

Winning The Will Contest At The Drafting Stage: Tips From The Litigation Trenches

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AGENDA

- Tips on what to do during drafting and will execution to win a will challenge and avoid a large settlement.
- Each question that can be raised increases the likelihood of a higher settlement.

- Do not assume that a jury will believe you just because you are a lawyer.

- Recognize the potential of a will contest.
- Any time a beneficiary is treated differently, you should assume a will contest.

Examples:

- Children inheriting different amounts
- One child receiving an inheritance outright; another child receiving the inheritance in a trust
- Executor commission to one child

- **Meet with the testator or testatrix alone**

- Do not meet with the testator or testatrix and a favored child
- Do not meet with the testator or testatrix and second spouse whose children are being treated better than the first family's children
- If meet with testator or testatrix and a beneficiary, make sure at least one meeting is alone between lawyer and testator or testatrix
- No beneficiary should attend the will execution

- **Use Independent Witnesses For The Will Execution**

- Do not use a beneficiary as a witness
- Do not use employees of the testator or testatrix
- Do not use employees of a beneficiary
- Understand the witnesses' ability to read and understand English

- **Create A Memorandum To File About Meetings And Will Execution**

- Identify who was in attendance
- Include details about what was discussed that would show competence
- Describe a discussion of family members by the testator or testatrix
- Describe a discussion of major assets the testator or testatrix knows about
- Describe a discussion of what the disposition of the estate is at least in general terms such as the percentage each beneficiary will receive and whether it is in trust or outright
- Beware of terms like “the family believes” instead of “testatrix believes”
- Do not keep handwritten notes once you create the typed memorandum

Time Records: A Trap For The Unwary

- Assume time records will be seen by the challenger to the will
- Take a little more time reviewing bills when a potential will challenge exists to avoid time entries giving a challenger an opening
- ENTRY: “Teleconference with beneficiary; draft will”
 - Better entry “Teleconference with beneficiary about bills he has to pay for his mother as attorney-in-fact; drafted will”
- ENTRY: “Teleconference with client” when the conversation was with a beneficiary who was attorney-in-fact and not with the testatrix who was the client

Beware of E-mails:
Use the phone or communicate in person

- Assume e-mails to your client and with your colleagues will be produced to the other side in a challenge.
- E-Mail: “I think we should redo the will because I don’t remember the testatrix talking about her assets.”

Consider a Revocable Trust

- To probate a will, notice has to be given to beneficiaries and statutorily identified potential beneficiaries.
- For a revocable trust to be used, no notice has to be given in most jurisdictions. If someone wants to challenge a revocable trust, he or she must institute a lawsuit.
- Caution: Level of competence to create a trust is higher than to create a will.
- All the assets have to be moved to the trust or you might have a will contest.
- Revocable trust makes a challenge harder, but not impossible.

Video of Will Execution?

- Some lawyers seem to think a video of the will execution will solve issues
- More than one take, appear to be staged
- Testator or testatrix may freeze in front of the camera
- Testator or testatrix may look confused, making your case harder
- Make a change in will, the camera will appear to have stopped and started again
- Malfunction of the videotape machine may raise questions about the execution ceremony

Small Change – Use Codicil?

- If the competence of the testatrix may be more questionable today than when a previous will was entered, but a change is desired, use a codicil so only the codicil is open to challenge.

Consider consulting a litigator with estate experience before a will execution if you believe a challenge is possible.

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