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Trusts & Estates/Planning for the Elderly

## A COMMONSENSE GUIDE TO DEFEATING WILL CONTESTS

By Harvey E. Corn

ALTHOUGH THE possibility of a will contest can never be totally eliminated, an attorney-draftsperson can follow certain practices to reduce the likelihood of such an event - or at least to increase the likelihood of prevailing should a contest occur.

The first opportunity to plan occurs at the first meeting between the attorney-draftsperson and the client. At this time, the attorney-draftsperson should obtain information about the testator's assets and next of kin. This information is important not only because it is needed to prepare a proper testamentary plan, but also because it forms the basis for the attorney-draftsperson's understanding of the testator's testamentary capacity.

Although wills can be made by persons "in every stage of life and condition of health," in order to have "testamentary capacity," a person must: (1) understand that he/she is making a will and have a general comprehension of its plan and effect; (2) be aware, in a general way, of the nature, extent and condition of his/her property; (3) understand which individuals would ordinarily be the natural objects of his/her bounty; and (4) be able to recall the above without prompting.

When the testator is a repeat will client, some attorneys have a tendency to assume, on the basis of past discussions, that the testator meets all the criteria concerning testamentary capacity. Since assumption is the mother of all mishaps, the attorney-draftsperson should treat a repeat client as if he/she were a new one, and commence the discussion as if the attorney-draftsperson and the client were meeting for the first time.

When discussing next of kin, the attorney-draftsperson should inquire about non-marital and adopted-out children. Note that the failure to cite non-marital children in a probate proceeding will

result in a probate decree which is jurisdictionally defective and subject to challenge.

### Initial Meeting

At the first meeting, the attorney-draftsperson will, of course, obtain information about the testamentary changes and the reasons for such changes. To the extent possible, the attorney-draftsperson should obtain a copy of the testator's prior will and use this document as the basis for discussion concerning the proposed will changes. It is good practice to receive all instructions concerning will changes directly from the testator and to avoid taking directions from persons other than the testator.

While clients may prefer to discuss their will changes on the telephone, the attorney-draftsperson should politely insist on a face-to-face meeting if the changes are significant, because the best way to assess whether the changes are the free and voluntary expression of the testator is to observe his/her demeanor when the changes are being discussed. Further, it is preferable to meet with the testator alone to ensure that the testator is expressing his/her desires and not those of a prospective beneficiary.

At the first meeting, the attorney-draftsperson should observe the physical condition of the client to see if he/she exhibits any obvious incapacities which would affect such person's ability to understand the conversation. Particularly with regard to an elderly testator, inquire as to whether the testator normally wears eyeglasses or a hearing aid if neither is observed. If the testator appears to have difficulty in seeing or reading, make note of this fact so special precautions can be taken at the will execution ceremony.

Because elderly persons are more likely to have recently been hospitalized or have undergone a serious surgical procedure, inquire how the testator is feeling and whether he/she was recently hospitalized. Attempt to ascertain whether the testator is taking medications which might impact his/her cognitive abilities.

If it appears that the testator might be offended by such questions but has a home care attendant, speak to the attendant to elicit such information. Since many home care attendants, particularly nurses, keep a daily journal of their patient's condition, consider reviewing the journal for the past several weeks to see if the testator has recently had any serious medical difficulties.

Explore with the testator the reasons for the proposed will changes. If the testator appears reluctant to provide such information, explain to him/her that these questions are being asked because if the will is challenged, a jury will want to know why the changes were made.

Introduce the subject of tax apportionment with the testator. Although deciding that they want to leave legacies to certain individuals, many testators have not thought about whether the legacies should be free

of tax. If the testator states that he/she wants a particular legacy to bear its share of the tax, attempt to quantify for the testator the amount of the tax to be sure that the testator understands the full impact of such a direction.

At the conclusion of the first meeting, it will usually be agreed that the attorney-draftsperson will prepare a draft of the will. In preparing the draft, the attorney-draftsperson should give thought to the impact of certain provisions, such as the tax apportionment clause and an in terrorem clause.

As to the tax apportionment clause, it is the practice of many attorneys to provide that all tax, even that applicable to non-testamentary assets, should be paid out of the residuary estate. If the non-testamentary assets (or even pre-residuary legacies) are particularly sizeable, the effect of such a tax provision might be to entirely eliminate the residuary estate. While such a result is not necessarily illogical, it creates an appearance that the testator did not understand the will.

As to an in terrorem clause, take care to provide that a potential contestant has a sufficient financial incentive to prevent him/her from challenging the will. While it may seem self-evident that an in terrorem clause will have no inhibitory effect if the person who is expected to challenge the will receives no bequest, wills that contain in terrorem clauses often fail to provide such financial inducements.

Consider also that an in terrorem clause can have unintended consequences. For example, before recent changes in the right of election statute, when combined with a bequest to a surviving spouse in trust, an in terrorem clause ran the risk of permitting that spouse to challenge the will and, if unsuccessful, claim an outright elective share because he/she received nothing under the will.

Before finalizing the will, it is good practice to send a draft to the testator, together with a letter summarizing its contents. Some people view things differently when they see their instructions in print, and it will give the testator an opportunity to reflect on his/her changes. The cover letter should be carefully reviewed for accuracy because any inaccurate statement will be portrayed by a contestant as evidence of fraud.

## Will Execution

In arranging for the will execution, the attorney-draftsperson should give careful consideration to the place of execution and the identity of the attesting witnesses. To the extent possible, the will execution should be held in the attorney-draftsperson's office. This suggests that there is nothing out of the ordinary with the testator and permits the argument that he/she had sufficient mental competence to remember where he/she had to go and how to get there. It also gives the attorney-draftsperson the ability to make last-second changes if the testator changes his/her mind.

In certain cases, the place of execution will be out of the attorney-draftsperson's control because the testator is hospitalized or confined to home. In such a circumstance, the attorney-draftsperson should consider speaking to the testator's doctor to become informed about the testator's medical condition. Because juries tend to have a favorable view of the medical profession, consideration should also be given to using the testator's doctor or nurse as an attesting witness.

If the will execution ceremony must be at a hospital, remember that many hospitals have a strict policy governing the use of their personnel as attesting witnesses, with some hospitals even requiring that the testator undergo an examination by a neurologist.

If the attorney-draftsperson determines that it would be best to have a medical person serve as an attesting witness, make sure that that person is informed about the bases for evaluating testamentary capacity. This is particularly important because most medical personnel assume that if a person is "alert and oriented times three" (that is, that they know who they are, where they are and what time it is), that such person is capable of executing a will.

If, for whatever reason, the attorney-draftsperson decides not to use medical personnel as attesting witnesses, consider using a friend or neighbor of the testator as an attesting witness. As with medical personnel, these witnesses are viewed by juries as having no ax to grind and will generally be favorably received. In selecting such a person as an attesting witness, remember that he/she should: (1) have no financial interest under the will; (2) be familiar with the testator and be able to state that the testator appeared no different than usual; and (3) be presentable and articulate.

None of the above discussion concerning the choice of attesting witnesses is meant to suggest that lawyers or other law office personnel do not make excellent attesting witnesses. The fact is, however, that lawyers tend to be held to a higher standard by juries because it is their professional activity which is being challenged.

Before the will is executed, it is essential that the attorney-draftsperson spend time alone with the testator to discuss the provisions of the will in detail. If the testator insists on having a certain person present during this discussion, advise the testator that this may enhance the possibility of a will contest.

In reviewing the will with the testator, give him/her a copy of the proposed will and discuss each of the essential provisions (including the tax apportionment clause and fiduciary appointment clause) on a paragraph-by-paragraph basis. When conducting a review of the will, consider not only summarizing the provisions or asking the testator to silently read them, but also asking the testator to verbalize his/her understanding of the provisions.

In reviewing the will with the testator, carefully explain the provision for the appointment of the

executor and the amount of commission that the executor could expect to receive. If the attorney-draftsperson is being nominated as the executor, he/she should obtain from the testator a signed form which explains to the testator that anyone is eligible to serve as an executor, that the executor is entitled to a fee for serving and that the attorney is entitled to receive legal fees, in addition to a commission, if he/she performs legal services.

After the attorney-draftsperson is satisfied that the testator understands the will and that it reflects his/her wishes, introduce the attesting witnesses to the testator. Before commencing the execution ceremony, have the attesting witnesses and the testator engage in general conversation. A good technique is to mention some prominent news item and use that as the focal point of the discussion. If possible, during this conversation, try to get the testator to discuss his/her family members and to verbalize the nature of any particular major asset that he/she owns.

When the will execution ceremony is ready to commence, make sure that the witnesses are all present and focused on the testator. While each attorney-draftsperson has his/her own unique ceremony, at all will executions the attorney-draftsperson should make sure that the testator affirmatively indicates that he/she understands that this is a will, that he/she is satisfied with its provisions, and that he/she wants the individuals present to serve as attesting witnesses. During the actual execution, have the testator write in the date in the space provided above the testator's signature line.

Even after the testator and the attesting witnesses have signed the will in the presence of each other, the attorney-draftsperson's work is not finished. Most attorneys utilize an [SCPA §1406](#) affidavit which requires the attesting witnesses to state under oath that, in their opinion, the testator: (1) was of sound mind, memory and understanding; (2) not under any restraint or incompetent to make a will; (3) could read, write and converse in the English language; and (4) was not suffering from any defect of sight, hearing or speech or from any other physical or mental impairment which could affect his/her capacity to make a will.

In order to make the testimony of the attesting witnesses even more persuasive, consider reading these provisions of the affidavit out loud, in the presence of the testator, and asking the testator whether each of these statements is true.

In taking steps to reduce the likelihood of a will contest, many attorneys are unsure whether they should prepare an execution memorandum and/or videotape or audiotape the execution ceremony. While an execution memorandum can be useful in helping the participants refresh their recollection of the events, it can also be harmful, particularly if each witness prepares his/her own memorandum containing contrary details.

Usually an execution memorandum is prepared where there is a marked change in testamentary scheme,

a will contest is expected, the will was executed in a place other than the office of the attorney-draftsperson, or the testator's condition requires special vigilance. In preparing the memorandum, one need not record everything that was said or done, but the memorandum should at least summarize: (1) the attorney-draftsperson's discussion with the testator about the contents of the will; (2) the discussion between the testator and the attesting witnesses; and (3) the will execution ceremony.

It is generally not recommended that the ceremony be either audiotaped or videotaped because such evidence tends to become the focal point of a jury's attention, to the exclusion of the testimony of the attorney-draftsperson and the attesting witnesses. Audiotaping or videotaping the ceremony will undoubtedly place greater emphasis on how the testator looked or sounded and divert attention from the key issue - whether the testator possessed testamentary capacity.

In sum, although the possibility of a will contest can never be completely eliminated, an attorney-draftsperson can reduce the likelihood of such an occurrence - or at least increase the prospect of prevailing should a will contest occur - by following these few simple procedures.

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