Estate Planning

Will contest: Could it happen to you?

By Eva Stark, JD, LL.M.

People often expend significant time and financial resources to put a will and overall estate plan in place. Despite these efforts, a small percentage of wills may be challenged or contested. A will contest could tie up assets in court proceedings for a long time and, if successful, may result in undesired outcomes.

An experienced estate planning team can help recognize the potential for a will contest, minimize risks, and ensure that assets will be distributed according to the intent of the testator (the person who died leaving a will or testament in force).

What is a will contest?

A will contest is a formal attack on a will that may generally be brought by a person mentioned in the will or any person who would have inherited under state law if the testator had died without a valid will. A challenger may rely on a variety of legal theories.

For example, he or she may argue that the testator lacked testamentary capacity or was subject to delusion at the time the will was executed. He or she may argue that the testator was under undue influence or possibly even duress by a certain child, the surviving spouse, or another person. A challenger may argue that fraud or forgery may have occurred, or that formal requirements for executing a valid will were not met.

While no estate plan can be made challenge-proof, an experienced estate planning team may help recognize risks, minimize incentives for potential challengers, and reduce the likelihood of success for a will contest.

Recognizing red flags.

Statistically, few wills are contested, but circumstances may exist that pose an increased risk for a will contest. The nature of the desired distribution structure and family dynamics are important to evaluate. A will contest may be more likely if a beneficiary could view the distribution structure as "unfair" or has difficulty accepting it as the intent of the testator. This could occur if similarly situated beneficiaries receive disproportionate shares, or when a distant relative or a friend who is not a relative receives a larger share at the expense of a child or other close relative. Generally, a will contest may also be likely in situations where a

testator has a surviving spouse and children from a previous relationship, or when children may be estranged from the testator, siblings or relatives.

Discussing the plan with family.

Sharing the provisions of an estate plan with family members and explaining why specific decisions were made will often make it less likely that a distribution scheme will be challenged. Including provisions in the will explaining certain decisions could also be considered in lieu of or in addition to discussing the plan with family.

Proving testamentary capacity.

Where an estate plan is established or changed later in life or during an illness, it may make sense to obtain proof of testamentary capacity. The attorney drafting the will might test an individual for testamentary capacity through a series of questions or may recommend that the client obtain a medical evaluation. This could help negate arguments that the testator lacked capacity.

Although the requirements vary by state, testamentary capacity is a different standard than contractual capacity and generally requires that the testator be generally aware of:

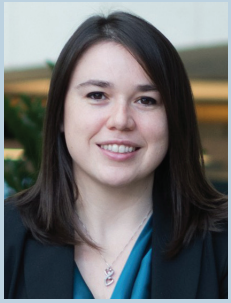
- What assets he or she has;
- Who makes up or who is a member of his or her family; and
- The disposition he or she is making.

Recording the signing of the will.

The drafting attorney may recommend that the signing of the will be video-recorded. Prior to signing the will, the attorney might ask the testator a series of questions or have the testator explain why certain decisions were made. Recording the signing of the will may help prove testamentary capacity, negate duress or undue influence, and show that the document was properly executed.

No-contest clause.

A "no-contest" clause or "in terrorem" clause is a provision in a will that either leaves nothing or a nominal sum—often just one dollar—to any beneficiary who unsuccessfully challenges the will. No contest clauses are not enforceable in certain states as a matter of public policy. A no-contest clause may discourage a disgruntled relative considering a challenge to the will but may also discourage unforeseeable—but potentially legitimate—challenges that could arise. Even in a state where no-contest clauses are generally enforceable, a no-contest clause may not always achieve its intended benefit. A no-contest clause will also not work against an individual who is excluded as a beneficiary under the will. Ironically, in certain situations, a no-contest clause may lead to additional litigation as questions may exist as to whether a certain challenge falls under the no-contest clause.



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