

Anticipating will contests and how to avoid them

by Gerry W. Beyer*

Anytime an individual executes a will that disposes of property differently from how it would pass under intestacy or under a prior will, the potential of a will contest exists. In this *Study* we focus on:

- Anticipating will contests
- Drafting techniques to reduce will contests
- Will execution procedures that defend against will contests
- Strategies to prevent will contests An estate planner must always be on guard when drafting instruments that may supply incentive for someone to contest a will. Anytime an individual would take more through intestacy or under a prior will, the potential for a will contest exists, especially if the estate is large. Although will contests are relatively rare, the prudent attorney must recognize situations that are likely to inspire a will contest and then take steps to reduce the probability of a will contest action being filed and the chances of its success.

The Red Lights: Reasons to Anticipate a Will Contest

Disinheritance of Close Family Members in Favor of Distant Relative, Friend, or Charity

A will leaving nothing or only nominal gifts to close family members, such as a spouse of many years or children, is ripe for a contest action, especially if the beneficiaries are distant relatives, social friends, or charities. Juries are prone in close cases to invalidate a will that disinherits the surviving spouse and children, although “[i]t is not for courts, juries, relatives, or friends to say how property should be passed by will, or to rewrite a will for a testator because they do not believe he made a wise or fair distribution of his property.”¹

Will contests based on property passing outside of the traditional family are likely to increase because of various societal changes. Many older individuals have significant involvement with people outside of the family in retirement communities and senior citizen organizations. The lifestyles of younger people include more divorces, childless marriages, cohabitation, and same-sex relationships. As a result, estate plans of these individuals are more likely to include gifts to non-family members and thus increase the likelihood of contests.

Unequal Treatment of Children

A will that treats children unequally, especially if the children receiving disproportionately large amounts have no special needs, is likely to encourage spurned siblings to contest the will. The contestant’s appeal to the inherent fairness of all children sharing equally may sway a wavering jury.

Sudden or Significant Change in Disposition Plan

When a testator makes a sudden or significant change to the will’s dispositive scheme, the beneficiaries of the old will who lose under the new will may be motivated to contest the new will. These beneficiaries will strive to show that the testator lacked capacity to change the will or that the testator was unduly influenced to make the alterations.

Imposition of Excessive Restrictions on Bequests

A testator may impose restrictions on gifts to heirs. For example, the will may create a testamentary trust for the children with expenditures limited to certain items (e.g., health care, room and board, and education) or with lump-sum distributions authorized only upon the beneficiary's fulfilling certain criteria (e.g., graduating from college or reaching a certain age). Although the trust may treat all of the testator's children equally, the imposition of restrictions may give the beneficiaries reason to contest the will and, if successful, immediately obtain the estate funds via intestacy without limitations or conditions.

Elderly or Disabled Testator

The age, health, mental condition, or physical capacity of a testator may provide unhappy heirs or beneficiaries of prior wills with a basis to claim lack of testamentary capacity or undue influence. Although the mere fact of advanced age, debilitating illness, or severe handicap does not necessarily diminish capacity, these circumstances can play an important role in supporting a will contest.

Unusual Behavior of Testator

A peculiarly acting testator is apt to give dissatisfied heirs a basis for contesting the will, either on the ground that the testator lacked capacity or was suffering from an insane delusion. Despite judicial statements such as, "A man may believe himself to be the supreme ruler of the universe and nevertheless make a perfectly sensible disposition of his property, and the courts will sustain it when it appears that his mania did not dictate its provisions,"² a will executed by a person with behavior or beliefs out of the mainstream of society's definition of "normal" is apt to trigger a contest action.

Drafting Techniques to Prevent Will Contests

Include No-Contest Provision

A *no-contest provision*, also called an *in terrorem* or *forfeiture* clause, provides that a beneficiary who contests the will loses at least some, and typically all, of the benefits given under the will. In terrorem provisions are one of the most frequently used contest prevention techniques. This widespread use is due to the technique's low cost (a few extra lines in the will), low risk (no penalty incurred if the clause is declared unenforceable), and the potential for effectuating the testator's intent (property passing via the will rather than through intestacy or under a prior will).

Most jurisdictions uphold forfeiture provisions, although several deem them invalid.³ Even if in terrorem provisions are valid and enforceable, they are unpopular with the courts and are strictly construed. Courts avoid forfeiture unless the beneficiary's conduct comes squarely within the conduct the testator prohibited in the will. Courts frequently treat the beneficiary's suit as one to construe or interpret the will, rather than as one to contest the will, to avoid triggering a forfeiture.

Many jurisdictions have cases or statutes limiting the scope of in terrorem provisions so that forfeiture does not occur if the beneficiary contests the will in good faith and with just cause.⁴ Courts support the good faith/just cause exception on several grounds. First, the testator would not have intended to preclude a contest under such circumstances; and second, enforcing the clause would be contrary to public policy if the beneficiary had a legitimate basis for bringing the contest. Nonetheless, a few courts hold that a general condition against contest is enforceable regardless of the contestant's good faith or the existence of probable cause.

For a no-contest provision to deter a will contest effectively, it must be carefully drafted to place the disgruntled beneficiary at significant risk. If a testator leaves nothing or only a relatively small amount to the heir he or she wishes to disinherit, a no-contest provision will have little impact because the heir gains tremendously if the will is invalid and loses little if the will and accompanying no-contest provision are upheld. Assume that an heir would receive \$100,000 under intestacy and \$5,000 in the will. The heir is likely to risk a sure \$5,000 for a potential \$100,000. However, if the testator leaves the heir a substantial sum, e.g., \$50,000, the heir will hesitate to forfeit a guaranteed \$50,000 for fear of taking nothing if the will is upheld, even though the heir would receive a \$100,000 intestate share if the will is invalidated. And, of course, the heir would not really receive \$100,000 because most attorneys take will contest cases on a contingency basis, so the heir is likely to net only about \$65,000. Most people in the heir's position would think long and hard before risking \$50,000 for \$65,000.

The testator should name an alternate recipient of the property that is subject to forfeiture under a no-contest provision. This provides someone with a strong interest for upholding the will and the forfeiture provision. This contingent beneficiary, espe-

cially if it is a large charity able to elicit the support of the state's attorney general, may be able to place significant resources into fighting the contest. In addition, the law of some states requires a gift over for an enforceable no-contest provision.

Avoid Explaining Reasons for Disposition

An explanation in the will of the reasons motivating particular dispositions may reduce will contests. For example, a parent could indicate that a larger portion of the estate is being left to a certain child because that child is mentally challenged, requires expensive medical care, supports many children, or is still in school. If the testator makes a large charitable donation, the reasons for benefiting that particular charity may be set forth along with an explanation that family members have sufficient assets of their own. The effectiveness of this technique is based on the assumption that disgruntled heirs are less likely to contest if they realize the reasons for receiving less than their fair (intestate) share.

It is possible, however, for this technique to backfire. The explanation may upset some heirs, especially if they disagree with the facts or reasons given, and thus spur them to contest the will. Likewise, the explanation may provide the heirs with material to bolster claims of lack of capacity or undue influence. For example, assume that the testator's will states that one child is receiving a greater share of the estate because that child frequently visited the aging parent. Another child may use this statement as evidence that the visiting child unduly influenced the parent. If the explanation is factually incorrect, heirs may contest on grounds ranging from insane delusion to mistake or assert that the will was conditioned on the truth of the stated facts.

An alternative approach for testators insistent on discussing their motivation is to provide explanations in a separate document or audio/video recording that could be produced in court if needed to defend a will contest, but which would not otherwise be made public.

Avoid Bitter or Hateful Language

If the drafter decides it is advisable to explain the reasons for a particular dispositive scheme, care must be exercised to ensure the explanation does not have the opposite result, i.e., provoking a contest action attributable solely to the will's language. Any explanation of gifts or descriptions of heirs should be evenhanded, free of bitterness or spite, and factually correct. An heir who feels slighted both emotionally and monetarily may be more likely to contest than one who is hurt only financially.

Testamentary libel may become an issue when a will containing libelous statements is probated and thereby published in the public records. Typically, such situations arise when testators explain their reasons for making, or not making, particular gifts. The question is then presented whether the defamed individuals are entitled to recover from the testator's estate or the executor.

Courts addressing the issue of testamentary libel have reached varying conclusions. Some courts simply delete the offensive material from the probated will, while others hold the estate liable for the damages caused by the libelous material. Other courts, however, rule that there is no cause of action for testamentary libel because statements relating to judicial proceedings are privileged or because actions for personal injuries against the testator died along with the testator.

Use Holographic Will

Wills entirely in the testator's own handwriting appear to have an aura of validity because they show the testator was sufficiently competent to choose his or her own words explaining intent and to write them down without outside assistance. The attorney may use this somewhat liberal tendency toward holographic wills to good advantage if the attorney anticipates a will contest. Before executing a detailed attested will, the testator could handwrite a will that, although not as comprehensive as the formal will, contains a disposition plan preferred to intestacy. If the attested will were invalidated, the holographic will could serve as an unrevoked prior will.

Will Execution Procedures That Defend Against Will Contests

One of the most crucial stages of a client's estate plan is the will execution ceremony—the point at which the client memorializes his or her desires regarding at-death distribution of property. Unfortunately, attorneys may handle this key event in a casual or sloppy fashion. There are even reports of attorneys mailing or hand-delivering unsigned wills to clients along with will execution instructions. Some attorneys allow law clerks or paralegals to supervise a will execution ceremony. This

practice is questionable not only because it raises the likelihood of error, but also because the delegation of responsibility may violate the rules of professional conduct proscribing the aiding of a non-lawyer in the practice of law. An unprofessional or unsupervised ceremony may provide the necessary ammunition for a will contestant successfully to challenge a will. Accordingly, it is important that the ceremony comply with all state law requirements as well as create evidence that could be used to bolster the will should a contest arise.

Select Witnesses Thoughtfully

Little thought is usually given to the selection of witnesses. Typically, witnesses are individuals who just happen to be available at the time of will execution, e.g., secretaries, paralegals, law clerks, and other attorneys. It may be that the testator sees the witnesses for the first and last time at the ceremony. In most cases, this practice is not harmful; the self-proving affidavit removes the necessity for finding the witnesses, and the vast majority of wills are uncontested. The situation is considerably different, however, if a contest arises and the testimony of the witnesses as to testamentary capacity or the details of the will execution ceremony is crucial.

Witnesses Familiar With Testator

“The jury is likely to give little weight to the testimony of a witness who never saw the testator before or after the execution of the will, and whose opportunity to form a conclusion was limited to the single brief occasion.”⁵ Accordingly, if the attorney anticipates a will contest, it is prudent to select witnesses previously acquainted with the testator, such as personal friends, co-workers, and business associates. These people are more likely to remember the ceremony and provide testimony about how the testator acted at the relevant time. In addition, they can compare the testator’s conduct at the ceremony with how the testator acted at a time when the contestants concede that the testator had capacity.

Supernumerary Witnesses

Although attested wills typically require only two witnesses, extra witnesses may be advisable if a contest is likely. Additional witnesses provide a greater pool of individuals who may be alive, available, and able to recollect the ceremony and the testator’s condition.

Youthful and Healthy Witnesses

The attorney should select witnesses who are younger than the testator and in good health. Although it is no guaranty, the use of young, healthy witnesses increases the likelihood that they will be available (alive and competent) to testify if the will is contested.

Traceable Witnesses

An attorney charged with locating attesting witnesses to counter a will contest is often faced with a difficult task. Witnesses may move out of the city, state, or country. In addition, witnesses may change their names (e.g., a female witness marries and adopts her husband’s name or a married female divorces and retakes her maiden name). To increase the chance of locating crucial witnesses, the attorney should select people who appear easy to trace, e.g., individuals with close family, friendship, business, educational, or political ties with the local community, retain contact information such as e-mail addresses, and keep their Social Security numbers on file.

Impressive Witnesses

The attorney should carefully evaluate the personal characteristics of the witnesses. The witnesses should be people who would “make a good impression on the court and jury—substantial people of strong personality who speak convincingly and with definiteness.”⁶

Video-Record the Ceremony

Modern video technology provides an inexpensive, convenient, and reliable method of preserving evidence of the will execution ceremony and its important components. A properly prepared video can be used to establish testamentary capacity, testamentary intent, compliance with will formalities, the contents of the will, lack of undue influence or fraud, and even the correct interpretation or construction of the will if the recording captured the testator explaining the provisions. This technique is gaining in popularity as states, either by case law or statute, begin to formulate guidelines for the use of videos as evi-

dence in a will contest action.

A video of the will execution ceremony has many potential advantages. It is highly accurate, unlike witnesses whose memories and impressions fade with the passage of time. The video improves the ability of the court or jury to evaluate the testator's condition by preserving valuable nonverbal evidence such as demeanor, voice tone and inflection, facial expressions, and gestures. The video also may have psychological benefits for both the testator and the survivors. The testator may feel more confident that the intended dispositive plan will take effect, and the survivors may gain solace from viewing the testator delivering a final message.

Despite the significant benefits of a will execution video-recording, there are several potential problems. In some cases, you can take steps to reduce or eliminate these problems, while in other situations the prudent decision would be to forgo recording the ceremony. Although a situation may otherwise seem appropriate for recording, you may be hesitant to expose the testator to the court. An accurate picture of the testator may lead a judge or jury to conclude that the testator was incompetent or unduly influenced. Similarly, bias against the testator may exist because of the testator's outward appearance: the testator's age, sex, race, disability, or annoying habits may prejudice some individuals. There is also a possibility that someone might alter the video. The alteration could be accidental. Careful storage procedures, however, greatly reduce this risk. Intentional alteration through skillful editing and dubbing may also occur, although a video-recording is more difficult to alter than a written document.

Strategies to Prevent Will Contests

Obtain Affidavits of Individuals Familiar With Testator

One of the most convincing types of evidence of a testator's capacity is testimony from individuals who observed the testator at and around the time the will was executed. Frequently, however, this testimony is unavailable at the time of the will contest action; the witnesses to the will may be dead, difficult to locate, or lack a good recollection of the testator. The same may be true of other individuals who had personal, business, or professional contacts with the testator. One way of preserving this valuable evidence is to obtain affidavits from these people detailing the testator's conduct, physical and mental condition, and related matters. Affidavits of attesting witnesses, individuals who spoke with the testator on a regular basis, or health care providers (doctors, psychiatrists, nurses) who examined the testator close to the time of will execution, will help protect this potentially valuable testimony should a will contest arise.

Document Transactions With Testator Verifying Intent

Under normal circumstances, the testator orally explains the desired disposition plan and the reasons therefore; the attorney takes scribbled notes; the attorney prepares a draft of the will; the testator makes oral corrections; and then the attorney prepares the final version of the will. This procedure supplies little in the way of documentation to refresh the attorney's memory about the details of the testator's situation or to use as evidence in a will contest action. If a contest is anticipated, all of these steps should be documented in writing, on videotape, or both. For example, the testator could write a letter to the attorney explaining the disposition scheme and motivating factors behind it. The attorney's written reply would warn that a contest may occur because of the disinheritance of prospective heirs, unequal treatment of children, excessive restrictions on gifts, etc. The testator would respond in writing that the testator has considered these factors but prefers to have property pass as originally indicated. The attorney should take detailed notes of all meetings with the testator as well as of the will execution ceremony. The attorney then would carefully preserve these documents for use should the will be contested.

"Coincidental" Doctor Appointment

On the same day as the testator executes the will, the testator may wish to visit his or her doctor for an annual physical or other routine appointment. If the will is later contested for lack of capacity, the doctor can testify that the testator was seen that day, and if mental capacity had been questionable, the doctor would have so indicated in the testator's medical records and taken appropriate steps.

Obtain Other Evidence to Document Testator's Actions

Gathering evidence to rebut a will contest is always easier while the testator is alive. Along with affidavits of individuals familiar with the testator and documenting testator's intent, the attorney may want to acquire additional evidence. For example, the

testator may have letters from a child showing family discord supporting the testator's reasons for disinheriting the child. Or, the attorney may wish to collect the testator's medical records and may easily do so by having the testator sign a release.

Preserve Prior Will

When a new will is executed, it is common practice to physically destroy prior wills. If the testator's capacity is in doubt, however, and the testator indicates that the testator prefers the prior will to intestacy, it is a good idea to retain the prior will. If a court holds that the new will is invalid, the attorney may offer the old will for probate much to the chagrin of the contestant.

Reexecute Same Will on Regular Basis

What happens when a will contest is successful? The estate passes under a prior will, or if none, via intestacy. As discussed above, it may be a good idea to preserve a prior will if the testator prefers its disposition to intestacy. However, the testator clearly prefers the new will to both the old will and intestacy. Thus, the attorney could have the testator reexecute the same will on a regular basis, for example, once every six months. At the time of the testator's death, the most recent will would be offered for probate. If a contest is successful, then the will executed six months prior would be introduced. If that one is likewise set aside, the will executed one year prior would be introduced, and so on until all wills are exhausted. A potential contestant might forgo a contest when the contestant realizes that sufficient reasons for contest would have to be proved for many different points in time.

Suggest That Testator Consider Making a More Traditional Disposition

Unusual dispositions, such as those disinheriting close family members, treating like-situated children differently, and imposing excessive restrictions on gifts, are apt to trigger contests. Therefore, the attorney may wish to suggest that the testator consider toning down the disposition plan to bring it closer to conforming to a traditional arrangement. Of course, the client may balk at this recommendation. The attorney should explain that although this may cause the testator to deal with property in an undesired way, it may reduce the motives for a contest and thus increase the chances of the will being uncontested. (Or stated another way, half a loaf is better than no loaf at all.) Alternatively, other estate planning techniques may be used to make unconventional dispositions.

Make Significant Inter Vivos Gift to Disinherited Heir Apparent at Time of Will Execution

The testator may wish to make an inter vivos gift, either outright or in trust, to a disinherited heir apparent at the same time the will is executed (i.e., minutes after will execution). This gift should be substantial but, of course, far less than the amount the heir apparent would take via intestacy. After the testator's death, the heir is less likely to contest the will on the basis of lack of testamentary capacity. By asserting lack of capacity, the contestant would be forced to concede that the contestant accepted property from a person who lacked the capacity to make a gift or establish a trust. In addition, should the contest succeed, the heir would be required to return any property already received to the estate or use it to offset the intestate share.

Contract Not to Contest

The testator could enter into a contract not to contest with the potential will contestants. In exchange for the payment of money or a transfer of other property, the heirs (or beneficiaries of prior wills) could bind themselves contractually not to contest the will. If the contract is drafted to meet all the elements of a valid contract, it should be enforceable, especially in light of the cases validating a contract to convey an inheritance.

Recommend Use of Alternative Estate Planning Techniques

Whenever the attorney anticipates a will contest, the attorney should consider using other estate planning techniques to supplement the will. Inter vivos gifts, either outright or in trust, multiple-party accounts, and life insurance, annuities, and other death benefit plans are just some of the alternative techniques available to the estate planner. Although these arrangements may be set aside on grounds similar to those for contesting a will, such as lack of capacity or undue influence, they may be more difficult for a contestant to undo. More people may be involved with the creation or administration of these techniques thereby providing a greater number of individuals competent to testify about the client's mental condition. In addition, the contestant may be estopped from contesting certain arrangements if the contestant already has accepted benefits as, for example, a beneficiary of a trust. Furthermore, many of these techniques may be used to secure other benefits such as tax

reduction, reduced need for guardianship, probate avoidance, and increased flexibility.

Ante-Mortem Probate

The post-mortem probate model prevalent in the United States contains a glaring deficiency. The key witness—the testator—is deceased, leaving the courts with only indirect evidence of the testator’s capacity and freedom from undue influence. The relative ease with which individuals dissatisfied with the testator’s choice of beneficiaries may manipulate this indirect evidence encourages spurious will contests. Though the methods already discussed are helpful, these techniques continue to fall short of the optimal solution—having the testator physically present for observation and examination at the probate proceeding. Ante-mortem probate offers this solution.

Several states including Alaska,⁷ Arkansas,⁸ New Hampshire,⁹ North Dakota,¹⁰ and Ohio,¹¹ permit a testator to reap the benefits of offering the will for probate while the testator is still alive. The statutes in these states are based on the *contest model* of ante-mortem probate and operate basically as follows. The testator executes a will and then asks for a declaratory judgment ruling the will valid, that all technical formalities were satisfied, that the testator had the required testamentary capacity to execute a will, and was not under undue influence. The beneficiaries of the will and the heirs apparent are given notice so they may contest the probate of the will. If the court finds that the new will is valid, it will be effective to dispose of the testator’s property when the testator dies, unless the testator makes a new will or otherwise revokes the will.

Practitioners in states with ante-mortem legislation should give serious consideration to using this technique when a will contest appears likely. Because the court determines the validity of the will prior to the testator’s death, contest actions are eliminated. However, ante-mortem probate does have several shortcomings. The process may be extremely disruptive to the testator and the testator’s family. Additionally, the testator may not wish to disclose the contents of the will or face the potential embarrassment that may occur if testamentary capacity is litigated.

Family Settlement Agreements

Regardless of how many will contest techniques the testator uses, a will contest may nonetheless be filed. Instead of litigating the controversy, the heirs and beneficiaries may enter into a family settlement agreement. Under this contractual arrangement, each party gives up all other claims to the decedent’s estate in exchange for a portion of the estate as provided in the agreement. Even though this agreement may result in a property distribution that is considerably different from the one the testator anticipated, courts are very prone to approve them because they avoid costly and time-consuming litigation, which is disruptive to family harmony.

Conclusion

A successful will contest thwarts a testator’s intent unless the testator actually lacked capacity or executed the will because of undue influence. Estate planners owe a duty to their clients to keep a watchful eye out for “symptoms” that may encourage a will contest and lead to its success. Once the planner recognizes a “dangerous” situation, the planner should take steps such as those outlined in this *Study* to prevent the will contest from occurring, and if it does, to make certain it will not succeed.

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FOOTNOTES

1 *Stephen v. Coleman*, 533 S.W.2d 444, 445 (Tex. Civ. App.—Fort Worth 1976, writ ref’d n.r.e.) (quoting *Farmer v. Dodson*, 326 S.W.2d 57, 61 (Tex. Civ. App.—Dallas 1959, no writ).)

2 *Gulf Oil Corp. v. Walker*, 288 S.W.2d 173, 180 (Tex. Civ. App.—Beaumont 1956, no writ) (quoting *Fraser v. Jennison*, 42 Mich. 206, 3 N.W. 882, 900 (1879)).

3 For example, Indiana will not enforce no-contest clauses. See IND. CODE § 29-1-6-2.

4 See UNIF. PROB. CODE §§ 2-517 & 3-905.

5 17 MARION K. WOODWARD & ERNEST E. SMITH, III, PROBATE AND DECEDENTS' ESTATES § 336, at 278 (Texas Practice 1971).

6 Leon Jaworski, *The Will Contest*, 10 BAY. L. REV. 87, 91 (1958).

7 ALASKA STAT. § 13.12.530-.590 (also providing for the validation of a trust during the settlor's lifetime).

8 ARK. STAT. §§ 28-40-201 to -203.

9 N.H. REV. STAT. ANN. § 564-B:4-406(d).

10 N.D. CENT. CODE §§ 30.1-08.1-01 to -04.

11 OHIO REV. CODE §§ 2107.081-.085.

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