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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #3014

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From: Steve Leimberg's Estate Planning Newsletter

Subject: [Linda Kotis: Making Amends - Baker v. Baker and the Case of the Missing Trust Caption](#)

“Charles F. Baker executed three trust documents prior to his death: a revocable trust agreement as Settlor and Trustee and two subsequent trust instruments purporting to amend or revoke the original trust agreement. Following his death, his adult children and second wife filed separate actions in the Hot Spring County Circuit Court for construction of the trust documents. Baker v. Baker presents a case study for drafting and amending trusts to mitigate the chances of a controversy.”

Linda Kotis provides members with commentary on drafting tips for revocable trusts to avoid a dispute after the Settlor’s death.

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 and formation of private foundations, marital agreements, complex guardianships, post-mortem planning, probate matters and court pleadings regarding fiduciary administration issues. For **LISI**, Linda has written [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), [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, [Navigating the Waters of Maryland’s New Elective Share Law: How Not to Be Up The Creek without](#)

[*A Paddle*](#) (October 2, 2020) with co-authors Andrea Dykes and Carolyn Rogers of Howard Insurance, [*Look, Up in the Sky. It's a Transfer Tax on Your Plane*](#) (March 19, 2020) with co-author Ken Jefferson, [*Modification Mania: Avoid Trust Code Trip-Ups and Draft Documents to Facilitate Change*](#) (October 31, 2019), [*Reset of the District of Columbia's Estate Tax Exemption*](#) (January 9, 2019) with co-authors Andrea Dykes and Carolyn Rogers, [*Minding the Gap: The Mismatch Between Maryland's 2019 Estate Tax Exemption and the New Federal Estate Tax Exemption*](#) (June 25, 2018), and [*Reform School: Lessons on Rescuing an Undesirable Tax Plan after Death*](#) (April 27, 2017). She is a co-author with Andrea Dykes and Carolyn Rogers 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 the author of *Nonjudicial Settlement Agreements: Your Irrevocable Trust is Not Set in Stone*, *Probate & Property* magazine (March/April 2017), and other articles in *Washington Lawyer*, *Bloomberg BNA Daily Tax Report*, and *Wealth Strategies Journal*. Linda's most recent presentations on estate planning were a 2022 webinar with co-presenter Gina Lynn based on Linda's LISI article *Lessons from a Trust-Maker*, a 2021 webinar with co-presenter Ken Jefferson based on their LISI article about *Mann v. U.S.*, and at the 2020-2021 DC Bar Communities Guardianship and Probate Program Series with co-presenter Kasey A. Place of Ivins Phillips & Barker on *The Blessings and Burdens of Drafting for and Administering Estates with Charitable Beneficiaries* (February 25, 2021). Other presentations include: 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* with co-presenter Judith Barnhard of Councilor Buchanan & Mitchell; at the DC Bar Communities, Estates, Trusts, and Probate Lunch Series with co-presenter Kasey A. Place on *Lemons to Lemonade: Making Use of the Delaware Tax Trap* (November 13, 2018); at the *Women, Influence & Power in Law* conference (October 4, 2018) as a panelist with Robin Solomon of Ivins, Phillips & Barker; and at meetings of the American Bar Association, the District of Columbia Bar, and law firm briefings. Linda is an active member of the Estate Planning Council of Montgomery County, Maryland.

Here is her commentary.

EXECUTIVE SUMMARY:

Charles F. Baker executed three trust documents prior to his death: a revocable trust as Settlor and Trustee and two subsequent trust instruments purporting to amend or revoke the original trust agreement. Following his death, his adult children and second wife filed separate actions in the Hot Spring County Circuit Court for construction of the trust documents. *Baker v. Baker*, 646 S.W.3d 397 (Ark. Ct. App. 2022) presents a case study for drafting and amending trusts to mitigate the chances of a controversy.

FACTS:

Initial Creation of Revocable Trust (July 2018)

Charles F. Baker created the Charles F. Baker Living Trust dated July 30, 2018, (the “July 2018 trust”), as Settlor and Trustee. His adult children, Kevin Baker, Nina Cranford, Doug Baker, and David Baker, and his second wife, Sharon, were named as beneficiaries of the July 2018 trust on his death. Article III stated the process for amending and revoking the trust, as follows:

As Settlor, I may, acting by a written instrument, signed, acknowledged, and delivered to the Trustee during my lifetime, revoke this Trust in whole or in part and amend it from time to time in any respect. Any amendment made by Settlor shall be executed by preparation of a signed, dated, written document titled “The Charles F. Baker Living Trust Amendment.” The amendment document must be kept with the original trust documents. In case of revocation, the Trust property shall be conveyed to the Settlor who originally transferred the property into the Trust, including assets and income which may be traced to the original property. Upon my death, this Trust shall thenceforth be irrevocable and shall not be revoked, modified, or amended in any respect.^[1]

Mr. Baker funded the trust on the day it was signed: he and Sharon executed a quitclaim deed conveying three parcels of real property to the trust.

Amendment of Revocable Trust (April 2019)

On April 10, 2019, Mr. Baker executed an amendment to the July 2018 Trust, titled "First Amendment of the Charles F. Baker Living Trust (the "April 2019 amendment"). The April 2019 trust amendment contained a recital stating: "Pursuant to the provisions of Article III of The Richard Harper Living Trust^[2] established by CHARLES F. BAKER, Settlor, with CHARLES F. BAKER, as Trustee, the Trust is hereby amended in the following respects." The April 2019 amendment primarily revised portions of Article V, deleting Sharon as a beneficiary, and removing her as a potential successor Trustee.^[3]

Amendment of Revocable Trust (May 2019)

On May 20, 2019, Mr. Baker executed another document titled "The Charles F. Baker Living Trust" (the "May 2019 trust"). According to the opinion, the May 2019 trust was nearly identical to the July 2018 trust. The instrument reinstated Sharon as a beneficiary of real and personal property and appointed her as successor Trustee. It differed in that it left all of the real property to Sharon instead of dividing it among Sharon and the adult children. Mr. Baker and Sharon executed a quitclaim deed on May 24 to the Charles F. Baker Living Trust conveying the same property as they had deeded to the July 2018 trust.^[4]

Circuit Court Proceedings

Mr. Baker died on January 31, 2020. Sharon filed a "Complaint for Confirmation of Trust and Title Trust Property" on February 21, 2020 in the Hot Spring County Circuit Court. The complaint requested an order quashing the July 2018 trust and April 2019 amendment, confirming the May 2019 trust and quitclaim deed, and quieting title to the property in her name. Kevin, Nina, Doug, and David filed a counterpetition, arguing that the May 2019 trust failed to substantially comply with the amendment requirements of the July 2018 trust, and therefore was void as an instrument amending the trust. They further alleged that the May 2019 trust was not properly funded, because Charles had attempted to fund the May 2019 trust with real and personal property that had already been placed in a different trust. They further requested a declaration that the May 2019 trust was void and that the terms of the July 2018 trust were controlling. Subsequently, Mr. Baker's children filed a motion for summary judgment, arguing again that the May 2019 trust failed to substantially comply with the provisions in the July 2018

trust for amending the trust. Sharon responded that since the July 2018 trust was revocable, Mr. Baker's execution of the May 2019 trust and quitclaim deed "clearly evidenced an intent to revoke" the trust.

The circuit court granted the summary judgment motion. The ruling was based upon the fact that the original trust agreement stated four conditions for an effective amendment, which were (i) an instrument in writing that is (ii) signed, (iii) dated, and (iv) entitled "The Charles F. Baker Living Trust Amendment." While the April 2019 amendment complied with these conditions, the May 2019 trust did not. The court reviewed Ark. Code Ann. § 28-73-602(c), which permits the settlor of a revocable trust to amend the trust as follows:

- (c) The settlor may revoke or amend a revocable trust:
 - (1) by substantial compliance with a method provided in the terms of the trust; or
 - (2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:
 - (A) executing a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
 - (B) any other method manifesting clear and convincing evidence of the settlor's intent.

The circuit court held that the July 2018 trust and the April 2019 amendment were valid. It also held because the document heading of the May 2019 trust did not include the word "amendment," as required by the provisions of the July 2018 trust, the May 2019 trust did not substantially comply with the requirement regarding amendment. In addition, it concluded that the May 2019 trust failed because the property Sharon and Mr. Baker attempted to transfer to it was already held in another trust. Sharon timely appealed the circuit court's order.^[5]

Appellate Court Proceedings

The Arkansas intermediate appellate court upheld the circuit court's grant of the summary judgment motion. While the appellate court acknowledged that the May 2019 trust was signed, dated, written, and titled "The Charles F.

Baker Living Trust," it disagreed with Sharon's contention that the absence of a caption with the required language, "The Charles F. Baker Living Trust Amendment," was not significant. The court stated:

The real problem is that nowhere in the May 2019 trust does it reflect a reference to any prior document. One reading the May 2019 trust by itself would never know that a prior document existed, much less that the prior document was being amended. In addition, Charles amended the July 2018 trust once before in compliance with Article III's provisions when he executed the April 2019 amendment, wherein he expressly captioned it the "*First Amendment* of the Charles F. Baker Living Trust." (Emphasis added.) Thus, Charles knew how he was supposed to accomplish an amendment.^[6]

Definition of Substantial Compliance

The appellate court acknowledged Sharon's argument regarding the requirement of substantial compliance as set forth in Ark. Code Ann. § 28-73-602(c) (1). It noted, however, that the trust code provision does not define substantial compliance. Further, the cases cited by Sharon on the issue of substantial compliance were "inapposite" because they did not address the specific requirement for amending a trust as set forth in *Ashley v. Ashley*, 2012 Ark. App. 236, at 9, 405 S.W.3d 419, 425: "if a trust agreement sets out by its own terms the method by which it may be revoked—or, in this case, amended—then revocation (or amendment) may only be accomplished in the manner provided in the trust."

The court also reviewed the Restatement (Third) of Trusts § 63 cmt. I (Am. L. Inst. 2003) and found it to be instructive:

[i]f the terms of the trust reserve to the settlor a power to revoke or amend the trust exclusively by a particular procedure, the settlor can exercise the power only by substantial compliance with the method prescribed. Thus, if a settlor reserves the power to revoke the trust 'only by a notice in writing delivered to the trustee,' revocation requires the delivery of such a notice to the trustee.

COMMENT:

There are several takeaways from this case. First, it is unnecessary to specify a caption for a document that amends a trust agreement. I've drafted and reviewed thousands of documents, and none of them required a certain caption in order to create a valid amendment to a trust. And there are myriad ways to identify an amendment. For example, I've seen amendments to trusts titled as follows:

- First [or Second or Third] Amendment to [Name of Trust]
- Amendment to [Name of Trust]
- Amended and Restated [Name of Trust]
- First [or Second or Third, etc.] Amendment and Restatement of [Name of Trust]
- First [or Second or Third, etc.] Supplement to [Name of Trust]

Second, it is not completely clear from the opinion whether Mr. Baker and Sharon viewed the May 2019 trust agreement as an attempt to revoke the July 2018 trust as amended by the April 2019 amendment, as an amendment and restatement of the July 2018 trust in its entirety, or as partial amendment of the July 2018 trust. Because Mr. Baker and Sharon attempted to reconvey the real property held by the July 2018 trust to the May 2019 trust, it seems likely the May 2019 trust was intended to revoke the July 2018 trust as amended by the April 2019 amendment. At any rate, there was no mention of the prior July 2018 trust in the May 2019 trust, and the appellate court therefore found that lack of reference to the prior trust document to cause the May 2019 trust to fail.

Third, it is good practice to include in the recitals of every trust agreement and its amendments the purpose of the document. For example, the May 2019 trust could have contained the following recitals:

WHEREAS, Settlor and Trustee entered into Charles F. Baker Living Trust dated July 30, 2018 (the "2018 Trust Agreement") of certain property described therein; and

WHEREAS, Settlor retained the power to modify or revoke the 2018 Trust Agreement as follows:

As Settlor, I may, acting by a written instrument, signed, acknowledged, and delivered to the Trustee during my lifetime, revoke this Trust in whole or in part and amend it from time to time in any respect. Any amendment made by Settlor shall be executed by preparation of a signed, dated, written document titled "The Charles F. Baker Living Trust Amendment."

and

WHEREAS, pursuant to the power retained by the Settlor in Article III of the 2018 Trust Agreement to modify or revoke the Trust Agreement, Settlor amended the 2018 Trust Agreement by a First Amendment of the Charles F. Baker Living Trust dated April 10, 2019; and

WHEREAS, Settlor now desires again to exercise said right to modify the 2018 Trust Agreement, and to amend and restate herein the terms and conditions of the 2018 Trust Agreement in their entirety;

Alternatively, if the May 2019 trust was intended to revoke the July 2018 trust, the final recital could be drafted as follows:

WHEREAS, Settlor now desires again to exercise said right to modify the 2018 Trust Agreement, and by this May 2019 trust instrument to revoke said 2018 Trust Agreement in its entirety, and furthermore, has conveyed the property originally transferred to the 2018 trust back to himself, along with all other assets and income which may be traced to the original property, which assets will be conveyed to this May 2019 trust to be held and administered in accordance with the provisions herein;

Finally, it is important to consider the family dynamics when revising an estate plan and to document the Settlor's intent as necessary and appropriate in anticipation of potential conflicts. In *Baker*, there was a blended family: Sharon was Mr. Baker's second wife and the stepmother of his four adult children, Kevin Baker, Nina Cranford, Doug Baker, and David Baker. In the July 2018 trust, she and the children were all named as beneficiaries of the real property deeded to the trust. Mr. Baker's amendment to the trust in April 2019 removed Sharon as a beneficiary and

as a successor Trustee. While the May 2019 trust agreement reinstated Sharon as a beneficiary and successor Trustee, which provisions were similar to the those of the July 2018 trust, the provisions also removed the adult children as beneficiaries of the real property.

The opinion does not explicitly address the family relationships. It is reasonable to infer, however, that tension may have existed between Sharon and Mr. Baker's adult children. Therefore, when reducing or eliminating an interest of a beneficiary in a trust, such as was done in the May 2019 trust, it is prudent to include a statement of the Settlor's intent. This could be a statement such as the following:

The Settlor [has made no provision for his children under this Trust Agreement] **OR** [has modified the provisions for his children under this Trust Agreement], because the Settlor has otherwise provided for his children during Settlor's lifetime and through other dispositions of the Settlor's other assets which will take effect upon the death of the Settlor.

Concluding Observation

This case is a good example of what not to do when drafting the initial trust instrument, amending a trust, revoking a trust, and funding a subsequent trust. More careful drafting of the initial trust agreement, along with acknowledging the family dynamics in subsequent trust instruments, may have prevented the controversy from occurring in the first place, saving the family members time, money, and aggravation.

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

Linda Kotis

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CITATIONS:

[1] *Baker v. Baker*, 646 S.W.3d 397, 398 (Ark. Ct. App. 2022).

[2] According to footnote 1, “The reference to The Richard Harper Living Trust is apparently a scrivener's error. None of the parties assign any weight or import to the one-time use of an incorrect name, and the circuit court referred to it as a ‘typographical error’ at the summary-judgment hearing.” *Id.*

[3] *Id.* at 398-399.

[4] *Id.* at 399.

[5] *Id.* at 400.

[6] *Id.* at 401.