Steve Leimberg's Estate Planning Email Newsletter - Archive Message #3027
Date: **29-Mar-23**
From: **Steve Leimberg's Estate Planning Newsletter**
Subject: **Linda Kotis: Little Did She Realize: The Case of an "Eye-O-Wa" - Opening Trust Amendment**

"*In February 2016, Donald K. Davis and Collen Davis, husband and wife, created the Donald K. & Collen Davis Family Trust (the "Family Trust"). While both spouses were living and competent, they could amend the trust agreement by a written instrument signed by both of them as Co-Trustors. The trust agreement also stated that upon the death of the first Co-Trustor to die, the trust was irrevocable and the surviving Co-Trustor could not amend, revoke or terminate the trust. Following Mrs. Davis' death, Mr. Davis and his adult children attempted to amend the Family Trust through a consent agreement and a First Amendment to the trust. The attempted amendment failed to comply with the Iowa Trust Code's requirements for modifying an irrevocable trust without court approval. Little v. Davis, 974 N.W.2d 70 (Iowa 2022), offers some important lessons for amending irrevocable trusts."*

Linda Kotis provides members with commentary on *Little v. Davis*, another recent case about a failed attempt to modify a trust.

Linda Kotis is Of Counsel in the Washington, DC office of **Ivins, Phillips & Barker,** a firm ranked by Chambers in its 2022 *High Net Worth Guide*. She is a member of the District of Columbia, California, Indiana, and Maryland Bars. Linda advises clients on forming and revising their estate plans and analyzes estate, income, generation-skipping transfer, and gift taxation matters for high-net-worth individuals and families. Linda's significant experience includes modification of trusts through mergers, decanting, and nonjudicial settlement agreements, analysis of complex state trust administration and non-tax issues, the administration of high-net-worth estates, charitable gift planning, marital agreements, post-mortem planning, and probate matters. Linda's most recent articles for **LISI** include *Making Amends - Baker v. Baker and the Case of the Missing Trust Caption* (February 16, 2023), *Go Tell It On The Mountain - Reasons to Talk about Your Philanthropy* (December 27, 2022), *Lessons from a Trust-Maker: Have Faith in Creative Drafting* (October 13, 2022), *Rotert v. Stiles*

and Dead Hand Control: Why Indiana Can't Be "Trusted" to Prohibit Public Policy Violations (April 13, 2022), and *Mann Up! Accept that Your Gift of a Deconstructed House is Less than the Sum of its Parts* (March 24, 2021) with co-author Ken Jefferson of Holland & Knight LLP. She is a co-author with Andrea Dykes and Carolyn Rogers, both of Howard Insurance, of *Maryland Enacts New Elective Share Law: Increased life insurance planning opportunities for states that have adopted the augmented estate concept,* Wealth Management's Trusts & Estates (August 11, 2020) and *The 2020 Election in Maryland*: *It's Not About Politics*, Probate & Property magazine (July/August 2020), and other articles in *Washington Lawyer, Bloomberg BNA Daily Tax Report,* and *Wealth Strategies Journal*. Among Linda's recent presentations on estate planning are a 2022 webinar with co-presenter Gina Lynn, Esq. based on Linda's LISI article *Lessons from a Trust-Maker* and a 2020 webinar with co-presenter Judith Barnhard, CPA, of Councilor Buchanan & Mitchell at the Greater Washington Society of CPAs' 2020 Nonprofit Symposium (December 14, 2020) on *Planning to SECURE Charitable Gifts: How the SECURE Act Supports Donations of Retirement Assets*, Linda is an active member of the Estate Planning Council of Montgomery County, Maryland.

Here is her commentary.

EXECUTIVE SUMMARY:

In February 2016, Donald K. Davis and Collen Davis, husband and wife, created the Donald K. & Collen Davis Family Trust. While both spouses were living and competent, they could amend the trust agreement by a written instrument signed by both of them as Co-Trustors. The trust agreement also stated that upon the death of the first Co-Trustor to die, the trust was irrevocable and the surviving Co-Trustor could not amend, revoke or terminate the trust. Following Mrs. Davis' death, Mr. Davis and his adult children attempted to amend the Family Trust through a consent agreement and a First Amendment to the trust. The Iowa Trust Code allows modification of an irrevocable trust in two ways: (i) without court approval, when the settlor and all beneficiaries consent, pursuant to Iowa Code § 633A.2202(1); and (ii) with court approval, with the consent of all beneficiaries "if continuance of the trust on the same or different terms is not necessary to carry out a material purpose," pursuant to Iowa Code § 633A.2203(1). Due to the death of Mrs. Davis, her consent as a Co-Trustor to amend the Family Trust could not be obtained. Therefore, the Supreme

Court of Iowa held that the attempt to modify the trust without court approval must fail.[1]

FACTS:

Initial Creation of Family Trust (February 2016)

Donald K. Davis and Collen Davis executed the Donald K. & Collen Davis Family Trust as Co-Trustors and Co-Trustees. The trust was created to hold farmland acquired by Mr. Davis prior to their marriage and which at some point following their marriage became jointly owned. The purpose of the Family Trust was to protect the property from claims by Mrs. Davis, or her children from a previous relationship, in the event Mr. Davis did not survive his wife. The dispositive provisions provided that upon the death of the last spouse to die, the trust estate was to be distributed in equal shares to Mr. Davis' adult children: Donald J. Davis, Keith Davis, Jeffrey Davis, and Katina Little.[2] Each of the four children would succeed Mr. Davis as a Co-Trustee.[3]

Decision to Amend Trust and Consent Agreement (April-May 2018)

Mrs. Davis died in September 2017, and Mr. Davis decided at some point after that to amend the Family Trust. His attorney prepared a "Consent to Modify Trust Agreement." The two-page consent agreement (i) acknowledged the provision in the trust agreement prohibiting the surviving Co-Trustor from amending, revoking, or terminating the trust, and (ii) stated that the purpose of the irrevocability provision, to protect the farmland against any claims from Mrs. Davis or her children, no longer existed.

The second page of the document consisted of the below paragraph with signature lines for Mr. Davis and Donald J., Keith, Jeffrey, and Katina:

> THEREFORE, the undersigned, being the current trustee, the current income beneficiary, and all of the adult beneficiaries who would receive a share of the trust if Donald K. Davis was not living, hereby agree that Donald K. Davis, as surviving Trustor and as surviving Trustee, shall have the power and authority to alter, amend, or revoke the DONALD K. & COLLEN DAVIS FAMILY TRUST[.]

Mr. Davis and each of his four children signed the consent agreement on separate dates in April 2018 and May 2018.[4]

Amendment of Family Trust (May 2018)

Mr. Davis executed a "First Amendment to Trust Agreement of Donald K. & Collen Davis Family Trust" on May 30, 2018. The amendment modified the disposition of the trust estate and the appointment of successor Trustees. Pursuant to the amendment, the farmland would pass in one-half shares to Donald J. and Keith, his two sons. His other son, Jeffrey, would receive the sum of $50,000, and his daughter, Katina, would receive the sum of $25,000. The remaining principal of the trust would be divided into equal shares for the four children. The amendment also provided that only Donald J. and Keith would succeed Mr. Davis as Co-Trustees, rather than having all four children serve as Co-Trustees.[5] While Katina had signed the consent agreement, the First Amendment apparently was not circulated to her.

District Court Proceedings (January 2020)

Mr. Davis died on November 13, 2019. Donald J. and Keith became Co-Trustees of the Family Trust. In January 2020, the Co-Trustees sent or caused to be sent to Katina a notice that contained a copy of the original Family Trust as executed in February 2016 and the First Amendment dated May 30, 2018. Katina filed a petition in January 2020 in the Iowa District Court for Keokuk County, contending the amendment to the Family Trust was void.

The parties filed cross-motions for summary judgment. The Co-Trustees argued that the amendment was valid[6] because Iowa Code § 633A.2202 provides for modification or termination of an irrevocable trust as follows:

> 633A.2202 Modification or termination by settlor and all beneficiaries.
>
> 1. An irrevocable trust may be modified or terminated upon the consent of the settlor and all of the beneficiaries.
>
> 2. Upon termination of the trust, the trustee shall distribute the trust property as agreed by the settlor and all beneficiaries, or in the absence of unanimous agreement, as ordered by the court.
>
> 3. For purposes of this section, the consent of a person who may bind a beneficiary or otherwise act on a beneficiary's behalf is considered the consent of the beneficiary.

Katina argued the amendment was not valid for several reasons:

(i) The terms of the trust agreement stated that it could not be amended, revoked, or terminated after the death of the first spouse;

(ii) The amendment was void without court approval because Mrs. Davis as a Co-Trustor could not and did not consent to the amendment, as required by Iowa Code § 633A.2203(1);

(iii) The amendment was invalid because the consent agreement did not identify the dispositive terms of the trust that were to be modified; and

(iv) She did not knowingly and voluntarily consent to the amendment. The document signed by Katina was only page two of the two-page consent agreement, which she signed despite not seeing both pages. The consent agreement that her father presented to her on April 25, 2018 contained only one page. According to Katina, her father became agitated when he was unable to find the first page as she requested. He finally explained to her that the purpose of the document was to remove his late wife's name from the trust agreement.[7]

The District Court denied the Co-Trustees' motion for summary judgment and granted Katina's motion for summary judgment. The court relied on Iowa Code § 633A.1105, which states as follows: "The terms of a trust shall always control and take precedence over any section of [the] trust code to the contrary." The court reasoned that Iowa Code § 633A.1105 "compelled the conclusion that the provision of the trust agreement stating that the surviving settlor could not amend, revoke, or terminate the trust was controlling." Therefore, modification of the Family Trust was disallowed under any circumstances. The District Court did not address any other arguments raised by the parties.[8] Donald J. and Keith filed an appeal with the Iowa Supreme Court to contest the grant of Katina's summary judgment motion and the District Court's finding that Iowa Code § 633A.1105 is a complete bar to the modification of an irrevocable trust.[9]

Supreme Court Proceedings (2022)

While the Supreme Court affirmed the grant of Katina's summary judgment motion, it concluded that the District Court erred in its interpretation and application of Iowa Code § 633A.1105 as grounds for granting the motion. Instead, the Supreme Court agreed with Katina's argument that when an

irrevocable trust is created by two Co-Trustors, as was the Family Trust, "it can be modified without court approval only with the consent of all settlors [and all beneficiaries, as provided in Iowa Code § 633A.2202(1)]. Obviously, [Mrs. Davis] could not and did not consent to the modification of the trust."[10] Therefore, the Supreme Court concluded that the purported amendment, obtained without court approval, must be invalid.[11]

The Court further stated that:

> [t]o allow the surviving settlor and beneficiaries of an irrevocable trust to amend the dispositive provisions of a trust without court approval is inconsistent with Iowa's focus on protecting the intent of all settlors of a trust, including a deceased settlor.
>
> . . . .
>
> To best protect the intent of a deceased settlor who held the power to modify the trust during her lifetime, we should not permit the surviving settlor and beneficiaries to amend a trust on their own after that settlor passes. The language of Iowa Code § 633A.2202(1) and our rules of statutory construction command this result. The persuasive caselaw from other jurisdictions supports this result.[12]

COMMENT:

This case provides an opportunity to exam other methods of modifying a trust without court approval.[13] It also offers lessons about family dynamics.

Decanting

Iowa Code § 633A.4215 allows a Trustee to decant a trust into a new trust, without court approval, and may be a method to change the beneficial interests in the original trust. This statute did not become effective until July 1, 2020, however. Therefore, this method would not have been not available to Mr. Davis under Iowa law for modifying the Family Trust, since Mr. Davis' attempted modification to the trust was in 2018 and he died in 2019.

Mr. Davis as Trustee may have been able to change governing law and situs of administration, if the trust instrument permitted such action. In that

instance, he could have moved the trust to a jurisdiction which had a decanting statute in effect during 2018, and following the change, decanted the Family Trust to a new trust.

There are several challenges with this strategy. First, the Family Trust may not have met the requirements of another jurisdiction's decanting statute. Many of these statutes require that the Trustee must have the power to invade principal under an unlimited distribution standard. The consent agreement stated that Mr. Davis was a current income beneficiary of the trust. Even if the distribution standards for a decanting were met, a decanting statute in a given state may or may not allow the new trust to change the beneficial interests of the Family Trust. Second, state decanting statutes based on the Uniform Trust Decanting Act require that a Trustee give notice to beneficiaries prior to the Trustee's exercise of the decanting power and provide them with a copy of the new trust instrument.[14] Had Mr. Davis done this, Katina may have balked after receiving a notice of a decanting and a new trust instrument and objected to its exercise. Finally, it is always good practice to request that the beneficiaries release the Trustee for exercising a decanting power. Further, a release is recommended no matter which method is used to modify a trust. Clearly, Katina was not asked to release potential claims against the Trustee or anyone else with respect to the consent agreement or the First Amendment to the Family Trust.

Merger

Iowa Code § 633A.2207(1) permits merger of trusts as follows: "A trustee, without approval of court, may combine two or more trusts with substantially similar beneficial interests unless the trust is a court reporting trust." Mr. Davis as Trustor and Trustee could have created a new irrevocable trust with the same beneficiaries and which provided for the new dispositive scheme created in the First Amendment. Mr. Davis as Trustee could then have combined the new trust and the Family Trust, with the dispositive scheme of the new trust to prevail. One issue is that the beneficial interests in the new trust may not qualify as substantially similar to those of the Family Trust. This is particularly the case, if the value of a one-quarter share of the farmland was greater than the $25,000 sum given to Katina in lieu of her share of real property. Such a merger may have constituted a gift from Katina to the other beneficiaries and also could have affected the GST (generation-skipping transfer) tax status of the trust. In addition, as for the other forms of trust modification, the same issues

regarding notice apply to a combination of trust and the beneficiaries should be requested to execute a release.

Family Dynamics

A major issue in this case is family dynamics. As previously discussed, prior to being amended, the Family Trust's disposition of the trust estate upon the surviving spouse's death was to be made in equal shares to all four children. The First Amendment instead provided that the farmland would be split in two equal shares for sons Donald J. and Keith, with son Jeffrey and daughter Katina to receive the sums of $50,000 and $25,000 respectively, in lieu of a share of the real property; the remainder of the trust estate would be split into four equal shares. The roles of Katina and Jeffrey with respect to the Family Trust were also diminished, as they were removed from being appointed as successor Co-Trustees along with their brothers.

The opinion does not provide any explanation for Mr. Davis' changes to Katina's and Jeffrey's beneficial interests or their reduced roles with respect to the trust. Perhaps Katina and Jeffrey were wealthier than their brothers. Maybe Katina and Jeffrey had expressed disinterest to their father or brothers in serving as fiduciaries. Katina reported that her father told her the purpose of the consent agreement was to take Mrs. Davis' name off of the trust instrument. The Court does say that the consent agreement stated that "the purpose of the irrevocability provision — to protect Donald's farmland against any claims from Collen or her children — no longer existed."

Perhaps Mr. Davis was in ill health following the death of his wife, and relying mostly on Donald J. and Keith for management of his assets and decision-making about his estate. Maybe Donald J. and Keith were the architects of the consent agreement and the First Amendment and misled their father about the reasons for the consent agreement and the scope of the changes intended for the Family Trust.

It is also curious that Jeffrey did not join Katina as a plaintiff in her action against Donald J. and Keith as Co-Trustees. This raises the question of whether Jeffrey knew about the content of the First Amendment and was in agreement with the changes. At any rate, Mr. Davis' alleged statement to Katina about the purpose of the consent agreement is at best partially untrue and at worst an obfuscation.

Katina also bears some responsibility here. She should not have signed the second page of the consent agreement without having seen a copy of the first page as well. And the opinion does not address whether she asked about or discussed the context of the consent agreement with her brothers or whether they told her about any potential plans to amend the Family Trust.

Concluding Observation

Little v. Davis is another example of what not to do when modifying an irrevocable trust. It is possible that Mr. Davis was not advised of all potential options for modifying the Family Trust; if he had been, he might have chosen a different approach to achieve his goals. The case also serves as a cautionary tale when family members are co-beneficiaries and may have interests at cross-purposes. Talking things over among the family before the death of Mr. Davis would have been a reasonable step to take and may have led to a different result.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Linda Kotis

CITE AS:

responsibility of the authors and do not represent an opinion on the part of the officers or staff of LISI.

CITATIONS:

[1] *Little v. Davis*, 974 N.W.2d 70,77-78 (Iowa 2022).

[2] *Id* at 71-72.

[3] *Id* at 72.

[4] *Id*.

[5] *Id*.

[6] *Id.*

[7] *Id* at 73.

[8] *Id.*

[9] Appellant Br. In *Little v. Davis,* The Supreme Court of Iowa, (Supreme Court No. 21-09530).

[10] *Little v. Davis,* 974 N.W.2d at 74.

[11] *Id* at 77-78.

[12] *Id* at 76-78.

[13] Some practitioners use a Nonjudicial Settlement Agreement (NJSA) to modify a trust without court approval. Iowa Code § 633A.6308(2) allows interested persons to "enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust." This is the case unless the NJSA would violate a material purpose of the trust (*See* Iowa Code § 633A.6308(3)), or except as otherwise provided with respect to a modification or termination of a trust under Iowa Code § 633A.2203. As previously discussed, because Iowa Code § 633A.2203 would have required court approval of the Family Trust modification because the consent of Mrs. Davis, one of the joint settlors, could not be obtained, Iowa Code § 633A.6308(2) would seem to make the use of an NJSA unavailable in this case.

[14] Unif. Trust Decanting Act, § 7 (Unif. Law Comm'n 2015).