FENSTERMACHER SCREWED UP MOTHER'S DOCUMENTS

About august 2020, Mother was convince that fenstermacher, working with jsh, was trying to steal from her (mother) and not being a honest and ethical lawyer. She knew fenstermacher hated me and was trying to make her (mother) dislike and not trust me (Arthur). Mother decided to go to a nearby law firm and had fenstermachers documents of her will, Trust and other legal documents fenster made analyzed by a lawyer.

The results by that law firm prove fenstermacher did not know what he was doing legally. Mother decided to get a new lawyer to rewrite those documents. In addition, over a year later

After mother was guardianized, fenstermacher refused to correct his many, serious mistakes in his documents.

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September 14, 2020

Mrs. Jane T. Herring
26 Chancery Court
Souderton, PA 18964

Re: **Review of Estate Planning Issues**

Dear Jane:

I met with you and your son, Arthur Herring, III, on September 3, 2020. In the meeting you requested that I review your current estate planning and provide feedback as to whether it reflects the changes you had requested be made and whether the trust for the benefit of Arthur has sufficient creditor protections. With this letter, I would like to clarify that the services offered are only that of a second opinion; I am not agreeing to represent either you or your son for any purpose other than a review of the details and provisions of your estate plan.

You and your husband had a professional relationship with Ronald W. Fenstermacher, Jr., Esq., who I believe drafted the majority of the documents. As described below, you will see that Mr. Fenstermacher plays several roles in your documents. By example, your Durable Power of Attorney first named your husband, Arthur Herring, Jr., as your agent. As a result of his death, your children, Jill S. Herring and Arthur Herring, III, are appointed as agent. As written, Arthur and Jill do not have the authority to act independently of each other. This is made clear by the following sentence in the document which states "Should my children be unable to agree on any decision that must be made, my attorney, Ronald W. Fenstermacher, Jr., shall make the final decision." At our meeting, you both mentioned difficulty in interacting with Mr. Fenstermacher. In light of his key roles in your estate plan, your professional relationship with Mr. Fenstermacher needs to be clarified.

As to your estate documents and the specific questions asked, please accept the following comments:

WILL, dated November 26, 2018:

1. Paragraph FIRST provides that Mr. Fenstermacher is the Executor of this Will. No successor is named if Mr. Fenstermacher is unavailable or unwilling to serve as Executor.

2. Paragraph SECOND deals with your personal property, stating that all of your personal property is to be distributed in "as nearly equal shares as practicable" to Arthur and Jill.

However, you also state that you may leave a memo providing for the distribution of certain items. I was provided with a sheet titled "Jane Herring's Will" which lists certain articles and to whom they should be distributed. This document was dated March 23, 2020 and has your signature at the bottom. It does make some specific distributions of personal property like vehicles and jewelry. I will have more to say about this document at the end of this letter.

3. Paragraph THIRD of the November 2018 will provides that all of the remainder of your assets (other than the personal property dealt with in Paragraph FIRST), get poured over into your Revocable Living Trust. This is known as a pour-over will, intended to ensure that any of your property that is not currently titled into the trust will flow through the probate estate into the trust, to be distributed under the terms of the trust.

AGREEMENT OF TRUST OF JANE T. HERRING, dtd April 26, 1993 (as amended):

1. The Preamble recites when the trust was created and the dates on which it was amended. It also confirms that you are the initial Trustee.

2. Section FIRST confirms that the trust is for your benefit while you are alive. You are to receive all income and as much of the principal as you request or that the Trustee, in his sole discretion, determines is desirable for your health, maintenance, and support. Since I assume that you remain the Trustee of the trust, you make the decisions regarding distributions to yourself.

In contrast, the last section of Section FIRST provides that if you are mentally or physically incapacitated, the Trustee is to distribute income and principal to meet your living needs. Per Section TWELFTH, Mr. Fenstermacher is the Trustee if you are mentally or physically incapacitated. This section also permits your agent under Durable Power of Attorney to request that the Trustee distribute to your agent under Durable Power of Attorney as much of the income and principal as the agent states is necessary to make gifts "to or among" your children, with the maximum gift being the annual exclusion amount of $15,000 per person per year.

3. Section SECOND deals with the residue of your Trust on your death. The Trustee is to divide the principal into equal shares for your surviving children. If both Arthur and Jill survive you, then it would be two equal shares; in other words, a 50/50 distribution. If only one survives you, then they inherit the entire trust.

4. As to Arthur's share, Section SECOND (A)-(C) provides that it be held in trust for his life. The Trustee must pay the net income either to Arthur or for his benefit at least quarterly.

Section SECOND(B) provides that principal may be paid to Arthur or applied for his benefit, **but only if the Trustee deems it necessary in the Trustee's sole discretion.** This is the provision that protects the trust assets from creditors. A creditor cannot force the Trustee to make a distribution to Arthur or for his benefit – that can only be done if the Trustee decides to do so. In addition, this also means that **Arthur cannot force the Trustee to make a distribution**. In addition, before making any distribution, the Trustee is permitted to take into account any other assets available to Arthur.

Section SECTION(C) provides that on Arthur's death, Arthur, by his will, may state to whom the trust proceeds will be paid, except that they cannot be left to himself, his creditors, or his estate. To exercise this ability, it must be done in a will and the will must make specific reference to the power granted to him in the trust. If Arthur fails to provide a will with adequate direction, the trust proceeds will be paid to Jill.

5. Section SIXTH of the trust is additional creditor protection in the form of a spendthrift provision. This provision makes it clear that while the assets are in the trust, they are not subject to creditor claims. This means a creditor cannot sue the Trustee to get a judgment against Arthur satisfied out of the trust while the funds are still in the trust. However, spendthrift protection is only available while the funds are in the trust. If, for example, the Trustee made a distribution to Arthur, the distribution would be fair game for collection attempts by creditors.

6. Section TWELFTH provides that if on your death, renunciation, resignation, incapacity, or if you otherwise fail to act as Trustee, then Mr. Fenstermacher will be the Trustee. There is provision that he can appoint a successor Trustee, whether an individual or a corporate Trustee. This section does note that if an attorney is acting as Trustee, he is to be paid his normal hourly rate as compensation.

Finally, please be aware that the document that you provided to me, labeled "Jane Herring's Will" is an ambiguous document. From what I recall of our meeting on September 3, 2020, the document was supposed to summarize how your estate should flow, in particular that Arthur would receive 75% of your estate and Jill 25% of your estate.

Please be advised that it is possible that this document could be considered a holographic will and/or codicil to your will dated November 26, 2018. To be a holographic will, a document must express testamentary intent and be signed at the bottom. If this document is submitted for probate, then I would interpret it as meaning that everything is distributed outright and Arthur's share does not go to the trust. If Arthur's share does not flow through to your trust, then it is subject to the claims of creditors.

Jane, as mentioned at the beginning of the letter, I want to be clear about the limited role I agreed to play. You requested a review of your documents in light of the expectations presented to me, and this letter is a summary of what I have found. In addition, the document labeled "Jane's Will and Daily Decisions", which is unsigned, reflects preferences for managing your affairs now via your Durable Power of Attorney as well as through your estate. You would need to update your estate documents to incorporate these changes.

With that said, please be aware that I have concerns about how further changes to your estate planning would be accomplished and the end result of same. You and Arthur were both very direct about the fact that Arthur and Jill do not have a good relationship, or, in fact, any relationship. Arthur described how changes were made to one of your bank accounts so that Jill could not have access to it. Regardless of the exact terms of your estate plan, I foresee a likelihood for conflict between Arthur and Jill.

My particular concern is that your situation could be interpreted as Arthur exerting undue influence on you and that on your passing your estate could be tied up in litigation between Arthur and Jill. In Pennsylvania, to establish that a will or estate plan was created under undue influence, an interested party must show, at a minimum, that (1) the testator – the person writing the will – had a weakened intellect at the time of the will's execution, (2) the person offering the will for probate stood in a confidential relationship with the testator, and (3) the person offering the will received a substantial benefit under the will. When there is this high a degree of distrust between beneficiaries of your estate, you need to be aware that a will contest or other litigation to allege undue influence and possibly overturn estate documents is a distinct possibility.

With that said, you should also know that just because there could be an appearance of undue influence does not mean that it actually exists. If there were a dispute or litigation, there is the opportunity to confirm that none of the elements of undue influence exist. You will recall that I suggested that if you are considering further changes to your estate plan, you would be well advised to have Dr. Kuhar, your treating physician, produce a written document confirming that you have complete capacity and the ability to execute legal documents.

Thank you for the opportunity to be of service to you.

Sincerely,

DOROTHY K. WEIK-HANGE, ESQ.

DKW/pas