

## The Best Defense is a Good Offense



### [Trusts & Estates](#)

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Action items for estate planners when a will or trust contest is anticipated

What should an estate-planning attorney do when a client wants to create a trust or will or change an existing provision, and the attorney thinks that the new document or provisions may be contested? For example, say the client wants to disinherit or significantly reduce the amount of assets passing to an heir? Although these changes often lead to a will or trust contest after the client's death, many clients will tolerate only a limited amount of inconvenience or expense to obtain the intangible benefits of reducing the likelihood of post-death litigation or improving the chances of a successful defense of their testamentary wishes if litigation is unavoidable. We'll provide estate-planning attorneys with a few action items that can increase the probability that the client's testamentary wishes will be honored, but which won't cause the client significant inconvenience or expense.

### Common Contest Grounds

A challenge to testamentary documents by a disappointed heir will most likely be based on one or more of the following [legal](#) grounds. The specifics of these causes of action will vary from state to state, but the general legal concepts are fairly uniform across the country.

- **Improper execution.** Generally, for a will and, in some states, the testamentary aspects of a trust, to be valid, the following are required: testamentary capacity, testamentary intent, a writing, the testator's signature, witnesses and attestation.<sup>1</sup> Some states require strict compliance with execution formalities, with any deviation causing the entire will to be held invalid.<sup>2</sup> Other states will accept substantial compliance with such formalities, providing that the will shall be probated if there's clear and convincing evidence that the testator intended the document to constitute his will and that the will substantially complied with the formalities.<sup>3</sup> If the state has enacted a harmless error statute, the court may probate the will if it's satisfied that no reasonable doubt exists that the decedent intended the document to constitute his will.<sup>4</sup>

- **Lack of capacity.** As a threshold requirement, the testator (or grantor) must have had testamentary capacity at the time he executed the testamentary document. Generally, this means that the testator met the state's minimum age requirement (for example, in Florida, it's 18 years old) and was of "sound mind" at the time of the will (or trust) execution. In most states, the test for sound mind is a modest one, requiring only that the individual is capable of knowing the nature and extent of his property, the natural objects of his bounty, that he's making a disposition of his assets, the basic plan of such disposition and the relationship of the previous three elements so as to form an orderly plan of disposition.<sup>5</sup>
- **Undue influence.** Undue influence is the exercise of control or influence over a testator (or grantor) so that the will (that is, choice) of the influencer is being substituted for that of the testator (or grantor).<sup>6</sup> The influence must rise to a level such that it deprives the testator of the ability to make a free choice. In most states, a presumption of undue influence arises if the contestant is able to prove some of the elements of undue influence.<sup>7</sup> For example, many states recognize a presumption of undue influence if the testator (or grantor) and the influencer were in a confidential relationship, the influencer was active in procuring the will (or trust) and the influencer is a substantial beneficiary of the contested portions of the will (or trust).<sup>8</sup> In several states that have a presumption of undue influence, once the presumption applies, the burden of proof shifts, and the party defending the will (or trust) must show that the testator (or grantor) acted freely, intelligently and voluntarily with regard to the contested portion of the document.<sup>9</sup>
- **Fraud.** Fraud occurs when there's been a misrepresentation made with the intent to mislead the testator (or grantor) and with the intent to influence the terms of the contested will (or trust), which does mislead the testator (or grantor) and does influence the terms of the will (or trust).<sup>10</sup> Fraud occurs in two forms: (1) fraud in the fact, wherein the defrauder misrepresents facts causing the testator (or grantor) to execute or not execute his will (or trust) or to include or exclude certain provisions,<sup>11</sup> and (2) fraud in the execution, wherein, at the time of execution, the defrauder misrepresents the character or the components of the will (or trust).<sup>12</sup>

### **Action Items When Contest is Likely**

An attorney and his client can do many things to reduce the risk of a successful challenge to the client's testamentary plan.<sup>13</sup> As one might expect, the investment of time and money required to implement these prophylactic measures varies greatly. With that in mind, we'll focus on those action items that provide the most bang for the buck.

**1. Representation and communication.** When a lawyer prepares testamentary documents, he does so at the direction of the client and in accordance with the clients expressed intentions. A few simple steps will minimize litigation relating to confusion or ambiguities over the source or content of instructions to the planning lawyer. For every estate-planning matter, the attorney should have a clear understanding of whom he represents. The attorney should communicate this information, both verbally and in writing, not only to the client, but also to any other person who could reasonably believe that the estate planner is his attorney with regard to the particular matter. For example, the estate-planning attorney's engagement letter should clearly identify whom the estate planner does and doesn't represent. Going one step further, if an estate-planning attorney's representation of the client will require

significant interaction with non-clients, such as the client's spouse, child, agent or beneficiary, a writing early in the relationship advising such other individuals that the estate planner isn't their attorney should avoid any confusion about the duties owed to those individuals. If the estate-planning attorney has undertaken joint representation or the representation of multiple generations, he will need to draft appropriate joint representation letters, multi-family-member representation letters or obtain the necessary waivers.<sup>14</sup>

**2. Knowledge of existing state law.** Most estate-planning attorneys would say that they know the law in their state regarding the issues that most often put the validity of testamentary documents at risk, such as the elements necessary to establish testamentary capacity, the execution requirements for testamentary documents, the facts that give rise to a presumption of undue influence and the requirements to re-establish a lost will. However, what we think we know might not be the same as what we actually know. It doesn't take much time to find and read the applicable statutes and case law on these basic topics, and this modest effort may yield significant benefits to the client. For example, knowing the circumstances that give rise to a presumption of undue influence may help the planning attorney recognize a client who may be the subject of a third party's improper influence, or even more likely, this knowledge may prevent the estate-planning attorney from inadvertently allowing/creating circumstances that cast doubt on the validity of the client's will or trust. The attorney should understand the adverse inferences that can be drawn from such simple acts as a potential beneficiary recommending the client to the attorney, driving the client to the meeting with the attorney or attending attorney-client meetings.

**3. Medical and/or psychological evaluations.** Medical and psychological records and evaluations made in close proximity to the execution of estate-planning documents can provide strong evidence that the client possessed the testamentary capacity required to validly execute such documents.<sup>15</sup> Most clients are reluctant to incur the expense or inconvenience of an evaluation by an independent doctor. The client is far more likely to agree to allow one or more of his treating doctors to perform a capacity evaluation or to render an opinion on his testamentary capacity. In choosing a physician to perform the evaluation or to render the opinion, the attorney should consider how effective the doctor will be when called as a witness in a deposition or trial in the event of a later will or trust contest. Prior to the examination, the attorney should provide the examining physician with a short letter setting forth the test for testamentary capacity under applicable state law. The attorney should consider drafting a form letter, which can be easily tailored to individual clients. The language in the letter articulating the test for testamentary capacity should closely track the language from the relevant cases and statutes.<sup>16</sup> After the examination, and before the doctor creates a writing, the attorney may want to speak with the doctor (with the client's permission) to discuss the examination to determine if the doctor has any reason to believe the client has a physical or mental issue that could compromise the client's ability to validly execute a will or trust. To the extent the doctor does have concerns, they can be addressed, and hopefully remedied, prior to the doctor rendering his opinion and the client executing his testamentary documents.

**4. Family meetings.** The origins of a great many will and trust contests can be traced to a beneficiary who's surprised, shocked, bewildered, disappointed or angry, when, after the death of the testator, the beneficiary first learns of the contents of the will or trust. Although the beneficiary may have had little or no information about the decedent's estate plan, the beneficiary expected to receive a larger share of the estate. Thus, the beneficiary concludes

that the disappointing terms of the testamentary documents were the result of a third party's bad acts or the testator's lack of capacity. One way to mitigate this situation is for the testator to call a family meeting to share his estate plan with the beneficiaries while he's still alive and can explain his thought process. For many reasons, the estate-planning attorney should approach the topic of a family meeting with caution and sensitivity. Clients may not want to share the details of their estate plan because they don't want to have a confrontation with a disappointed child or because they think they'll be hounded by beneficiaries who don't like the plan. In some circumstances, clients intentionally deceive or mislead beneficiaries, using the express or implied promise of a large bequest to control them. If so, a family meeting isn't a good idea and won't be well received by the client. On the other hand, if the testator has made significant lifetime transfers to one beneficiary or if a particular beneficiary is engaging in behavior that could change, but is presently resulting in a reduced share of the estate, a family meeting may be very useful. Regardless of whether the family meeting is a success or a disaster, it's much harder to challenge an estate plan that was clearly articulated by the testator to the beneficiaries at a time when the beneficiaries had the opportunity to voice their questions and concerns directly to the testator.

**5. Trusted advisors.** An alternative to a family meeting is for the testator to share his estate plan with one or more of his trusted advisors, such as his financial advisor, his accountant or his business attorney. The testator must keep in mind that when he shares his estate plan with these individuals, he's making them witnesses who will most likely have to testify in any litigation challenging the validity of his testamentary documents. Thus, the testator (with input from the estate-planning attorney) needs to consider whether this person will be a good witness. Will he be willing to say things that may be unpleasant for certain [people](#) to hear? When he's on the hot seat, in a deposition or at trial, will he be able to clearly and accurately convey what the testator told him? Does the testator want to put this person in a position that could be very difficult and unpleasant and which could damage certain relationships? In addition, if the testator wants to keep his estate plan confidential, he needs to ask himself if the person with whom he shares it can keep a secret. As the old saying goes: "Everybody has a confidant that is not you."

**6. Documentation.** Because will and trust contests often occur many years after the execution of the documents being contested, there's a substantial likelihood that the estate-planning attorney and key witnesses may be unavailable or unable to recall the details of client meetings or the execution ceremony. Thus, it's a good idea to clearly document the client's estate-planning file. Writing letters, preparing memos to the file and preserving handwritten notes are low cost, low effort tasks that can pay big dividends.

**7. Execution ceremony.** Every estate-planning attorney should develop a common practice for will and trust execution ceremonies, such as asking the client if he's read the contents of the document and intends it to be his will or trust, reading the major dispositive provisions of the will or trust to the client and asking the client to verify that each such provision accurately represents his intentions, providing the witnesses with a verbal summary of the contents of the will (with the client's permission), reading the attestation clause to the witnesses in full and asking if they agree that the statements are true and correct and having the testator and witnesses sign in a particular order. Once the ceremony is scripted, the estate-planning attorney should adhere to the script so that, while the attorney may not be able to recall the facts of a particular execution, he will be able to testify with a fair amount of certainty that the documents were executed in accordance with his custom. To the extent

possible, the attorney should select disinterested witnesses and inform them of the contents of the will. Many states require the testimony of at least one disinterested witness to establish the specific content of a lost or destroyed will for it to be admitted to probate.<sup>17</sup>

Further, the timing of the execution ceremony may be very important. If a client's medical condition is inconsistent, the execution ceremony should occur at a time when the client is in the best possible mental and physical health. Before scheduling the execution ceremony, the attorney should speak with the client to determine at what time of day he's typically at his best (based on sleep schedule, medication schedule, etc.). If the attorney meets with the client and doesn't believe that the client is at the top of his game, the meeting should be rescheduled.

**8. Contemporaneous memoranda.** If a will or trust contest is foreseeable, the estate-planning attorney should consider having his associates or experienced paralegals present for the execution ceremony and have those same individuals serve as witnesses to the execution of the testamentary documents. Prior to the execution ceremony, the attorney should ask these individuals to make notes of their observations and to prepare contemporaneous memoranda regarding the execution ceremony setting forth who was present, the location, their observations of the testator's mental condition and any discussions between the attorney and client, particularly any discussions concerning the client's family members, assets and the key provisions of the documents which were executed. The more detailed the memoranda, the more useful they will be in litigation. To aid in the preparation for the execution ceremony, the attorney may wish to prepare a checklist of questions to ask the client, leaving blank lines to note the client's answers.<sup>18</sup>

**9. Multiple documents.** If a client intends to disinherit or reduce the share of an heir, the estate-planning attorney should consider having the client execute a series of testamentary documents over some extended period of time. If the contested terms are present in a number of executed wills or trusts, the contestant would need to challenge each of those documents and prove that the client lacked capacity or was being unduly influenced on each separate occasion over this extended period of time. This is a much more difficult task than challenging a single document.

**10. In terrorem clauses.** The estate-planning attorney may wish to consider including an in terrorem clause in a client's estate-planning documents to discourage a disgruntled heir from challenging them. There are pros and cons involved with the use of an in terrorem clause. Consider the following points:

**a.** For the in terrorem clause to be effective, the testamentary documents must provide the potential challenger with an asset of value; otherwise, the disgruntled heir would have nothing to lose by challenging the documents. This may be unattractive to a testator who wants to give the beneficiary nothing. In addition, it's important that the contestant's entire family line be disinherited in the event of a challenge; otherwise, anti-lapse statutes may allow the contestant's descendants to receive assets if the contestant loses his challenge.

**b.** An in terrorem clause can backfire. For example, assume a testator executes a will containing an in terrorem clause. A number of years later, when the testator has become physically ill and mentally weak, a con man unlawfully procures a change in the will that substitutes the con man for the testator's son as the primary beneficiary of the will. In all other respects, the will remains the same, including the presence of the in terrorem clause. The in

terrorem clause has now become a significant hurdle to the family in their efforts to overturn the will obtained by the con man's fraud.

**c.** Whether the in terrorem clause is enforceable depends upon applicable state law. Some states enforce such clauses strictly,<sup>19</sup> while others refuse to enforce such clauses under any circumstance.<sup>20</sup> The majority of states follow the Uniform Probate Code approach and won't enforce an in terrorem clause if the person contesting the document has probable cause to do so.<sup>21</sup> If an in terrorem clause is being included in a document that's governed by the law of a jurisdiction that doesn't recognize the validity of such clauses, the attorney should so advise the client in writing.

**d.** Outside of jurisdictions where in terrorem clauses are strictly enforced, it may be possible for the attorney to achieve the same result by making the beneficiaries file a written waiver of their right to contest the decedent's estate plan as a requirement for receiving any asset or fiduciary appointment under the client's will or trust.<sup>22</sup> As with a standard in terrorem clause, if such language is included as a condition precedent, the beneficiary must stand to lose something of value to induce his acceptance of the condition precedent. Alternatively, the attorney may wish to draft multiple wills, with the earlier will omitting the beneficiary and the later will making a limited provision for such beneficiary. Despite the limited provisions under the client's latest will, the beneficiary would be deterred from contesting such will for fear that he's unable to prove that the prior will is also invalid, thus leaving the beneficiary with nothing.

**11. Choice of governing law.** To the extent permissible, the attorney may consider including a choice-of-law clause in estate-planning documents. The goal is to have the documents governed by the law of a state with more favorable laws pertaining to the matters that may become the subject of litigation. However, for such a provision to take effect, it may be necessary to take additional steps to ensure a sufficient nexus to the chosen jurisdiction, such as appointing a co-trustee located there.<sup>23</sup>

**12. Alternative dispute resolution provision.** The attorney may wish to consider including a provision in the client's estate-planning documents that mandates the use of alternative dispute resolution (ADR) procedures. Because the client's heirs or other potential beneficiaries aren't parties to the testamentary instruments, there's some question as whether the court will enforce these provisions as to the individuals who didn't agree to ADR.<sup>24</sup>

**13. Other testamentary documents.** When a client wants to change the dispositive scheme in his estate-planning documents, it's common for the attorney to prepare a new will and/or new revocable trust. However, other testamentary documents are often overlooked. For example, it's not uncommon for a client's most substantial asset to be one that passes by beneficiary designation, such as a life insurance policy, retirement plan or [annuity](#). Thus, it's critical that the estate-planning attorney pay appropriate attention not only to the client's will and revocable trust, but also to such beneficiary designations.

## Endnotes

1. *See, e.g.*, Fla. Stat. Ann. Sections 732.501, 732.502 (2012); N.Y. Est. Powers & Trusts Law Sections 3-1.1, 3-2.1 (2012). But see Uniform Probate Code (UPC) Sections 2-501, 2-502 (amended 2010) (requiring that the testator acknowledge his signature to either two witnesses or before a notary public). Some states also require compliance with will act formalities for other estate-planning documents. *See, e.g.*, Fla. Stat. Ann. Section 736.0403

- (2012) (requiring that the testamentary aspects of a revocable trust be executed with will act formalities).
2. *See, e.g., Stevens v. Casdorff*, 508 S.E.2d 610 (W. Va. 1998).
  3. *See, e.g., In Re Will of Ranney*, 124 N.J. 1 (S.Ct. N.J. 1991).
  4. MCA Section 72-2-523 (2011); UPC Section 2-503 (amended 2010).
  5. Eunice L. Ross and Thomas J. Reed, *Will Contests* Section 6:2 (2d. ed., updated September 2012). The legal presumption is always in favor of sanity. *Ibid.* at Section 6:13.
  6. *Ibid.* at Section 7:3.
  7. *Ibid.* at Section 7:10.
  8. *Ibid.*
  9. *Ibid.* at Section 7:12.
  10. *Black's Law Dictionary* (9th ed. 2009) (definition of "fraud").
  11. *Ibid.* (definitions of "fraud in the act" and "actual fraud").
  12. *Ibid.* (definitions of "fraud in the factum" and "fraud in the execution").
  13. This article is for education purposes only and doesn't set forth the minimum standards of care or required standards of practice. For an in-depth discussion on the steps that an estate planner can take to reduce the chances of a contest or, in the event of a contest, to increase the likelihood that the will or trust will be successfully defended, *see* Charles M. Bennett, "Protecting Your Client's Estate Plan from Litigators and Other Predators; Pre-Mortem Planning to Ease Post-Mortem Administration" (2002) (available at [www.actec.org/Documents/misc/ProtClientBennett.pdf](http://www.actec.org/Documents/misc/ProtClientBennett.pdf)); Lisa M. Stern and Leonard S. Baum, "Implement Strategies to Help Guard Against Will Contests," 37 *Est. Plan.* 21 (June 2010); Bruce Stone and Bruce S. Ross, "Bombproofing the Estate Plan to Anticipate and Avoid Litigation: Version 2.0," 44th Ann. Philip E. Heckerling Inst. on Est. Pl., U. of Miami Law Center (2010); and Adam F. Streisand, "Malpractice Melee: Fending Off the Disgruntled and Disappointed, an Estate Planner's Guide," 3 *Est. Plan. & Community Prop. L. J.* 241 (Spring 2011).
  14. For assistance in determining the appropriate content of these letters, the attorney should look to the state bar rules, the American Bar Association Model Rules and similar resources.
  15. An in-depth discussion of the medical disorders that may effect capacity and susceptibility to undue influences and advice on how to effectively use medical records and experts in deposition or trial is beyond the scope of this article. For a thorough discussion of these topics, *see* Adam F. Streisand and James Edward Spar, "A Lawyer's Guide to Diminishing Medical Capacity and Effective Use of Medical Experts in Contemporaneous and Retrospective Evaluations," 33 *ACTEC L. J.* 180 (2007).
  16. *But see Jervis v. Tucker*, 82 So.3d 126 (Fla. Dist. Ct. App. 2012) (holding that a grantor who had been judicially declared to lack capacity lacked the testamentary capacity to amend her trust, despite obtaining an opinion from one physician as to having regained capacity, because the trust agreement specifically provided that if the grantor was declared incapacitated, either her capacity had to be restored by a court or she must have obtained two opinions from licensed physicians as to having regained capacity).
  17. 80 Am. Jur.2d Wills Sections 941, 948 (2012).
  18. For sample checklists containing questions to establish testamentary capacity and to demonstrate the absence of undue influence, *see* Stern and Baum *supra* note 13 at Exhibits 1 and 2.
  19. *See, e.g.,* Cal. Prob. Code Sections 21310–21315 (2012); Mass. Gen. Laws Ann. Ch. 190B, Section 2-517 (2012); Nev. Rev. Stat. Ann. Sections 137.005, 163.00195 (2011); N.Y. Est. Powers & Trusts Law Section 3-3.5 (2012); Tex. Est. Code Section 254.005 (2011); Tex. Prob. Code Section 64 (2011). It should be noted that even in such "strict enforcement"

- jurisdictions, an experienced litigator may nonetheless be able to attack a decedent's estate plan by filing a petition asking the probate court first to determine whether the disgruntled beneficiary's action in bringing a contest would violate the in terrorem clause and, second, only after determining that the clause wouldn't be violated, to rule on the beneficiary's claim that the decedent's estate plan should be found invalid. *See Bennett, supra* note 13.
20. *See, e.g.*, Fla. Stat. Ann. Sections 732.517, 736.1108 (2012).
  21. T. Jack Challis and Howard M. Zaritsky, State Laws: No Contest Clauses (March 24, 2012) (available at [www.actec.org/public/Documents/Studies/State\\_Laws\\_No\\_Contest\\_Clauses\\_-\\_Chart.pdf](http://www.actec.org/public/Documents/Studies/State_Laws_No_Contest_Clauses_-_Chart.pdf)).
  22. The attorney should check the law of the state where the document is to be operative, as some states may refuse to enforce the condition precedent as against public policy.
  23. *See, e.g.*, Alaska Stat. Ann. Section 13.36.035 (2012) (requiring that there be some nexus to the state to enforce a choice of law provision); Fla. Stat. Ann. Section 736.0107 (2012) (same); N.Y. Est. Powers & Trusts Law Sections 3-5.1, 7-1.10 (2012) (enforcing a choice of law provision as to property located in the state). *But see* N.Y. Sur. Ct. Proc. Act Section 1605 (2012) (allowing non-domiciliaries to direct admission of a will to probate in New York); Uniform Trust Code Section 107 (2000) (providing that the meaning and effect of the terms of a trust are governed by "the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter").
  24. *See, e.g.*, Ariz. Rev. Stat. Ann. Section 14-10205 (2012); *In re Meredith's Estate*, 266 N.W. 351 (Mich. 1936); *but see* Fla. Stat. Ann. Section 731.401(1) (2012) ("A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable.") (emphasis added).

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