the documents, um, and, and filling in the blanks. Um, probably a more relevant situation I've run into. In, in recent times I've noticed people have done, uh, drafted a lot of their own, what we call holographic oils, which are wills in their own handwriting. Now on its face, it seems simple. Uh, you, you, it must be totally in the handwriting of the person that draws up the will. Um, it must be dated by them and it must be signed by them. And that sounds simple enough, right? Well, when you got in cases like I've had five, 10, 15 million in assets at hand, and in some cases I've had split families first and second, and that person tries to amend those documents by drawing a line through them and initialing them. The radar goes up between family members and you're inevitably gonna end up a huge fight because the stakes are big, you know.

Speaker 2: [\(03:35\)](#)

So that's a category that we refer to as will formality issues. Right, right, right, and so it's like this wasn't properly executed and we're already seeing some cases during the pandemic. There were a lot of states changed. The requirements lifted the requirements, but not everybody understood what that meant. Like some said, well, you can do an electronic notary, but the witnesses still must be in person. Right.

And we saw a lot of people printing stuff online and thinking, and sadly, and some states have been supportive and kind about some of the lack of formalities where others are strict about it. Right. So that's one area. Then another area we see a fair amount of litigation and is called this lack of capacity area. What type of litigation is that? Can you expand on how that occurs?

Speaker 4: [\(04:24\)](#)

Yes, so when you talk about lack of capacity, one of the requirements, when a testamentary document is signed, whether that is a power of attorney, healthcare, power of attorney will trust any of those court documents. One of the, one of the requirements is that the person must understand what they're signing. They must understand who, what their assets are, that they are going to be giving away either during life or at death. And they must understand who the, in individuals or institutions in the case of a charity or a foundation that they're giving this money to. And if they don't have that, what we call testamentary capacity to understand those, those three concepts, then, then we got an issue of whether the instruments valid or not. And without going to, into a long line of detail in determining capacity, it's a function of, you got to look at medical capacity first, typically. And hopefully that was looked at while the document was being signed while the person was alive. And then if there's a, you know, if there shows some level of decline in ask you, at least it's questionable a mental capacity of the person, then you got to make the determination of legal capacity. And that's UN typically, unfortunately is where you got to invoke the courts. And that's when you get into the litigation aspects of it.

Speaker 2: [\(05:56\)](#)

And at this point we're dealing with somebody who's deceased. So, we're in litigate and the litigation's occurring after death and we have beneficiaries fighting about it. So how are we proving? They sign this document sometimes often in an attorney's office. Yeah. And so how do, how do we prove that what are they shoes?

Speaker 4: [\(06:18\)](#)

A few things that you look at in some proactive majors that can be taken again,

Speaker 2: [\(06:23\)](#)

Wait, let me ask that more specifically. So, you said like capacity, which you're referring to testamentary capacity, which can be different from contractual capacity, designing wills and trust is usually a testamentary capacity standard. Right? Right what they need to know is the, you know, nature of their bounty, what their assets are. Whose kind of getting what general understanding, but it's not a super high standard in some senses. So, whose job is it at that document signing conference to figure out whether the person has capacity?

Speaker 4: [\(06:58\)](#)

I think it's, it's incumbent again, lawyers are not psychiatrists or psychologists or people who can run those tests. But if there, if the attorney is suspect that the person may have, there may be a question about the person signing their estate planning document, whether they understand what they're signing. I think it's incumbent on the attorney to pull back and say, we need to take some steps to decide of this. And you know, what are those steps? Again if it's the client themselves, I think you need to at least have a conversation with them to, to say that, to make sure that your documents stand up when you pass away, we should do have some proof of your capacity

Speaker 2: [\(07:49\)](#)

Now and so that's when you doubt it. But I say even with my standard day to day client, they come into

sign documents. Yes, I engage in a casual conversation about the web other, the college world series, the, you know, national basketball, whatever's going on now in life. And I'm just kind of looking, Hey, and I'm, I'm not a psychologist. I'm not, but all I want to do is have enough conversation to see their level of understanding what I'm talking about. Yeah. You know, I avoid Paul politics because that'll bring out anybody's in capacity, but I might ask about their kids and, and it's just a casual conversation. And sometimes I've had, you know, younger attorneys say, why are you like talking for so long? You know, we're on the clock. And I'm like because I'm trying to figure out. And then as they go into the documents before they sign it, I always ask them about the documents. And so, what you're saying is if I start to see at some point that they can't remember their younger son's name. I might raise the question and say something like, maybe we shouldn't sign these today. Is that, and so now we're talking post death. How do we know whether those steps were taken?

Speaker 4: [\(09:03\)](#)

Well, a, a couple of things when a testamentary document is signed, particularly specifically a will you have witnesses, typically two witness and those persons have to be of a specified age. And they sit there and watch the individual sign the documents. And typically, the attorney in the signing conferences, whether it's a trust or a will, will have parties sitting at the table and those, those critical questions you lose it to. I think more than the specifics about you know, before you get into the specifics about what assets do you have, who are you leaving your estate plan to? I think those general conversations are critical. And if I have any question mark about it, I know my personal practices. And I think Mary yours has been the same. I will literally film the person asking those questions. It's kept confidential in the file. But if things blow up later, post death, at least I can have evidence of video evidence and not just people testifying, not that that's insignificant having witnesses and a notary in the room, but to have that additional videotaping will, will go a long ways. Typically, toward proving that this person had some capacity or at least mitigate the chance of, of somebody contesting, whether this person understood what they were signing.

Speaker 2: [\(10:28\)](#)

So it'd be important though, if you're videoing or recording, to make sure that, you know, there's some states that you can do one party without knowledge of consent. Right. And there's other states I think there, I can't remember 12 or 13 states that don't where you must have the consent. So, if you record that and they, they ultimately didn't have capacity, their consent was invalid.

Speaker 4: [\(10:52\)](#)

Yeah. That, that could be a problem.

Speaker 2: [\(10:56\)](#)

Still another litigation topics

Speaker 4: [\(10:57\)](#)

For you, another litigation topic. But I, I still think having that in hand and of course I always have, but you would get their consent, right?

Speaker 2: [\(11:03\)](#)

Absolutely and, we're gonna start, we've had the, I've had the casual conversation before we're recording or taping an actual execution ceremony anyway. So, I've at least decided, you know, made this decision, like, okay, I don't feel, I need to send this person on to a psychiatrist at this moment or to a neuroscience for an evaluation.

Speaker 4: [\(11:24\)](#)

Interestingly enough, I've rarely will I say never, but I've never had a client where I've asked permission to videotape them resist that they seem to be willing to do that. And they seem to understand the purpose.

Speaker 2: [\(11:38\)](#)

I think client clients want their Testament intent to happen and so that's the conversation that I have with them about it. We are going to take a brief break from our episode for a word from one of our sponsors.

Speaker 5: [\(11:53\)](#)

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Speaker 2: [\(12:53\)](#)

Okay, let's continue our episode. So, there's another kind of related, but different topic that comes up in litigation. And that's the area of undue influence. Can you just explain, and this is again, we're in the post death situation what's the claim who's making the claim? And what is the claim?

Speaker 4: [\(13:11\)](#)

Typically, the person that's making the claim and undue influence would be one of the heirs who feels based on how the trust distributed the assets at death, or is proposed to distribute the assets or the will, is significantly less than that, than what they understood before. And frequently that let's use a family situation. I it's an easy one. You have four children and the person who died had shown them their estate plan before. Not always, but, and, and it was clear all along and mom and dad during all those years always indicated we want everything to be equal. We want everything to be equal. And then suddenly, the person dies the will is filed. And suddenly son one gets 50% of the estate and son two, and the two daughters split the other 50%.

Speaker 4: [\(14:10\)](#)

And it's like, what happened here? I, you know, mom and dad clearly wanted everything. What been, well, you know, almost without failure on a practical basis, one of those other three, or all of them, any combination of the three of them are going to say, you know, son who got 50% clearly was, you know, he was seeing dad more regularly. He was going into the nursing home or regularly, if that was a case or visiting dad at his, his residence, you know, mom may have died already. He was isolated. And there's a lot of circumstances that raise heightened concern about son exerting some fraud or, and fraud and undue influence is really a form of fraud, you know, trying to persuade a person to change that.

Speaker 2: [\(15:03\)](#)

Speaker 4: (15:05)

And a lot of times though, frequently, and though not all, it's, it's the child who live as closest to the parent and, and a lot of times those other children may not be in the area.

Speaker 2: (15:18)

So, and that person we've had kids show up that hadn't seen their parents for 20 years. Yeah. Right.

Speaker 4: (15:22)

Speaker 2: (15:23)

That's the magical reunification. That's part of the issue is that undo, influence, or did the kid really feel bad that they'd been estranged from mom or dad? I'm just gonna like, take a shot here and throw a hypothetical at you and say, what are the, what are the lawsuits in this one? And I'm gonna kind of use, obviously I can't use facts too like some things I'm gonna make them up, but let's just say that a guy, his wife had died. And so, he meets another woman, spends 30 years with her lives in a state where there's no common law marriage, but they, you know, stayed together the entire 30 years. And three kids totally estranged from him had no interest in talking to him, had no conversation with him, but suddenly, he becomes ill.

Speaker 2: (16:11)

And so the all three kids show up and this guy's left every, you know, he's left his kids, some stuff, even though they've been estranged from them, but he's taken care of his 30 year partner really well, leaving her annuities, covering her in her trust. Well, the kids show up running, get dad to sign a power of attorney, naming them as power for healthcare and legal power of attorney. And then actually, and they give themselves the authority to change his trust documents. So, change cut out the 30-year partner completely. What, what litigation do I have on behalf of this 30-year partner?

Speaker 4: (16:48)

I think you got the litigation that involves undue influence and, and capacity questions come into to play there. And I, interestingly enough, I think where, especially where this was done under the auspices of a, of a power of attorney or under the authority of a power of attorney I think that I, you know, this is a contractual, a, you know, action in, and interestingly enough contracts even have a higher level of standard, you know where authorities given, where, you can prove undue influence and that that person named his power of attorney abuse, that, so you you've got the undue influence. And then I think hand in hand with that is you also have a potential breach of fiduciary duty. A power of attorney has a fiduciary duty to act in the interest of the person who gave that, that power of attorney. And, and if, if it can be shown by the circumstances that, uh, there was never, you know, that, that they abused that to benefit themselves as opposed to doing what the person granting the power of attorney did. I think that's a breach of fiduciary duty and you could have a potential action there as well, too, and reverse things retroactively,

Speaker 2: (18:05)

Perhaps. And the exact cause of action that you have is gonna depend a little bit on the state that you're in. Oh, absolutely. So, there's changes from state to state some states that recognize what I would call, interference with testamentary intent. I think most states recognize the interference with contractual intent. Yeah. But you have like the annuity situation where somebody changes the beneficiary or draws down and an annuity, right. That'd be interference with contract, but in some case, some states you still

have an issue pursuing that simply because they say this ought to be handled in probate. Right. Yeah. And that's one of the challenges in dealing with some of the, some of these cases. So, you know, I have another set of facts that is a similar to something I saw, but let's say that there's a son who moves his mom up into his attic room and she's like 95 years old and they're caring for her. She hasn't driven a car for 15 years, but she owns a Maserati and she has a hundred thousand a year food bill, even though she eats like a bird and then daughter, your son, the son gets power of attorney, starts drain annuities, changing the trust. What's what are causes of action there?

Speaker 4: [\(19:23\)](#)

Well, I think there's, I think there's both court actions and actions you can take out of the court. You know, where you, have a situation like that, I think there could be an argument for elder abuse and reporting, for example, to the Nebraska department of health and human services. There are even actions that can be.

Speaker 2: [\(19:42\)](#)

It's to a level of, or whatever state they're in. So, it might be Nebraska. This was, you know, maybe Oregon is where my set of facts was. Right,

Speaker 4: [\(19:49\)](#)

Right. So, you have that. And, and, and then also you would have an action of, you know, of an adult in, in need of protection. You could also use that route as well, though, through the court systems and through the mental health systems as well to potentially if the, if the mother has, you know, potential declining mental health and so forth, she would need action. And of course there is the court action for, particularly if the person who's being held up in the attic might have diminished capacity and so forth might have to go for a guardianship and, or a, a conservatorship, especially if that person can no longer designate another person, his or her healthcare power of attorney.

Speaker 2: [\(20:35\)](#)

So the good news out of that list is when there's a challenge, there's potentially a lot of ways to address

Speaker 4: [\(20:39\)](#)

An issue, oh, many, many ways. And, and, you know, it's the, it's the attorney's job at that point to sit there and assess what the, what the, what the path to helping this person, what the best path or combination of path might be to, to assist this person.

Speaker 2: [\(20:56\)](#)

So it's not uncommon for, to be an estrangement among a family. If somebody wants to disinherit, let's say a child or some other beneficiary, what are the issues that arise in that context?

Speaker 4: [\(21:10\)](#)

So the issues that arise in that context are first let's start with, with, with one general rule, the only, the only person under the laws of virtually every state jurisdiction, this country that is to an inheritance and cannot be disinherited is a surviving spouse. Okay. You can't disinherit a spouse there's provisions for that, unless

Speaker 2: [\(21:36\)](#)

She signed a valid premarital agreement allowing herself or himself to be disinherited, correct? Correct.

Speaker 4: [\(21:43\)](#)

Children can be disinherited, any other virtually anybody else can be disinherited, but let's focus on children. Cause obviously that's the, you know, the biggest target that in the biggest controversy that's gonna rise, because children sometimes feel an entitlement to have an inheritance and it's not an entitlement, it's a windfall frankly. And so, so when it comes to children who want to contest this? One of the things I always recommend on the estate planning and again, being preemptive before we go to having to do the surgery, to remedy this called a trial is make certain that you designate very clearly in your documents. If you're gonna disinherit a child or children that you identify that per that child in the documents, um, that you specifically state that you are disinheriting them, you don't have to give reasons you just, that you are disinheriting them.

Speaker 4: [\(22:38\)](#)

And although this doesn't bullet proof, it it's often been suggested that you leave a, a relatively token amount of money or assets to that person. The reason why that's encourages that the, the argument that you'll come into after the fact by children who have been disinherited is well, mom or dad didn't really mean to disinherit me. They, it was just a mission by, by him or her, you know, their memory may have been failing or the attorney didn't get that in the document. Well, when you specifically, you know, no knowledge that that they're being that this is a child of mine, they're being disinherited and, and I'm leaving them, whatever the token, relatively token amount of money is versus what, what, what would typically be a way larger inheritance that really helps seal you know, and at least let's put it this way. It's a, it's not a brick wall. It's gonna stop them but it's certainly a hurdle from them claiming that they, they, they can't be disinherited.

Speaker 2: [\(23:37\)](#)

So, and the other thing I've heard Mon is there's the token amount theory, but the other theory is give them enough. So, they have something to lose if they challenge that's, is that a strategy that's worth considering? Yeah. That's what if they are left? Absolutely nothing or \$1, yes by suing and running up all these legal fees, they have nothing to lose. So, who cares if they have the money to pursue the suit or think they have some ability to get attorney's fees out of that, right?

Speaker 4: [\(24:04\)](#)

Yeah. I agree. And that's a very pragmatic strategy and, and what the attorney, and the estate are gonna, or, or trust are gonna have to determine is you got to look at the dynamics of the family and see if that, that type of strategy is gonna work to dissuade them from filing a litigation claim.

Speaker 2: [\(24:25\)](#)

So breach of fiduciary, you've mentioned in a couple of my hypotheticals, but can you just explain generally what it means to have a breach of fiduciary duty? That is something that you can litigate about. Yes

Speaker 4: [\(24:39\)](#)

So in trust in states and a trust, the fiduciary is the individual or institution called the trustee. There can also, there can be other parties that are designated with the fiduciary responsibilities, such as a trust protector, a trust director, those types of things. And then on the estate side, the fiduciary is typically the personal representative executor, whatever that terminology is, that's designated in the state. These are the people that are charged with the administering the estate or the trust, and their job is to administer it, make sure all the, the ministerial duties are done you know, filing of the, the appropriate court actions is in the case of an estate making sure the counting goes out post death if

required to the relatives in the case of a trust, making sure that the assets are being protected, preserved and ultimately where there's provisions in the trust or estate that, that dictate where the asset it's hard to go are to go to at spec upon specified events, making sure that happens and parti in the case of a trust, that's a tough balancing act because if the trust continues after death, you have people who, that are called income beneficiaries, typically that you have to take care of them.

Speaker 4: ([26:06](#))

And yet you have to preserve the assets of the trust for future or remainder beneficiaries. And the thing that's CRI critical in doing your fiduciary duty, you must make sure you invest the assets prudently, and you must be objective. Those are the two big things that I see happening.

Speaker 2: ([26:23](#))

So because we're running short on time. I just want to say, well, if I'm a beneficiary yeah. What's to my most likely claim as for a breach of fiduciary,

Speaker 4: ([26:33](#))

Typically either that the trustee did not act in the best interests of, of the beneficiaries of the trust.

Speaker 2: ([26:42](#))

For example, they invested all the funds, all the assets and funds that they got huge fees from, in addition to their trustees fees. Right. Is that a possible

Speaker 4: ([26:51](#))

Right? Or they didn't, or they didn't invest it prudently. They, put too, too many of the trust funds into one asset.

Speaker 2: ([26:59](#))

Didn't put everything into cryptocurrency in it. Yeah, exactly, exactly. As opposed to them should have put it all in apple stock last year. Yeah. Right into tech stocks that really did well. Well, Monte there's several other types of trust in estate litigation. And we'll talk about those and weave those into some future podcasts. But I appreciate your time today talking about these topics. So I appreciate the listeners for listening to today's episode and stay tuned for our weekly releases

Speaker 6: ([27:31](#))

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