

Fair Questions

Making a Case for Effectively Contesting a Will Isn't Easy

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“But it's just not fair!” Estate planning lawyers often hear this protest from a potential client who wishes to object to a loved one's will on the grounds that they were either promised something, the will was supposed to have been rewritten, or the terms are not, in their estimation, fair.

Unfortunately, in most cases, the message in response is, “You are right, but the law in will contests is such that you don't have a case.”

In will contests in most states, it is fairly clear that a will may be objected to only on certain grounds. The first is ‘undue influence.’ This is proven when (1) the person who wrote the will was susceptible to being unduly influenced, (2) the person who exerted undue influence had the opportunity to do so, and (3) the person exerting this undue influence had enough control over the will signer to cause the will to be drafted in accordance with provisions that were not intended.

Normally the opponent or contestant of the will has the obligation to prove that the will should be overturned, but in some cases, when the person who exerted the influence had a relationship with the will signer that was of a nature and relationship that could be construed to be a fiduciary or more than special relationship, the burden may shift to the proponent of the will to prove that they did not in fact exert undue influence.

An example could be somebody who was living with the decedent, such as a child, a caregiver, or a close neighbor who had control and the opportunity to

speak with the decedent sufficiently enough to be able to coerce the person to change their will. It could also be a person who is acting as health care proxy and power of attorney, or someone upon whom the decedent relied sufficiently to either feel dependent or otherwise controlled.

A second opportunity to contest a will is one in which the testator/testatrix was not of ‘sound mind.’ In this situation, it would have to be proven that at the time the will was signed, the testator/testatrix was not able to make decisions with a total soundness of mind such that the will signed changed prior provisions, changed asset distribution proportions, or created an unnatural distribution of assets to people who shouldn't be included.

The evidence required to establish this mental incapacity is normally determined by a physician who knew the testator/testatrix and can produce medical testimony to conclusively establish the capacity or incapacity of the decedent. This is usually very difficult, since it is highly unlikely that the will was signed on the same day that the physician saw the decedent. Nevertheless, this is the best evidence that may be brought to the court. All medical records, physicians, nurses, and other medical personnel who may have known or had any interaction with the decedent will certainly be required to testify as witnesses for either the opponent or the proponent of the will.

Another opportunity to contest a will is the allegation that fraud upon the decedent was exercised. Examples of this are that the person did not know they

were signing a will, or that the document they were asked to sign was purported to be other papers or documents.

Fraud would also be exercised by telling the decedent something that was not true about a potential beneficiary, which in turn caused the decedent to reduce an inheritance left to that person or possibly to eliminate them.

Examples of this would be saying that a child was merely sticking around to gain their inheritance, or a potential beneficiary had intentions of giving money to their spouse, who the decedent may dislike, which may then cause the testator/testatrix to eliminate that person from their will.

A final challenge to a will could be based on the fact that it was not signed properly. In most states, witnesses must be present at the same time of the execution of the will and actually see the decedent sign their will or designate another person to sign it for them.

If the formalities of the signing do not comply with the law, the will may fail as a valid document. In these situations, it is necessary to investigate the will signing by deposing the witnesses and possibly the lawyer or delegated staff who attended to the will execution to conclusively establish whether all parties were in the room and paying attention to the signer when the document was executed.

In many states, a probate judge will hear a will contest as opposed to having a jury determine the validity of a will. In addition, it must be noted that the standard of proof with evidence may also vary in a will contest. In

a typical civil suit, the test would normally be a fair preponderance of the evidence. In a criminal case, the determining test is beyond a reasonable doubt. In a will contest, the standard of proof is clear and convincing evidence.

Therefore, this will be a greater test than the civil standard, but less than a criminal standard. The scales of justice will have to be tilted more than just a fraction to nullify a will based on the clear and convincing evidence test.

Of course, there are always exceptions to the evidence rules, standard of proof and other factors which may vary from court to court or state to state. However, before attempting to challenge a will, it should be reviewed to determine whether it contains a so-called “no-contest clause,” which may also eliminate a person's right to inherit merely by making a challenge against it. In some states, this has been determined to be non-enforceable, but it should be reviewed.

The bottom line is that just because a promise was made, or somebody else got more or less, it does not mean that your challenge to a will is going to be successful, even if the will is “not fair.”❖

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