

The Will That Won't – Should it be Contested?

By Gina M. Barry, Esquire

You neighbor just received terrible news. Her mother, who was an elderly widow, has passed away. Although your neighbor was estranged from her mother for a number of years before her passing, she is noticeably upset. Soon thereafter, your neighbor learns that she has received only a very small sum in her mother's Will, or even worse, that she has been intentionally omitted altogether. She is hurt, shocked and outraged. She decides that she wants to contest her mother's Will because if she succeeds, she will inherit a sizeable sum from the estate.

While unhappiness with the dispositions in a Will alone is not sufficient, there are various grounds upon which a Will may be successfully contested. Knowledge of these grounds is crucial when deciding whether a Will contest should be undertaken. The most common grounds for challenging a Will include lack of mental competence and undue influence, although other less commonly used grounds, such as fraud, also exist.

To validly execute a Will, the person making the Will must be at least 18 years old, mentally competent, and free from undue influence. The Will must be signed by the person making the Will or by another person in his presence that he expressly directs to sign the Will for him. The Will also must be attested and subscribed in the presence of the person making the Will by two or

more independent witnesses. If any of these formalities are missing, a Will contest may be in the making.

With respect to mental competence, the question is whether the person making the Will was of sound mind at the time the Will was executed. When determining whether a person had the requisite capacity to execute a Will, the Court considers whether the person had the ability to understand and carry in his mind the nature and situation of his property and his relations to persons who would naturally have some claim to his remembrance. If those basic understandings are lacking, then there is no legal ability to sign a Will, and the Will may be successfully challenged. A successful challenge on this basis will require securing the opinion of a physician as to the mental incompetence of the person who executed the Will at the time it was executed. Note well that the incompetence must persist at the time the Will is executed, as it is possible for a person who is mentally incompetent to enjoy a moment of lucidity during which he may execute a valid Will.

When contesting a Will using the theory of undue influence, the person challenging the Will must prove that coercion has taken place. Whether mental, physical, or moral, the coercion must overtake the sound judgment and genuine desire of the person making the Will. In order to prove undue influence, the person

contesting the Will must show that (1) an unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means. Undue influence often occurs in private. As such, it is usually very difficult to prove.

A Will may also be contested based upon fraud. Proving fraud requires evidence that the person making the Will was affected by a false representation of fact. Further, the false representation must have induced the person making the Will into executing the Will. For example, a document is placed in front of the person making the Will and they are told that it is their Will as they reviewed it prior to signing; however, it is not that Will, it is a revised version with different provisions. The person making the Will relies on that representation and executes the Will fully believing that they executed the Will they intended to execute and not a revised version. As you might imagine, it is the rare case where fraud can be successfully proven.

Another important detail to be aware of when deciding whether to contest a Will is whether there is a no-contest clause included in the Will. A no-contest clause generally provides that if you contest the Will, you will receive nothing from the estate and the

estate will be distributed as if you had predeceased the person who made the Will. While this clause may be void if the Will is successfully challenged, if the challenge is unsuccessful, the person challenging the Will could be forfeiting the sum they were originally given in the Will.

Understanding the grounds for challenging a Will is the first step when deciding whether to proceed with such a challenge. Contesting a will is never an easy

task, emotionally or legally. Should you believe that you have valid grounds for contesting a Will, it is highly recommended that you contact an attorney who has experience with Will contests to discuss your likelihood of success prior to proceeding.

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