

WHAT DO ESTATE PLANNERS NEED TO KNOW ABOUT WILL CONTESTS?

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WILL CONTESTS—WHAT CAN ESTATE PLANNERS EXPECT WHEN IT HAPPENS?

Will contests involve a heavy burden of proof for the objector. In Minnesota will contests are governed by Minn. Stat. §524.3-407. Lawrence M. Friedman, Professor of Law at Stanford University Law School, published a book in 2009 entitled *DEAD HANDS, A Social History of Wills, Trusts, and Inheritance Law*. Mr. Friedman talks about the difficulty and historical rarity of will contests. Then he states at page 83,

Every year there are probably thousands of wills that somebody *could* conceivably contest. But the vast majority of disappointed and disgruntled heirs and legatees will in the end shrug their shoulders and get on with their lives. The disgruntled heir who goes to a lawyer with his story is likely to be told that he has no case, either because he has no right to contest, or because, although he has a *right*, he would probably lose the case.

Even with these difficulties in challenging a will, probate litigation is a growing, if not burgeoning part of the practice of law. *LawyersWeekly USA* had a post on solo/small issues on January 8, 2010 which quoted Christine Alsop, a lawyer in St. Louis, who said an increase “an increase in contested probate cases is keeping her firm busy.” She went on:

Litigation is occurring more and more readily, she said, children or disgruntled beneficiaries who were in a will or trust and who are now ‘out’ [of the will] file a lawsuit. They don’t know if there was undue influence, but they’re going on a fishing expedition to find out what happened and settle the case.

LawyersWeekly USA, January 8, 2010, Solo Small Update (online newsletter).

The American Bar Association Section of Real Property, Trust and Estate Law has a Probate and Fiduciary Litigation Committee. The most recent newsletter of the Probate and Trust Section of the MSBA stated that the Litigation Committee would like to expand its membership and become more of a working committee. The commercial litigators from large firms are now showing up on contested probate and guardianship matters. These developments,

the phone calls we receive in our office, the daily court calendars all tell us that contested probate matters are on the rise.

A fundamental question for all of us is whether probate contests are the cause of family estrangement, the result of family estrangement or the occasion for family estrangement.

Take a look at “Winning the Will Contest at the Drafting Stage: Tips from the Litigation Trenches,” paper presented at the ABA Joint Full Meeting of the Tax Section and Trust and Estate Law Division, September 12, 2008. Mr. Robinson recommends that planners recognize the potential of a will contest and that a will contest should be assumed any time a beneficiary is treated differently. The differential treatment may include naming one beneficiary as personal representative, disinheriting one child, preferential treatment of one or more children during lifetime or upon death.

1. Grounds for challenge.
 - a. Lack of due execution—look at 524.3-407
 - falling out of a boat.
 - dying with pen in hand.
 - self-proved will
 - b. Lack of capacity. See *Torgersen, Healy*
 - c. Product of undue influence.
2. Motives for challenge – Money, Love, Autonomy.
 - a. Disinheritance.
 - b. Disproportionate Disposition.
 - c. Funds in Trust.
 - d. Control.
 - e. Non-traditional Families
3. Standing.
 - a. Heirs.
 - b. Beneficiaries under prior wills.
 - c. Nominated personal representatives under prior wills—*Torgersen*.

4. Burden of proof.
–Undue Influence = Clear and Convincing Proof
5. What to expect.
 - a. Demand for your files (also on prior wills), time records, calendar
–Insist on a court order because of questions of attorney-client privilege.
 - b. Electronic files.
 - c. Subpoena.
 - d. Witnesses to will.
 - e. Demand for Medical Records.
 - f. Deposition.
6. Means of Avoiding Challenge
 - a. Procedures
–Videotape or no.
 - b. Substantive.
 - c. Emotional Issue
–Trusts and Estates article
–Tom Hubler.
–John Hopkins, lawyer in San Jose.
7. Professional Liability Issues–*McIntosh County Bank v. Dorsey*, *Marker v. Greenberg*, and *Goldberger v. Kaplan, Strangis & Kaplan*
 - a. Who has standing to sue?
–Testator.
–Personal Representative.
8. Other Developments and Issues
 - a. Interference with contractual relationships.
 - b. Guardianship/Conservatorship Issues.
 - c. Pre-death mediation–Probate mediation
 - d. Setting Aside Lifetime Transfers

MATERIALS

1. Matthew Matiasovich. ABA Joint Fall CLE Meeting, Chicago, IL, September , 2009, “Litigation Avoidance for the Tax Practitioner and Estate Planner.”
2. Steven Mignogna and Robert Sacks, RPTE 14th Annual Fall Symposia, New York, New York, April, 2003, “Estate Litigation: What Every Estate Planner Should Know about Probate Litigation.”
3. ABA Center for Continuing Legal Education, “Diminished Capacity: How to Recognize It and What to Do About It?”

–Capacity Worksheet for Lawyers
4. Brew, Carey, Fitzimmons, Jr. And Uzcategui, ABA Spring Estate Planning Symposium, Washington, DC, May, 2008, “Heirs in Waiting? Pre-Mortem Probate Disputes in the Context of Guardianships, Conservatorships, Powers of Attorney, and Family Business Entities.”
5. Mark A. Robertson, ABA Joint Fall Meeting of the Tax Section and Trust & Estate Law Division, San Francisco, CA, September 12, 1008, “Winning the Will Contest at the Drafting Stage: Tips from the Litigation Trenches”